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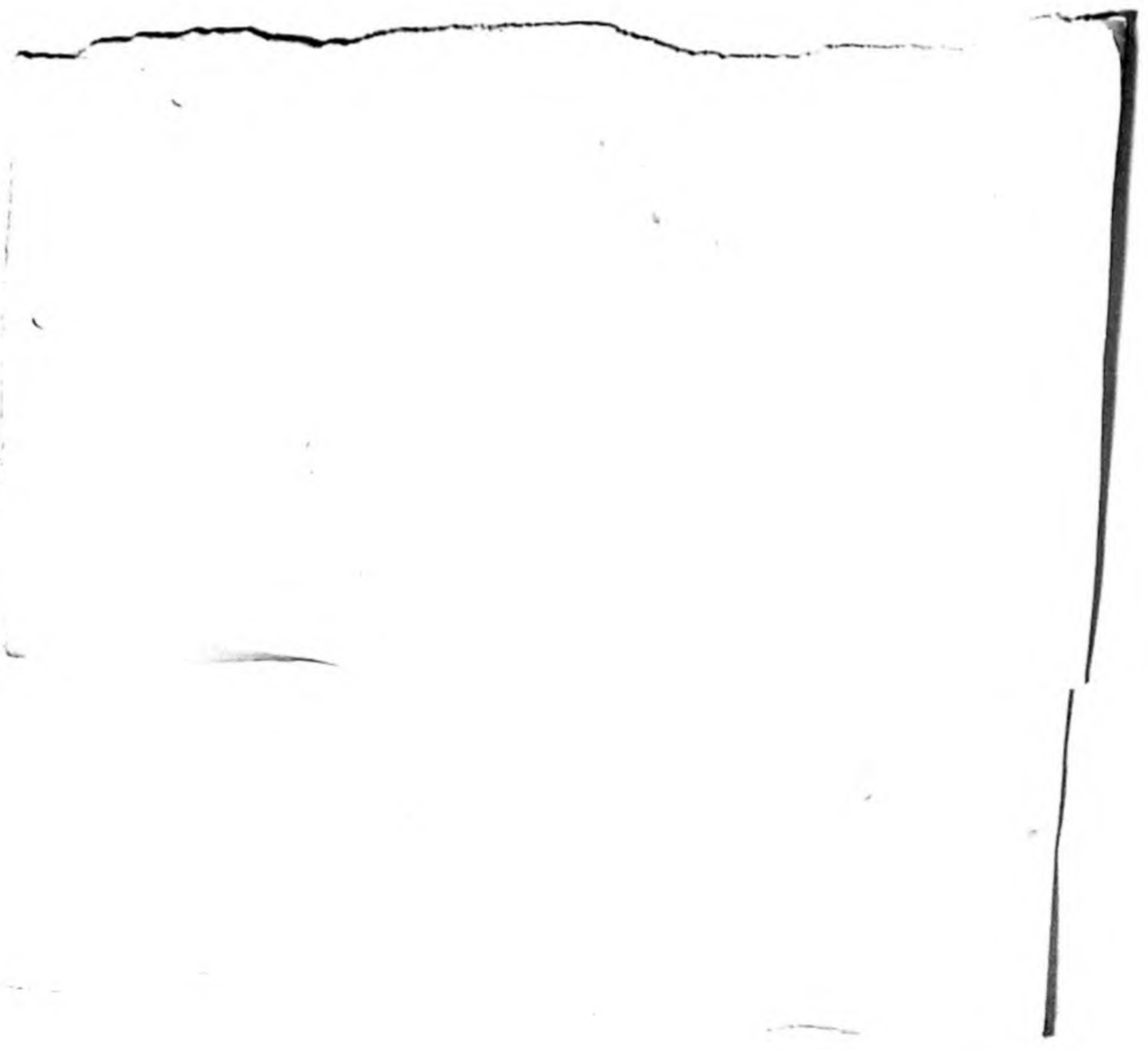

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282	1	29	30th June 1921. That would...	30th June 1921 that would ...	
285	2	30	then is no alternative	there is no alternative ..	
297	2	43	arbitrary done ...	arbitrary one ...	
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652	1	36	Owner of ...	Owner of property ...	
663	1	12, 13	in my opinion ...	.....	*omit.*
"	1	59	(1) that ...	*Held*, (1) that ...	
684	2	21	had become ..	have become ...	
702	1	36	Land reformed in suit ...	Land re-formed *in situ* ...	
737	1	46	Railways Act (IX of 1890), s. 70	Railways Act (IX of 1890), s. 72	
849	2	last line	the payment ...	for the payment ...	
899	2	30	where there out of four brothers ..	where three out of four brothers ..	
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1017	2	21	to have lawfully ...	to have acted lawfully ...	
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NAGPORE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 345 OF 1922.

December 11, 1923.

Present :—Mr. Kinkhede, A. J. C.

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—APPELLANT
versus
MURADALI—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), ss. 72, 76—Risk Note Form B—Carriage of goods—Unreasonable delay in delivery—Damages—Railway Company, liability.

Where a railway company fails to deliver goods consigned to it for carriage within a reasonable time, it is liable for ordinary damages in respect of the delay and such liability is not covered by the Risk Note Form B, the protection afforded by which extends to the exempted or specified cases only.

East Indian Ry. v. *Gopi Krishna Kashi Prasad*, 77 Ind. Cas. 1046; 45 A. 534 ; 21 A. L. J. 448 ; (1924) A. I. R. (A) 8, relied on.

Case-law discussed.

What is reasonable time within the meaning of the above rule is a question of fact to be decided on the particular circumstances of each case.

Appeal against the decree of the District Judge, Jubbulpore, dated the 11th April 1922, in Civil Appeal No. 4 of 1922.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *Fida Hussain*, for the Respondent.

JUDGMENT.—The respondent Muradali on 29th June 1920 consigned 40 bags of gum from Katni to be delivered to him at Hatras, another station on the line belonging to the appellant Company. The goods were not delivered at Hatras and consequently after some unsuccessful correspondence with the Company, plaintiff sued the latter, on 22nd December 1920 for damages assessed at Rs. 1,900. The consignment was covered by a risk-note in form B. The last demand in writing which plaintiff made was as per notice, dated 15th November 1920. Ordinarily it takes 10 to 15 days for goods to reach Hatras from Katni, but here no delivery was made of the goods until even the date of the suit. On some pretext or other the defendant Company took nearly 3 months to put in its defence and that too after heavy adjournment costs were awarded against it. On 6th June 1921 the defendant's agent made oral statement admitting that the goods were not delivered till the date of the suit. The claim was, however, contested and liability denied on the basis of the risk-note in form B. The extent of the damages was disputed. It appears that although nearly 1½ months before the date of the statement the goods had been traced and had arrived at Hatras on 27th March 1921, this fact was, however, not brought to the notice of the Court at any of the intermediate hearings until 6th May 1921. The plaintiff in reply admitted that the goods had arrived on 27th March 1921, but submitted that he would not take delivery thereof, as they were damaged during the last 10 months, and

particularly, as the market rate of the goods had fallen considerably.

On 14th July 1921, however, the plaintiff through his pleader stated that the delivery of 40 bags was taken on 1st July 1921, but he asserted that the Company was guilty of wilful, culpable negligence inasmuch as they failed to deliver goods within reasonable time, that is within the usual period of 11 or 15 days, whereas the actual delay was of a year. It was further contended that the market rate of gum had gone down from Rs. 20 in June or July 1920, to Rs. 10-12 on the date of the actual delivery, that is 1st July 1921, and that the defendant Company should be made liable to make good the loss, that is the difference in price amounting to Rs. 823-4-0 plus costs of the suit. The defendant Company denied liability for damages for the delay as also for costs and disputed the correctness of the rates stated by the plaintiff. The points for determination, therefore, have been narrowed down. The following issues are material:—

(1) Whether the defendant Company is liable for damages in view of the goods being consigned under risk-note B ?

(2) What was the value of the goods at the date of the consignment and what is their value now ?

The first Court found that the goods were not deteriorated or damaged but that the defendant Company was liable to make good the damage resulting from unreasonable delay in carrying the goods to their destination. The damages were assessed at Rs. 810 and a decree was passed for that sum together with Rs. 69-12-9 on account of interest. Against this decree an appeal was preferred to the Court of the District Judge, Jubbulpore, by the defendant Company. One of the points urged in appeal was as to the effect of the risk-note, on the defendant Company's liability for delayed delivery. The District Judge held that under section 72 of Indian Railways Act read with the provisions of the Contract Act the defendant Company as a bailee was bound to carry the goods, under ordinary circumstances, within a reasonable time and that 9 months period could not be treated as " reasonable time" for the goods to go from Katni to Hatras in the circumstances of the case. In other words, the risk-note did not expressly or by necessary implication free the Company from the liability on account of the delivery being delayed. The award of damages was considered not excessive and the appeal was accordingly dismissed.

It is contended before me that the risk-note exonerated the Company from all liability to compensate the plaintiff, on the ground that the Company was not an insurer against delay in delivering the goods. I must say that no attempt was made at the stage of pleadings to offer any explanations as to why this inordinate delay in the matter of carrying the goods from Katni to Hatras was caused. I have read the conditions noted on the back of Exhibits P-3, D-1 and D-2. I nowhere find in any of these documents any stipulations to hold the Company harmless and free from all responsibilities for damages to the goods, whatever " by reason of accidental or unavoidable delays in transit or otherwise." Here there is no " loss, destruction or deterioration of, or damage to the said consignment " so as to bring the case within the protection of the risk-note Exhibit D-2. The learned Munsif was, I think, perfectly right in the interpretation he put on the words " loss, destruction or deterioration of, or damage to, the *said consignment.*" Relying upon the case of *Fazal Ilahi* v. *The East Indian Railway Company* (1), he held plaintiff entitled to recover damages for the delay. As observed in that case, damages to be awarded in such cases are not special damages but damages assessed on general principles. Through the fault of the Company's servants, the goods were delayed in transmission and were not delivered until nearly 6½ months even after this suit was instituted. There is, no doubt, authority for the view that unless the object of the sender of goods was specially brought to the notice of the carrier and unless intimation was given that the goods should reach the destination by a particular date the plaintiff is not entitled to any special damage on the ground of non-realisation of the special profit, the consignor or consignee might have made, if the goods had reached their destination in time. The learned Advocate arguing the case from that point of

(1) 64 Ind. Cas. 868 ; 19 A. L. J. 654 ; 43 A. 623 ; (1922) A. I. R. (A.) 324.

view urged that this is not the plaintiff's case and, therefore, plaintiff should get nothing. This is true, but it does not mean that plaintiff is not entitled to recover even ordinary damages for the delay. In several cases he is held entitled to recover, as I will presently show, damages for the natural consequences of a failure to deliver goods within a "reasonable time." What is "reasonable time" is always a question of fact, as it depends upon the circumstances of each case. Both the Courts below have held that the delay, in this case, was very unreasonable. Under these circumstances I entertain no doubt whatever that it was due to the neglect of the railway administration that the goods were not carried to their destination within the usual time and that this could not but be "wilful", and that the award of damages as given by the lower Courts is correct. By reason of the absence of the words "damage due to accidental or unavoidable delays in transit or otherwise" in the risk-note form B (Exhibit D-2) the case must, I think, be regarded as if there was no risk-note exempting the Railway Company from liability. I think the case is analogous to the one of this very Company reported in *East Indian Railway* v. *Tulshi Ram* (2), and distinguishable from the case reported in *Madras Railway Company* v. *Govinda Rau* (3), and on which reliance was placed by the pleader and advocate of the respective parties. In the Allahabad case even 15 days delay was considered "unreasonable." In the Madras case, there was clear exemption from liability on the ground of delay in the contract itselt, which is not the case here. In the absence of any pleadings or proof that there were valid reasons preventing the Company from delivering the goods at a time when they should ordinarily have been delivered, I do not think, there is any force in the contention of the learned Advocate that the Railway Company is not an insurer against delay. In *Albuquerque* v. *The South Indian Railway Company* (4), on which reliance is placed for the appellant there was a delay of only 40 days, and in the exceptional circumstances of that case, it was held that although there was "delay" it was not "wilful" because of the want of rolling stock. That case is, therefore, no authority for the present case where absolutely no attempt is made to state much less to prove the reasons for the delay. I am fortified in this view by the recent ruling of the *East Indian Railway Company* v. *Gopi Krishna Kashi* (5) which is a case exactly analogous to or on all fours with the present case. There also this very Company claimed protection under risk-note form B as is done in this case. The delay there was of 5 months, and it was held to be "unquestionably unreasonable." The Trial Court had found that, owing to the delay, damage was suffered by the plaintiff, quite independently of any deterioration of goods. The risk-note form B was sought to be so interpreted there, as to give protection to the Railway Company from all claims or damages due to the loss, destruction or deterioration of the goods, or for damage to the consignment, but the protection afforded by the risk-note form B was held to extend to the exempted or specified cases only; and that as the damage in that case was not due to any of these special events against which the Railway was protected by the risk-note, it was held that the case was outside such protection. Relying upon this most recent and direct authority I hold that the claim has been rightly decreed by both the Courts below.

The appeal is, therefore, dismissed with costs. Costs of the Courts below be paid as already ordered.

Z. K. *Appeal dismissed.*

(2) 65 Ind. Cas. 771; 20 A. L. J. 114; (1922) A. I. R. (A.) 63.

(3) 21 M. 172; 8 M. L. J. 85; 7 Ind. Dec. (N. S.) 478.

(4) 68 Ind. Cas. 269; 43 M. L. J. 90; (1922) M. W. N. 328; (1922) A. I. R. (M.) 231; 16 L. W. 667; 31 M. L. T. 470.

(5) 77 Ind. Cas. 1046; 45 A. 534; 21 A. L. J. 448; (1924) A. I. R. (A.) 8.

BECHU PANDE *v.* DULHMA

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1272 OF 1922.

May 27, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

BECHU PANDE—DEFENDANT—APPELLANT

versus

Musammat DULHMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow's estate—Gift to one of several reversioners—Acceleration—Invalid transfer—Suit by remote reversioner—Daughter or daughter's son alive, effect of.

A surrender of a Hindu widow's estate to be valid must be in favour of the nearest reversioner if there be only one or all the reversioners nearest in degree if there be more than one.

Rangasami Goundan v. *Nachiappa Goundan*, 50 Ind. Cas. 498; 42 M. 523 at p. 532; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.). 66 (P. C.); *Prag*; *Narain* v. *Mathura Prasad*, 79 Ind. Cas. 575; 22 A. L. J. 472; *Dodhasappa Ramlingappa Nargund* v. *Basawanappa Shivlingappa Sintri*, 46 Ind. Cas. 239; 42 B. 719; 20 Bom. L. R. 783, followed.

In the case of an invalid transfer by a Hindu widow a suit for declaration must ordinarily be brought by the reversioner nearest in succession at the time.

If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful the next presumable reversioner would be entitled to sue.

Rani Anand Kunwar v. *Court of Wards*, 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shome. L. R. 78; 4 Sar. P. C. J. 195; 8 C. L. R. 292; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63; 3 Ind. Dec. (N. S.) 495 (P. C.), relied on.

In the presence of daughters and a daughter's son, even if the daughter's son be a minor, a remote reversioner is not entitled to sue.

Rangasami Goundan v. *Nachiappa Gounden*, 50 Ind. Cas. 498; 42 M. 528 at p. 532; 36 M.L.J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P.C.), followed.

Appeal from a decree of the Subordinate Judge, Jaunpur, dated the 5th July 1922.

Mr. *Gadadhar Prasad* for Mr. *Kumuda Prasad*, for the Appellant.

Mr. *N. Upadhya* for Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—The question in this appeal is whether the plaintiff is entitled to a declaration that a deed of gift executed by *Mt.* Dulhma in favour of her daughter *Musammat* Maharaji is invalid as against the rights of the reversioners. The pedigree of the family to which the parties belong is given in the judgment of the Court below. *Musammat* Dulhma's husband Ram Adhin was the last survivor of the joint family to which he belonged, and on his death *Musammat* Dulhma succeeded to a widow's interest in the property. She has three daughters who are all alive and are defendants to the suit, and at the time of the institution of the suit there was also a daughter's son Bachcha who was defendant No. 5. This child has since died.

The gift was in favour of one only of *Musammat* Dulhma's three daughters. The Courts below have held that it was valid as an acceleration of the widow's life interest. This finding is erroneous. It was held by the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan* (1) that a surrender to be valid must be in favour of the nearest reversioner if there be only one or all the reversioners nearest in degree if there be more than one. This decision has been followed in this Court in the recent case of *Prag Narain* v. *Mathura Prasad* (2) and by the Bombay High Court in *Dodhasappa Ramalingappa Nargund* v. *Basawaneppa Shivlingappa Sintri* (3).

The next question is whether the plaintiff as a remote reversioner had any right to institute the suit. The general rule on the subject was laid down by their Lordships of the Privy Council in *Rani Anand Kunwar* v. *The Court*

(1) 50 Ind. Cas. 498; 42 M. 523 at p. 532; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L.W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P.C).

(2) 79 Ind. Cas. 575; 22 A. L. L. 472.

(3) 46 Ind. Cas. 239; 42 B. 719; 20 Bom. L. R. 783.

of Wards (4). The rule is that a suit of this nature must ordinarily be brought by the reversioner nearest in succession at the time. The cases in which a remote reversioner may be entitled to sue are thus stated." If the nearest reversionery heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful the next presumable reversioner would be entitled to sue." In this case the next reversioners entitled to sue are *Mt.* Maharaji's two sisters *Musammat* Chandra and *Musammat* Badra. There was an allegation in the plaint that they were in collusion with the widow, but no issue was framed on the point and no circumstance has been pointed out to us from which an inference of collusion could be drawn. The only fact relied upon by the appellant is that they refrained from suing for a period of some ten years after the gift. There is a conflict of authority on the question whether the fact that the nearest reversioner is a female holding a life-interest is in itself sufficient to give the remote reversioner a right to sue. The cases on both sides are given in a footnote to the 9th edition of Mayne's Hindu Law at page 956. In this case, however, we have to see whether the plaintiff had a good cause of action on the date when he instituted his suit. If he had no cause of action on that date his suit cannot succeed because one or more deaths have taken place during the pendency of the litigation. On the date when the suit was brought there was admittedly a daughter's son of *Musammat* Dulhma in existence, so that the plaintiff was not even the next reversioner after the death of the daughter's son. In *Gumanan* v. *Jahangira* (5) it was held by this Court that in the presence of daughters and a daughter's son, even if the daughter's son be a minor, a remote reversioner is not entitled to sue.

We accordingly dismiss the appeal with costs, but as we are deciding the case on a different ground from that on which it was decided by the Court below and overruling its decision on that ground, we think the costs should not include fees on the higher scale, and we direct accordingly.

N. H. *Appeal dismissed.*

(4) 6 C. 764 ; 8 C. L. R. 381 ; 8 I. A. 14 ; 4 Shome. L. R. 78; 4 Sar. P. C. J. 195 ; 8 C. L. R. 292; 5 Ind. Jur. 161 ; Rafique and Jacksons. P. C. No. 63 ; 3 Ind. Dec. (N. S.) 495 (P. C.).

(5) 46 Ind. Cas. 186 ; 40 A. 518 ; 16 A. L. J. 455.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 968 OF 1921.

February 19, 1924.

Present :—Mr. Justice Venkatasubba Rao.

YADAVENDRA BHATTA—PLAINTIFF —APPELLANT

versus

SRINIVASA BABHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (*I of* 1877), *s.* 42—*Transfer of Property Act* (*IV of* 1882), *s.* 6 (*e*) *Specific Performance—Agreement to lend money on mortgage—Suit on agreement, whether maintainable—Proper remedy—Mortgagor, right of, whether transferable.*

A suit does not lie for specific performance of an agreement to lend money on mortgage.

Where a mortgagee does not pay the whole of the mortgage-money, the mortgagor cannot sue for the recovery of the balance, but he may obtain compensation or damages for breach of the contract or may redeem the mortgage on payment of the sum due.

Anakaran Kasim v. *Saidamadath Arulla*, 2 M. 79 3 Ind. Jur. 312 ; 1 Ind. Dec. (N. S.) 326 ; *Rajagopal Aiyar* v. *Sheik Davood Rowther*, 45 Ind. Cas. 161 ; 34 M. L. J. 342 ; *Sheikh Galim* v. *Sadarjan Bibi*, 29 Ind. Cas. 621 ; 43 C. 59 ; 19 C. W. N. 1332 ; 21 C. L. J. 502, followed.

Therefore, the right of a mortgagor under an agreement to obtain money on mortgage, being a mere right to sue for damages, cannot be assigned under section 6 (*e*) of the Transfer of Property Act.

Appeal against the decree of the District Court, South Kanara, in A. S. No. 239 of 1920 preferred against the decree of the Court of the District Munsif, Karkal, in O. S. No. 317 of 1919.

Mr. *B. Sitaram Rao*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—The second defendant executed a mortgage in favour of the first defendant. Out of the consideration, a small portion was not paid. The plaintiff sues for the recovery of that balance on the strength of an assigment made by the third defendant who himself had obtained a similar assignment from the second defendant. The first defendant pleaded that the balance was payable only on the performance of a certain condition. The lower Appellate Court has clearly found that the second defendant made default and that the condition was not fulfilled. On this finding, the plaintiff can have no decree. Apart from this circumstance, it is perfecty clear on the authorities cited *Anakaran Kasim* v. *Saidamadath Avulla* (1), *Rajagopala Aiyar* v. *Sheik Davood Rowther* (2) and *Sheik Galim* v. *Sadarjan Bibi* (3), that the present suit is a suit to enforce an agreement to lend money on a mortgage and that such a suit does not lie. In *Anakaran Kasmi* v. *Saidamadath Avulla* (1) this is what the learned Judges say :—

> "The Court ought not to make a decree for specific performance of an agreement to lend money on mortgage. Plaintiffs may obtain compensation or damages in a properly framed suit against the defendant for breach of his contract or they may redeem the mortgage on payment of the sum due."

The English cases on the point are referred to in *Sheik Galim* v. *Sadarjan Bibi* (3).

It was open to the mortgagor to sue the mortgagee for damages but a right to obtain damages cannot be transfered. See section 6 (e) of the Transfer of Property Act.

The Second Appeal, therefore, fails and is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 2 M. 79 ; 3 Ind. Jur. 312 ; 1 Ind. Dec. (N.S.) 326
(2) 45 Ind Cas 161 ; 34 M. L. J. 342.
(3) 29 Ind. Cas. 621 ; 43 C. 59 ; 19 C. W. N. 1332 ; 21 C. L. J. 502.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1288 OF 1922.

June 6, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

UMA SHANKAR—DEFENDANT—APPELLANT
versus
GOBIND NARAYAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (*V of* 1908), *s.* 19—*Acknowledgment of liability—Acknowledgment written by agent bearing name of principal, whether sufficient—Authority to acknowledge liability.*

A letter acknowledging liability for a debt written by the *munim* of a firm and bearing no other signature than the name of the firm in the heading of the letter is sufficient to come within the meaning of s. 19 of the Limitation Act provided the *munim* was authorised to make the acknowledgment.

Mathura Das v. *Babu Lal*, 1 A. 683 ; 1 Ind. Dec. (N. S.) 477, followed.

The mere fact that the *munim* used to write letters on behalf of his principals is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability.

Appeal from the decree of the District Judge, Cawnpore, dated the 26th July 1922.

Mr. *Iqbal Ahmad*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether a certain letter, Ex. 2, is a good acknowledgment of liability so as to extend limitation against the defendant appellant within the meaning of section 19 of the Limitation Act. The letter purports to be from the defendant's firm Ram Charan Jagdish Prasad to the plaintiffs' firm Sheo Baksh Sri Narain. As far as the contents of the letter are concerned it contains an acknowledgment of liability sufficient to come within the section. It was written by Piyare Lal the *Munim* of the defendant. It bears no signature other than the name of the firm in the heading of the letter. Such a signature has, however, been

held to be good in *Mathura Das* v. *Babu Lal*, (1) and *Mohesh Lal* v. *Busunt Kumaree* (2). The question remains, however, whether there is proof that Piyare Lal was authorised to make an acknowledgment on behalf of his principal within the meaning of Explanation 2 of the section. The Court below holds that he was, on the ground of an admission made by the defendant that Piyare Lal used to write letters on behalf of his principal. No evidence was offered by the plaintiffs on this point. No question was put as to whether this particular letter was written by the authority of the principal or as to whether Piyare Lal was authorised to acknowledge debts on behalf of his principal. It was distinctly denied that he was authorised to execute a *hundi*. We think that the mere fact that the defendant used to write letters on behalf of his principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability. On this ground we allow the appeal and as the suit apart from the acknowledgment was admittedly beyond time we dismiss the suit with costs in all Courts.

N. H. *Appeal allowed.*

(1) 1 A. 683; 1 Ind. Dec. (N. S.) 477.
(2) 6 C. 340 ; 7 C. L. R. 121; 3 Ind. Dec. (N. S.) 222.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION NO. 50 of 1924.

May 30, 1924.

Present :—Mr. Pullan, A. J. C.

Molvi WALIULLAH—PLAINTIFF—APPLICANT
versus
BHAGGAN—DEFENDANT—OPPOSITE PARTY.

Arbitration—Reference not in writing—Award, validity of—Position of arbitrator.

An award is none the less valid though the reference to arbitration was not in writing.

An arbitrator entrusted with the decision of a case can only decide the points referred to him and is not bound to consider or follow the reasons given by the Court whose decision on appeal is referred to arbitration.

Where parties prefer an amature Court to a professional Court, they take the risk that the decision may not be technically perfect.

Application against the decree of the Subordinate Judge, Barabanki, dated the 9th November 1923 upholding the order of the Munsif, Fatehpur, dated the 13th March 1923.

Mr. *H. Dhian Chandra* for Mr. *M. A. Khan*, for the Applicant.

Mr. *Ram Prasad Varma*, for the Opposite Party.

JUDGMENT.—This is an application for revision of a judgment of the Subordinate Judge of Barabanki upholding the award of an arbitrator. The facts of the case are somewhat unusual. The plaintiff filed a suit in the Court of a Munsif for possession of certain trees on payment of Rs. 50 alleging that he had purchased the trees from one Makhdum and was entitled to possession from a prior mortgagee on payment of his mortgage-money. The Munsif dismissed the suit on the grounds that though the plaintiff's sale-deed was genuine the vendor had no property to sell and, therefore, the plaintiff was entitled to no relief. The plaintiff appealed to the Subordinate Judge but instead of allowing the appeal to be heard the parties referred the matter to the arbitration of a certain *taluqdar*. This gentleman made an award against the plaintiff and the latter filed objections. The objections were heard by the Subordinate Judge and dismissed. Now on the same grounds the plaintitff comes before this Court in revision. Briefly his case is that the award was bad first on the ground that the reference was not in writing and, therefore, contrary to law, secondly that the decision was not based on the points, referred to the arbitrator. I may say at once that the objections relating to misconduct and the improper action of some third party in influencing the decision of the arbitrator are not worthy of consideration in this Court. The first objection that the reference was not in writing is met by the decision of the Allahabad High Court reported

in *Abdul Hamid* v. *Riaz-ud-din* (1). In this case the reference was made by the Ccurt and the parties both appeared and conducted their case before the arbitrator. Under these circumstances a written reference was hardly necessary and I do not think that the award could be set aside on this ground. The second and most serious ground for revision is based on the supposition that the reference to the arbitrator consisted of the points raised in appeal against the decision of the Munsif. Now an arbitrator cannot hear an appeal against a Court and can only decide the points referred to him. According to the order of reference the arbitrator was entrusted with the decision of the case. He was not bound to consider in any way the decision of the Munsif, and as a matter of fact he framed new issues and accepted many pages of written arguments besides recording evidence. The upshot of his inquiry was that he found the sale-deed invalid for want of consideration. Now this was not actually the point raised in the pleadings but there is no question that the sale-deed had been essential to the disposal of the plaintiff's case. It is impossible at this stage of the proceedings to consider whether the arbitrator's decision was right or wrong. He certainly decided a vital point and gave a decision which is the same as the decision of the Munsif's Court although based on different grounds. I cannot hold that the arbitrator went beyond the terms of his reference and there is no question as to misconduct or corruption. Section 15 of Schedule II lays down the reasons on which alone an arbitrator's award can be held to be void and none of those reasons apply to the case before me. Where parties prefer an amateur Court to a professional Court they take the risk that the decision may not be technically perfect. The law is not supposed to assist such persons to get a second decision from a professional Court because they are dissatisfied with the decision of the amateur tribunal which they themselves have chosen. After all I cannot find that the plaintiff has a valid grievance. The Munsif gave the case against him, the arbitrator gave the case against him and the Subordinate Judge was of the same opinion. The arbitrator's methods may have been unlike those of an ordinary Court and his decision is not that of a practised lawyer but I have no reason to suppose that he did not give justice and there is nothing in the grounds for revision which would justify me in setting aside the order of the lower Court. I dismiss the application with costs.

(1) 41 A. L. J. 691.

G. H. *Application dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 470 OF 1921.

May 22, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

Babu FATEH CHAND—PLAINTIFF—APPELLANT

versus

Lala MURARI LAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II *of* 1901), *ss.* 4, 51—*Revenue, remission of—Abatement of rent—Lessee, whether tenant.*

Where a remission of Revenue is made by Government owing to failure of crops, the tenant is entitled to an abatement of rent under section 51 of the Agra Tenancy Act, even though he has expressly contracted not to claim abatement of rent under such circumstances.

For the purposes of section 51 of the Agra Tenancy Act, a, 'tenant' includes a lessee.

Bochan Lal v. *Pooran Kunwar*, 1 Ind. Cas. 529, **not followed.**

Shim Lal v. *Makkan Lal*, 2 Ind. Cas. 639. **distinguished.**

Appeal from the decree of the Assistant Collector, 1st Class, Muzaffarnagar, dated the 11th of May 1921.

Mr. *G. Agarwala*, for the Appellant.

Mr. *S. N. Gupta* and Dr. *S. N. Sen*, for the Respondent.

FATEH CHAND *v.* MURARI LAL

JUDGMENT.—This appeal arises out of a suit for arrears of rent, the rent being payable by the lessee or '*thekadar*' under a written lease bearing date 28th June 1918.

It appears that the Local Government, by notification in the Local Official Gazette, remitted land revenue for a portion of the year (*kharif*) 1326F. The defendant-lessee claimed in the suit that he should receive an abatement in the rent under section 51 of the Tenancy Act of 1901. The lower Court held that he should and decreed the claim after allowing reduction on account of the contention of the defendant.

In appeal it has been contended by the plaintiff that there is a clear stipulation in the lease that the rent would be payable irrespective of whether there is any drought or flood or any calamity by which there is no produce in the village. We have to construe section 51 of the Tenancy Act and to see whether the provisions of the said section override the contract or whether the contract should prevail. In section 51 the word used is "tenant". Under section 4 of the Tenancy Act the word "tenant", unless there is something repugnant in the subject or context, includes a *thekadar* or lessee. We see nothing in section 51 repugnant to the sense that the word "tenant" should include a lessee. If we look to the principle on which section 51 is based we find that it is owing to there being a want of produce in the village that the Government remits the revenue. If in spite of the Government remitting the revenue, the landlord be allowed to collect the rent, the cultivators would receive no benefit and there would be no meaning in the Government giving up the revenue. Similarly, if in the present case the *Zemindar*, the plaintiff, be allowed to recover his full amount of rent from the defendant, the result would be that the defendant must try by unfair means to get the rents out of the tenants, the actual cultivators of the soil. We think that there is nothing in section 51 which enables us to take out the case of a lessee, who has agreed to pay rent under all circumstances, from the provisions of section 51 of the Tenancy Act. As for the Statute overriding a contract, it is sufficient to say that in the majority of cases, the rent is fixed as the result of a contract, and yet the law says that the rent would not be paid or would be suspended. Two cases were cited in the Court below and they have been cited here also. They are to be found in *Bachan Lal* v. *Pooran Kunwar*. (1) In this case the *thekadar* was compelled to pay the rent in spite of remission of the land revenue on the ground that he was holding under a special contract from the *Zemindar* and he may have made substantial profit in fat years. Section 4 of the Tenancy Act was not referred to in that case. This was a decision by a single Judge. The second case is a later one and was decided in 1909. It is reported in *Shiam Lal* v. *Makhan Lal* (2). In this case too the *thekadar* was compelled to pay the rent, but the ground given was entirely different. It was this. Although under section 51 of the Tenancy Act the Local Government remitted or suspended the payment of land revenue there was nothing before the learned Judges to show that there was any order passed to apply to the case of a '*thekadar*'. The learned Judges say that they allowed the defendant an opportunity to produce an order that may have been passed by the Collector, but no order was produced before their Lordships. Section 4 of the Tenancy Act was not referred to in this case also. Without expressing any opinion on the correctness or otherwise of this case, we note that, we have in the present case, an express order of the Collector directing that, the rent payable by the defendant-lessee should be remitted to the extent mentioned therein. This document which is called a 'certificate by the Collector' is printed at p. 26 of the record. We should think that the contract between the parties is entirely over-ridden by the express provision of law contained in section 51 of the Tenancy Act. The judgment of the Court below seems to have been correct except in respect of costs, as to which we will pass orders later on. The appeal is otherwise dismissed with proportionate costs to the parties, which will include in this Court Counsels' fees on the higher scale.

There is a cross-objection on behalf of the defendant-respondent. Two points were taken, but only the second one is pressed. It appears that the Court below ordered that the

(1) 1 Ind. Cas. 529
(2) 2 Ind. Cas. 629.

parties should pay their own costs. This portion of the decree has been taken exception to. We see no justification for allowing no costs to the parties. We allow the cross-objection and the appeal in part and order that the parties pay and receive costs in both the Courts in proportion to their respective failure and success. The respondent will receive costs of the cross-objection in proportion to his success. The costs in this Court will include Counsels' fees on the higher scale.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 1149 AND 1150 OF 1923.

March 25, 1924.

Present :—Mr. Justice Mukerjee.

MAHENDRA NATH KUNDU—
—DEFENDANT—PETITIONER
versus
SURESH CHANDRA PRAMANIK—
PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, para. 12 (b)—Award, rectification of—Palpable mistake—Jurisdiction of Court.

A Court has no power to rectify or correct the award on the ground that the arbitrator has taken a wrong view of the evidence which was palpable or apparent on the face of the evidence, unless the award is imperfect in form or the obvious error is of such a character that it can be set right without affecting the decision of the arbitrator.

A Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator.

Rule against an order, dated the 31st August 1923, in S. C. C. Suit (Register) Nos. 33 and 49 of 1923 of the Court of the Sub. Judge of Nadia exercising the powers of a Court of Small Causes.

Babu *Mrityunjoy Chatterjee* (with him Babu *Sudhi Ranjan Roy Chowdhury*), for the Petitioner.

Babu *Tarakeswar Pal Chowdhry* (with him Babu *Jnan Chandra Roy*), for the Opposite Party.

JUDGMENT.—The two suits out of which the present Rules have arisen being Suits Nos. 33 and 49 of 1923 of the Court of Small Causes at Krishnagar were referred to a certain arbitrator. The arbitrator submitted his award on the 17th August 1923. On the 27th of August 1923, the opposite party in these Rules put in a petition challenging the validity and correctness of the award. The petition was headed as one under para. 15 of Schedule. II of the Code of Civil Procedure. It dealt substantially with two sorts of grievances. One was that there was misconduct on the part of the arbitrator, in as much as he had refused to take relevant evidence which the opposite party was ready to adduce before him and the other was that the arbitrator had been misled into coming to certain findings upon calculations which were the result of fraudulent representations made to him on behalf of the petitioner in these Rules. The matter came up before the learned Subordinate Judge on the 31st of August 1923. The learned Judge noted in his judgment that an objection had been taken to the award on the allegation that the arbitrator had been guilty of misconduct in not taking into evidence all that the opposite party was ready to adduce; and he himself went into the account-books and, being of opinion that a certain finding of the arbitrator with regard to the period up to which the *Karbar* between the parties continued was wrong on the face of the account-books, set aside that finding and made two decrees in the two suits in consonance with his own finding to the effect that the said *Karbar* went on down to the end of *Chaitra* 1326, B. S. The learned Judge seems to have held in his judgment not that the awad is fit to be set aside on any of the grounds mentioned in para. 15 of the Second Schedule to the Civil Procedure Code but that the award should be modified or corrected in accordance with the provisions of para 12 of that schedule. Para. 15 of Schedule II of the Code of Civil Procedure lays down that no award shall be set aside except on one of the following grounds, namely, (*a*) corruption or misconduct of the arbitrator, (*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator. It is not necessary

for the purposes of the present cases to refer to the other part of this paragraph. The learned Subordinate Judge has recorded no finding to the effect that there was any corruption or misconduct on the part of the arbitrator nor has he found in his judgment that any party has been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator. It is clear then that the learned Judge should not have acted under the powers conferred on him by para. 15 of Schedule 11 of the Code of Civil Procedure. Nor did the learned Judge, in my opinion, purport to act under the provisions of that paragraph. He preferred to correct or modify the award in accordance with para 12 of Schedule 11. The provisions therein contained empower the Court to modify or correct an award (I do not quote such part of this paragraph as is not relevant for the present purposes) (*b*) where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission." The mistake into which the arbitrator fell, according to the opinion of the learned Subordinate Judge cannot be said to be a clerical mistake or an error arising from an accidental slip or omission and, therefore, the provisions of sub-para, (c) of para, 12 of Schedule II Code of Civil Procedure need not further be considered. Nor was the error one which made the award either imperfect in form or which could be amended without affecting the decision of the arbitrator. It may be that the learned Subordinate Judge was perfectly justified upon the evidence before him to come to the conclusion as he did to the effect that the arbitrator had taken a wrong view of the evidence and that such a wrong view was palpable or was apparent on the face of the account books. But even then the Court had no power to rectify or correct the award unless the award was imperfect in form or the obvious error was of such a character that it could be amended without affecting the decision of the arbitrator. It is well-settled that a Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator. In this connection, reference may be made to the case of *Madepalli Venkataswami* v. *Madepalli Suramma* (1), where, after discussing the authorities bearing upon the question, the learned Judges of the Madras High Court have laid down that even in a case where the award is patently illegal in consequence of the arbitrator having taken a wrong view on a pure question of law, the Court has no power to rectify the same under the provisions of para. 12 of the Second Schedule to the Code of Civil Procedure. The learned Subordinate Judge, therefore, in my opinion, acted entirely without jurisdiction in modifying or correcting the award of the arbitrator and the decision passed by him cannot be upheld in any view of the matter.

The question now arises whether I should send the cases back to the learned Subordinate Judge to deal with the objections which had been taken before him by the Opposite Party in these Rules and which do not appear to have been considered or dealt with by him in the order which he has passed. The learned Vakil appearing on behalf of the petitioner has drawn my attention to the order-sheet of the learned Subordinate Judge and has asked me to hold that there was no attempt really made by the Opposite Party to prove the allegations which he made in his petition under paragraph 15 of Schedule II of the Code. I have duly considered the matter and it seems to me, regard being had to the fact that the Court itself took a wrong view of the law, that the Opposite Party in these Rules might probably have been misled and I, therefore, do not propose to refuse him an opportunity of substantiating those allegations. It will be for him to prove those facts and, if he succeeds in proving the[illegible] the satisfaction of the Court below, the learned Subordinate Judge will be able on a proper case being made out to deal with the matter on the footing of the provisions contained in para. 15 of Schedule II. If they are not made out then the learned Judge will have to proceed in accordance with the provisions of para. 16 (2) of Schedule II of the Code of Civil Procedure and pronounce a judgment and pass decrees in accordance with those provisions. The Rules are made absolute as indicated above. Having

(1) 45 Ind. Cas. 644 ; 41 M. 1022; 34 M. L. J. 323; 24 M. L. T. 60; 8 L. W. 202; (1918) M. W. N. 482.

regard to the peculiar circumstances of the cases, I do not make any order as to costs in these Rules.

M. B. *Rules made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 769 OF 1922.

March 24, 1924.

Present :—Mr. Justice Dalal and Mr. Justice Daniels.

BAIJNATH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
RAM BILAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Trespasser, transferee from—Invalid transfer—Limitation, operation of Hindu Law—Joint family—Discharge by manager, validity of.

A trespasser succeeding another under an invalid transfer can tack his possession on to that of the former so as to bar a suit for ejectment brought more than 12 years after the dispossession by the original trespasser.

The managing member of a joint Hindu family can give good receipts on behalf of the family, which will bind the family.

Ganga Dayal v. *Maniram*, 1 Ind. Cas. 824 ; 31 A. 156 ; 6 A. L. J. 62, distinguished.

Appeal from the decree of the District Judge, Gorakhpur, dated the 1st of April 1922.

Messrs. *Saila Nath Mukerji* and *U. S. Bajpai*, for the Appellants.

Messrs. *Iqbal Ahmad* and *M. A. Aziz*, for the Respondents.

JUDGMENT.—In the Court of first instance a suit was brought for the possession of a house by three brothers, Munna Lal major and Baijnath and Rang Lal minors, under the guardianship of Munna Lal. There were three sets of defendants, Rambilas, Gulab Rai and others and Ramjidas. The plaint allegations were that by collusion between Rambilas and the plaintiffs' cousin Ramjidas, Rambilas was placed in possession of the house, and that subsequently Gulab Rai and others took possession and refused to vacate on notice being issued to them. In 1909 Rambilas sued Ramjidas and the then minors Munna Lal Baijnath and Rang Lal under the guardainship of the Nazir of the Court of suit, for recovery of money due on *bahi khata* accounts. The defence of Ramjidas was that he had transferred a house worth Rs. 800 and odd to the plaintiff of that suit on condition of the price being set off against the money due. This defence was accepted and the Court passed a decree giving to the defendants credit for that sum if they executed a sale-deed in favour of the plaintiff. No such deed was executed and the plaintiff applied for execution of the full amount of the decree. Ramjidas objected and on the litigation being carried up to this Court, the order of this Court was that Rambilas should file a draft sale-deed within two months of the date of the order, which was 1st November 1912. No further action was taken by Rambilas in execution of his decree, which in consequence became inoperative by lapse of time.

The learned District Judge held that Rambilas entered into possession of the house in 1907, that his possession was adverse from that year, that it had perfected into good title when the present suit was instituted in 1920, and that the suit was time-barred because Munna Lal had attained majority more than three years prior to the institution of the suit.

The points argued before us were :—

1. That the possession of Rambilas did not become adverse till 1st November 1912, the date of the order of this Court referred to above.

2. That Gulab Rai was an independent trespasser and the period of his possession cannot be tacked on to the period of possession of Rambilas ; and

3. That even if the suit be barred against Munna Lal, it was not barred against his two brothers who were still minors. Only Baijnath and Rang Lal have appealed and it is not explained why Munna Lal did not appeal if there was any substance in the first two arguments advanced by the appellants' learned Counsel. It is not clear how the

order of this Court made any difference to Rambilas's possession and why it should become adverse on that date. It is found by the lower Court as a fact that Rambilas entered into possession by right of ownership in 1907. The appellants' learned Counsel submitted that Rambilas would have said so at the time of his money suit if he had claimed to be owner of the house. In our opinion, he was not required to make such a declaration. He wanted to hold on to the house, recover the full amount due to him and give no set-off for the price of the house. It was not to his interest to disclose the arrangement regarding the house of which he was in possession. The defence in that suit led the Court to recognize the arrangement between Rambilas and Ramjidas. Ramjidas stated as his defence that he had made over possession of the house to Rambilas and was entitled to a reduction of the money claim by the price of that house. The appellants' learned Counsel argued that Ramjidas was colluding with Rambilas and that his clients did not recognise any act of Ramjidas,who was not acting in their behalf. If this is the attitude of the appellants, Rambilas's possession as owner against the wishes of the appellants, was certainly adverse to the appellants at all events, from its very inception, whatever its nature may have been against Ramjidas. The learned Judge of the lower Court was correct in holding that the possession of Rambilas was adverse from the year 1907.

Gulab Rai was not an independent trespasser. He derived his title from Rambilas to whom he paid the price of the house. The appellants' learned Counsel pointed out that there was no sale-deed and that the sale was not valid. This fact does not prevent Gulab Rai from being a successor in interest to Rambilas. When it was definitely put to the learned Counsel by one of us whether there was any authority for the proposition that one trespasser succeeding another can tack his possession on to the former's only in case of a valid transfer, he was unable to cite one. Gulab Rai according to the statements of both himself and Rambilas derived his title from Rambilas and did not commit trespass against both Rambilas and the appellants. Gulab Rai who stepped into the shoes of Rambilas with the latter's consent continued the trespass, which had commenced with the possession of Rambilas. The suit was, therefore, barred by 12 years' limitation.

The learned District Judge has held, though not in clear terms, that the three plaintiffs were members of a joint Hindu family with Munna Lal as manager and that Munna Lal having failed to bring the suit within three years of attaining majority, his brothers were barred from bringing the suit in accordance with the principles of section 7 of the Limitation Act. It was justified in presuming that Munna Lal as the oldest brother and the sole adult member of the family became the manager from the date on which he attained majority. The appellant's learned Counsel quoted *Ganga Dayal* v. *Maniram* (1) as an authority against this proposition. In that case, however, the learned Judges did not find any evidence to support the suggestion made at the hearing of that appeal that plaintiff No. 1 of that suit was the manager of the family (see p. 160 of the Report). This ruling was distinguished in the later ruling of *Achhaibar Singh* v. *Ram Sarup Sahu* (2). It was held there on the authority of the Full Bench in *Hori Lal* v. *Munwan Kunwar* (3) that the managing member of a joint Hindu family can give good receipts on behalf of the family, which will bind the family. These subsequent rulings of this Court enunciate the same principles of law as have been laid down by the Madras and Bombay High Courts in *Doraisami Sirumadan* v. *Nondisami Sahwan* (4), and *Bapu Tatya Desai* v. *Bala Raoji Desai* (5). The finding of the learned District Judge is, therefore, well supported by the case law on the subject.

The appeal fails and we dismiss it with costs on the higher scale.

M. H. *Appeal dismissed.*

(1) 1 Ind. Cas. 824 ; 31 A. 156 ; 6 A. L. J. 62.
(2) 19 Ind. Cas. 645 ; 35 A. 380 ; 11 A. L. J . 463.
(3) 15 Ind. Cas. 126 ; 34 A. 549 ; 9 A. L J. 819.
(4) 21 Ind. Cas. 410 ; 38 M. 113 ; 25 M. L. J. 405 ; 14 M. L. J. 401.
(5) 59 Ind. Cas. 759 ; 45 B. 446 ; 22 Bom. L. R. 1383.

KALI PROSANNO CHAKRAVARTY *v.* NAJABULLA JAMADAR

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 627 OF 1924.

February 4, 1924.

Present :—Mr. Justice Suhrawardi and Mr. Justice Chotzner.

KALI PROSANNO CHAKRAVARTY—PLAINTIFF—APPELLANT

versus

NAJABULLA JAMADAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 100 (2),—Ex parte decision—Second Appeal, maintainability of.

A Second Appeal against an *ex parte* decision is maintainable under section 100 (2), Civil Procedure Code, even though there are other remedies open to the appellant.

When a case is decided *ex parte*, the remedy open to the party affected by the decision is threefold; first, he may apply for restoration of the case; secondly, he may apply for a review of judgment, and thirdly, he may appeal from the decree.

Appeal against the decree of the Subordinate Judge, 4th Court, Mymensingh, dated the 27th September 1920 modifying the decree of the Munsif, Additional Court at Kishoreganga, dated the 28th February 1918.

Dr. *Sarat Chandra Basak*, (with Babu *Urukram Das Chakravarthy*), for the Appellant :—

This appeal is against an *exparte* decision of the lower Appellate Court in spite of my client's application for an adjournment on very reasonable grounds. My client got a decree against his tenant in the Trial Court. On appeal by the tenant the decree was confirmed. But again an application for review having been made by the tenant the same was granted. Against this my client preferred an appeal here and sent all his papers to his Vakil. During that time the lower Appellate Court fixed the 25th September peremptorily for rehearing of the appeal. On that date my client applied for an adjournment on the ground that his papers were with his Vakil who was away on the long vacation of the High Court. The Court, however, refused the application on the ground that the case was old and the order fixing the date was a peremptory one and then heard the case *ex parte*. Now was it not arbitrary and illegal? By all means the case should be reheard in the interests of justice.

Babu *Ramesh Chandra Sen*, for the Respondent :—

There is no error of law or irregularity of procedure in this case. The lower Appellate Court in the exercise of its discretion refused any further adjournment of the appeal and gave sufficient notice to the parties that the case would be taken up on the 25th September 1921. It has also given good reasons for not granting any further time. The appellant had sufficient time to get the papers from his Vakil in the High Court for the purpose of the hearing of the appeal in the lower Appellate Court. The High Court was closed from September till the middle of November and so the papers could not be required for any hearing in the High Court on the 25th. The learned Vakil's letter shows that he was in Calcutta at the time and that the papers could have been sent to Mymensingh for the hearing of the appeal on the 25th September and sent back to the learned Vakil for use at the hearing in the High Court after reopening in November. The learned Subordinate Judge in view of the fact that the suit had been pending since 1917 and had been the subject of a Review and an appeal to the High Court during that time declined to grant any further time. He exercised his discretion and refused further adjournment. There is no irregularity in this procedure within the meaning of section 100 (*c*), Civil Procedure Code. I submit that a refusal to grant an adjournment cannot be a ground of second appeal. The remedy of the appellant was to apply to set aside the *ex parte* decree under O. XLI, r. 21. This Court has no jurisdiction to interfere with the decree in second appeal on this ground. Further even if this Court had any discretion in the matter it should not be exercised in favour of the appellant in view of the long period during which this litigation has been dragging on. Even this appeal which was filed in 1921 has not been expedited and it is being heard after 3 years. The other side is the landlord and has a long purse. He is not enti-

tled to a reversal of the decree as of right and should not be shown any indulgence which would give him an opportunity of further harassing the poor tenant.

Dr. *Sarat Chandra Basak* in reply—My client made an application for adjournment of the hearing of the appeal and he had no fresh grounds to advance for restoration of it. Therefore, it is incorrect to say that there was any other remedy open to my client which was not tried. Besides, if my friend's contention were true, in each case in which an appeal is preferred to this Court an application for review of judgment of the lower Court should be made. But certainly this is not necessary and binding. Therefore, instead of making an application for restoration of the appeal or for review of the judgment my client thought it better to prefer an appeal directly to this Court, and he was quite within his rights to do it. As to the jurisdiction of this Court, it is wide enough for interfering in a case like the present one. Then again, clause 2 of section 100, Civil Procedure Code expressly provides for an appeal against an appellate decree passed *ex parte* giving right to the appellant on the one hand and jurisdiction to the Court on the other.

JUDGMENT.—It is an unfortunate case. It was started nearly 7 years ago and had a chequered career. It came to this Court twice. It is not necessary to relate the history of its progress. It is enough for our present purpose to refer to a few dates. The suit was decreed by the first Court and there was an appeal to the lower Appellate Court. There was also an application for review of judgment before the lower Appellate Court which was finally granted on the 20th August 1920. An appeal was preferred to this Court against the order granting review, on the 30th August 1920. On the 4th September 1920, the learned Judge having granted the review, fixed the 25th September peremptorily for the rehearing of the appeal. On the 25th September the appellant before us applied for an adjournment on the ground that he had sent all the papers in connection with the case to his pleader in the High Court in order to file an appeal and as the pleader had left Calcutta during the long vacation he had not been able to get back the papers from him. The learned Judge, however, rejected the application and heard the case *ex-parte*. His main grounds for refusing the adjournment are, first, that the case was an old one; and secondly, that he had given peremptory notice to the parties that the appeal would be taken up for hearing on the date fixed. We think that the Court below would have acted more wisely in allowing the respondent opportunity to be present at the hearing after the receipt by him of all the necessary papers that were with his pleader in the High Court. It is possible that the application for adjournment made before the lower Appellate Court was groundless. It is possible also that he had sent his papers to his vakil in the High Court because as a matter of fact an appeal was preferred on the 30th August 1920, that being the last day the High Court sat before the long vacation. The case was no doubt an old one but it was restored not even a month before it was heard. In these circumstances we think that the learned Judge would have exercised proper discretion in giving an opportunity to the appellant to appear at the hearing. The result of the rejection of the application was that the *ex-parte* decision affected not only the present tenant applicant but might affect the other tenants of the estate also. In this view of the matter it seems that this appeal should be reheard.

The respondent opposes this order on the ground that we have no jurisdiction to interfere under section 100, Civil Procedure Code, as appellant has other remedies open to him in the Court below. His contention is that the proper course which should have been adopted by the appellant was to apply to the Court below under O. XLI, r. 21 to restore the appeal to its file and to rehear it in his presence; but he has not adopted this course. It is well known that when a case is decided *ex-parte* the remedy open to the party affected by the decision is threefold; first he may apply for restoration of the case; secondly, he may apply for a review of judgment, and thirdly, he may appeal from the decree. In this case the appellant has chosen the last recourse. I am not sure that this course was not intentionally adopted for a purpose ; but that is a remedy open to him and I cannot avail him of it. With regard to our jurisdiction under the Code I think that that jurisdiction is wide enough to embrace this. It is not necessary to

refer to any provision of the law ; but if any be needed reference may be made to clause (2) of section 100 Civil Procedure Code.

The learned Vakil for the appellant has agreed to pay to the respondent all his costs up to this stage of the litigation. On this undertaking being given, we direct that the appeal be allowed, the decree of the lower Appellate Court set aside and the appeal sent back to that Court for rehearing in accordance with law. The respondent will be entitled to costs in all the Courts. The appeal will be reheard by the lower Appellate Court on the appellant depositing the costs of the respondent in the lower Appellate Court within one month after the arrival of the record there and assessment of costs by that Court. On his failure to do so, the appeal will stand dismissed with costs.

M. B. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 293 OF 1924.

May 7, 1924.

Present :—Mr. Justice Sulaiman and
Mr. Justice Kanhaiya Lal.

HIMANCHAL SINGH—PLAINTIFF—APPELLANT
versus
JATWAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Compromise of suit—Agreement to be bound by statement of third party—Admission by nominee of party—Evidence Act (I *of* 1872), *ss* 20, 31.

The plaintiff and the defendant in a suit signed a written statement which said" it has been settled between the parties that G. shall hear our whole affair and that we shall accept any statement that he may make before the Court." G. made a statement on oath against the plaintiff and the Court dismissed the suit. The plaintiff urged in appeal that the statement of G. was not binding and that the Court should have decided the Case on the merits :—

Held **(1) that the agreement operated as an adjustment of the suit and was binding on the parties.**

(2) that at any rate the statement of G. must be taken to be an admission made in the suit by a nominee of a party thereto, which was as effectual and conclusive as an admission made by the party himself in his witten or oral pleadings.

Appeal from a decree of the District Judge, Jhansi, dated the 4th December 1923.

Mr. *N. C. Vaish*, for the Appellant.

JUDGMENT.—These two appeals are connected and arise out of two suits for pre-emption.

On the 22nd February 1922 before the Trial Court the plaintiff and the contesting defendants with the pleaders for both parties signed a written statement to the following effect :

" It has been settled between the parties that Rai Sahib Pt. Gopal Das Sharma, Vakil, shall hear our whole affair and that we shall accept any statement that he may make before the Court."

It is not necessary to refer to the various adjournments in the case, but it may be noted that ultimately the case was under an order of the District Judge transferred from the Court of the learned Munsif to that of another officer. Pt. Gopal Das Sharma, Vakil, made a statement on oath before this latter Court. And the suit was dismissed in accordance with the referee's statement.

On an appeal by the plaintiff to the District Judge that decree has been affirmed.

On behalf of the plaintiff it is strongly contended that the statement referred to above was not a reference to arbitration ; nor did it come under the Oaths Act. It is, accordingly, urged that it is in no way binding on the plaintiff, and that the Courts below should have decided the case on the merits and not on the mere statement of Pt. Gopal Das Sharma.

We are of opinion that the contention of the plaintiff cannot prevail. The case can be looked at from two points of view. To say the least, the statement being duly signed by the plaintiff as well as his pleader amounted to an agreement that he would be bound by the statement that would be made by the referee. The statement made by the referee was clearly a statement made by a person to whom the parties to the suit had expressly referred for information in reference to the

matters in dispute, and was a statement within the meaning of section 20 of the Indian Evidence Act. It is true that ordinarily mere admissions are not conclusive as is provided in section 31 ; but admissions of this kind must be taken to be admissions made in a suit by the nominee of a party thereto. Such admissions, therefore, are as conclusive and effectual as admissions made by the parties in their written or oral pleadings. The effect is to prevent each party from resiling from the statement made by such a nominee.

It may also be said that the parties really compromised their dispute in this manner that they agreed that the decree of the Court shall be in accordance with the statement to be made by their nominee hereafter. There is nothing to prevent the parties from compromising the suit and agreeing to a decree being passed in terms to be stated by a person named. Such an agreement, therefore, would be an adjustment of the suit, and it is difficult to see how any party could be allowed to go back on it. The Madras High Court has treated such an agreement as an adjustment of the claim (Vide *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (1) and the earlier cases referred to therein). In the case of *Muhammad Asghar Ali Khan* v. *Muhammad Imtiaz Ali* (2) it was held that an agreement by a defendant to a civil suit to be bound by whatever statement that might be made by the plaintiff upon oath was binding on him even though it did not fall under the Oaths Act. A similar view has been expressed by Walsh, J., in the case of *Kesho Ram* v. *Piare Lal* (3).

We are satisfied that it is impossible to allow the plaintiff now to go back on the statement. There is no suggestion that there was any fraud or dishonesty or misrepresentation which has prejudiced the plaintiff. We accordingly, dismiss this appeal under O. XLI, r. 11, Civil Procedure Code.

N. H. *Appeal dismissed.*

(1) 51 Ind. Cas. 827 ; 42 M. 625 ; 36 M. L. J. 291 ; (1919) M. W. N. 221 ; 25 M. L. T. 397
(2) A. W. N. (1898) 200.
(3) 71 Ind. Cas. 761 ; 21 A. L. J. 209 ; (1923) A I R. (A.) 443.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 10 OF 1923.

January 10, 1924.

Present :—Mr. Wazir Hasan, J. C.,
and Mr. Kendall, A. J. C.

SHAMBHU BHAN SINGH—PLAINTIFF—APPELLANT
versus
I. B. CHANDRA SHEKHAR BAKHSH SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Decree for mesne profits against father—Sale of joint family property—Illegality or immorality of debt—Liability of sons.

Hindu joint family property in the hands of sons is liable to be taken in execution of a decree for a debt incurred by the father alone, provided the same was not illegal or immoral.

Raja Bahadur Raja Brij Narain Rai v. *Mangal Prasad Rai*, 77 Ind. Cas. 689 ; 21 A. L. J. 934 ; 46 M. L. J. 23 ; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41 ; 10 O. and A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 33 M. L. T. 457 ; 46 A. 95 ; 26 Bom. L. R. 500; 11 O. L. J. 107 (P. C.), relied on.

A decree for mesne profits obtained against a Hindu father stands on the same footing as any other debt incurred by him and his conduct in defending the suit for mesne profits without success cannot be characterised as illegal or immoral.

Appeal against the order of the Officiating Sub-Judge, Unao, dated the 1st November 1922.

Mr. *M. L. Tiwari*, for the Appellant.

Mr. *L. S. Misra*, for the Respondents.

JUDGMENT.—One Babu Debi Singh seems to have possessed considerable immoveable property. On his death his sons, Rao Udit Narain Singh and Girja Bakhsh Singh, naturally succeeded to his estate. On the death of Rao Udit Narain Singh, his son, Rao Chandra Shekhar Bakhsh, entered into the possession of the estate of his deceased father. *Mt.* Raj Kuar is the daughter of Rao Udit Narain Singh. She sued her brother, Rao Chandra Shekhar Bakhsh, for

recovery of possession of the estate of her father on the ground that Rao Chandra Shekhar Bakhsh was not the heir of his father for the reason that he had been adopted by his uncle, Girja Bakhsh Singh, and consequently *Mt.* Raj Kuar was the sole heiress to the estate of her father. Her suit was dismissed by the Court of first instance, which was the Court of the Subordinate Judge of Cawnpore. She appealed against that decree to the High Court of Allahabad. The learned Judges of the last-mentioned Court set aside the decree of the Court of the first instance and decreed the suit of *Mt.* Raj Kuar against her brother, Rao Chandra Shekhar Bakhsh.

It is admitted that the decision of the High Court mainly rested on the fact that Rao Chandra Shekhar Bakhsh had been adopted by his uncle, Girja Bakhsh Singh. It naturally followed that Rao Chandra Shekhar Bakhsh was not the heir of his father in the estate. In view of this decree *Mt.* Raj Kuar entered into the possession of the estate and an inquiry was instituted into the claim for mesne profits which she had against her brother, The result of that inquiry was that Rao Chandra Shekhar Bakhsh was held liable for a large sum of money amounting to Rs. 31,340-8-0. *Mt.* Raj Kuar then proceeded to execute her decree for mesne profits against the properties held by Rao Chandra Shekhar Bakhsh. The plaintiff of the suit, out of which this appeal has arisen, is the son of Rao Chandra Shekhar Bakhsh. He prays for a declaration that the properties, which *Mt.* Raj Kuar has attached in execution of her decree for mesne profits, are not liable to attachment and sale in satisfaction of that decree. The broad ground of the claim of the plaintiff is that he and his father formed a joint Hindu family and the properties in suit are the joint ancestral properties of that family. The Court below has dismissed the suit. Hence this appeal.

We are of opinion that the decree of the lower Court is correct and should be maintained. The only argument advanced in support of the appeal by the learned pleader for the appellant is that the debt for which the decree was passed was either an illegal or immoral debt and consequently under the law of the *Mitakshara* as now settled the joint family property is not liable for such a debt. It is obvious that this contention is founded on the admission that apart from the question of illegality or immorality of the debt the decree for mesne-profits which *Mt.* Raj Kuar had obtained against her brother could be executed against the whole of the joint family property. We have mentioned this aspect of the case for the reason that whatever might have been the doubts on that point before to-day they must be taken to have been set at rest by the recent decision of their Lordships of the Privy Council in the case of *Raja Bahadur Raja Brij Nararin Rai* v. *Mangal Prasad Rai* (1). This decision must be taken to be the last word on the subject. Their Lordships laid down five propositions. The present case falls within proposition No. 2, which is as follows :—" If he is the father and the reversioners are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." It is agreed before us that the decree for mesne-profits stands on the same footing as any other ordinary debt incurred by the father. The real question, therefore, which we have to decide in this appeal, is whether this debt can be construed as illegal or immoral.

We are of opinion that it is not possible to so construe this debt. There is a string of decisions of all High Courts in which execution of decrees as against joint family properties has been upheld though such decrees were for mesne profits passed in suits instituted against the father alone. Indeed the Privy Council decision in the case of *Nanomi Babuasin* v. *Modhun Mohun* (2), seems to us to be a direct authority on the point. In the case before us, our opinion is strengthened by the peculiar circumstances of it. Rao Chandra Shekhar Bakhsh was defending his position to the estate of his father. No objection can be taken to that act of his and if he eventually failed in the litigation against his sister on questions of fact on which the Court of first instance and the Court of Appeal had differed

(1) 77 Ind. Cas. 689 ; 21 A. L. J. 934 ; 46 M. L. J, 23 ; 5 P. L. T. 1; 28 C. W. N. 258 ; (1924) M. W. N. 68 ; 19 L. W. 72; 2 P. L. R. 41 ; 10 O. and A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 33 M. L. T. 457 ; 46 A. 95 ; 26 Bom. L. R. 500 ; 11 O. L. J. 107 (P. C).

(2) 13 C. 21 ; 13 I. A. 1 ; 10 Ind. Jur. 151 ; 4 Sar. P. C. J. 632 ; 6 Ind. Dec. (N. S.) 510 (P. C.).

it is hardly possible to characterise his conduct as immoral or illegal.

This appeal fails. We dismiss it with costs.

G. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 29 OF 1924.

May 27, 1924.

Present :—Mr. Justice Neave.

B. N. W. RAILWAY—DEFENDANT—APPELLANT

versus

FIRM MUNNA LAL BISHAMBHAR NATH—PLAINTIFF AND B. B. C. I. RAILWAY—DEFENDANT—RESPONDENTS.

Railway Company—Goods, Consignment of—Risk note A—Loss caused by delay—Company, responsibility of.

A Railway Company is in the absence of a risk-note protecting it from consquences of delay, bound to deliver goods within a reasonable time, and is liable to pay compensation for loss caused by delay which it is unable to explain.

East Indian Railway v. *Indar Man*, 65 Ind. Cas. 771; 20 A. L. J 114 ; (1922) A. I. R. (A) 63, relied on.

In the case of goods consigned to a Railway Company under Risk-note A, which protects the Company from responsibility for the" condition in which the goods may be delivered to the consignee at destination or for any loss arising from the same", the Railway are not protected against loss caused by delay.

Ram Kishun Ram v. *North Western Ry. Co.*, 77 Ind. Cas. 1020, 20 A. L. J.) 978 ; (1928) A. I. R. (A) 426 ; *Secretary of State* v. *Jiwan Abdulla*, 71 Ind. Cas. 609 ; 21 A. L. J. 220 ; 45 A. 380 ; (1923) A. I. R. (A) 426, distinguished.

Civil revision from an order of the Judge of the Court of Small Causes at Agra, dated the 2nd October 1923.

Dr. *S. N. Sen*, for the Appellant.

Dr. *K. N. Katju*, and Mr. *Ladli Prasad Zutshi*, for the Respondents.

JUDGMENT.—This is an application for the revision of an order of the Judge of the Court of Small Causes at Agra granting to the plaintiff-opposite party a decree for Rs. 357-8-0 as damages.

It has been found that the plaintiff booked a number of bags of chillies at Semaria Ghat Station on the B and N. W. Railway for despatch to Agra Fort Station on the East Indian Railway. The goods were despatched on the 5th May 1922 and were not delivered till the 19th of June 1922, 45 days later. It has further been found on the evidence of the Railway Company's own witness that the normal time for the journey is from 11 to 16 days. There was, therefore, in this case a delay of a month, and during this interval the price of chillies dropped from Rs. 24-8-0 a maund to Rs. 21-8-0 a maund, a difference of Rs. 3 a maund.

On behalf of the defendant-applicant it is contended that as the goods were consigned to the Railway Company under a risk-note in Form A, the Company is exempted from all liability for loss occasioned to the consignor by the delay. This Risk-Note is employed in cases where goods tendered for carriage are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit, and in the particular risk-note which has been signed by the consignor in the present case the consignment is described as contained in " bags old, torn and different sizes, contents liable to wastage, damage or shortage in weight in transit." The note goes on to say that the sender "agrees and undertakes to hold Railway administration.....harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same."

The learned Munsif has held that this language clearly shows that the risk-note in form A has no concern whatever with the case of delay. In this view I concur. It is obvious that the special contract contained in this document is merely intended to protect the Railway from responsibility for any loss or damage which will result to the goods from defective packing and consquent leakage or wastage in transit. No evidence appears to have been given by the Company to explain

or account for the unusual delay except that when the waggon containing the goods arrived at Gorakhpur on the 7th May it was found to be "panel torn" and the goods were, therefore, transhipped to another waggon on the following day. This explanation, however, fails to account for more than one day out of the month which was spent on the journey in excess of the usual time. It has been held in *East Indian Railway* v. *Indar Man* (1) that in the absence of any risk note a Railway Company is bound to deliver goods within a reasonable time, and is liable to pay compensation for loss caused by delay which it is unable to explain. It is true that in the present case there was a risk-note, but it was of a character which did not protect the Company against the consequences of delay. The learned counsel for the defendant-applicant has relied on *Ram Kishun Ram* v. *North Western Railway Company* (2), and *The Secretary of State* v. *Jiwan Abdulla* (3). These, however, were both cases in which a risk-note in form B was employed and the goods were taken at a reduced rate on conditions quite different to those contained in the contract which is embodied in form A. The case of the *East Indian Railway* v. *Gopi Krishna* (4) is similar in many respects to the present case, though in it also the risk-note was in form B. In that case unreasonable delay in transit which resulted in damage to the plaintiff quite independent of any deterioration or loss of the goods consigned was held to give a cause of action to the plaintiff.

In the first ground of appeal reference is made to paragraph 40 the Goods Tariff Regulation. This Regulation, however, was not produced ; nor was this point argued.

The application is dismissed with costs including in this Court fees on the higher scale.

N. H. *Application dismissed.*

(1) 65 Ind. Cas. 771 ; 20 A. L. J. 114 ; (1922) A. I. R. (A) 68.
(2) 77 Ind. Cas. 1040 ; 20 A. L. J. 978 ; (1923) A. I. R. (A) 122.
(3) 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380 ; (1923) A. I. R. (A) 426.
(4) 77 Ind. Cas. 1046 ; 21 A. L. J. 448 ; 45 A. 534; (1924) A. I. R. (A) 8.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 385 OF 1923.

March 26, 1924.

Present :—Mr. Justice Mukerjee.

JATINDRA CHANDRA CHOWDHURY
—PETITIONER
versus
THE RANGPUR TOBACCO CO. LTD.
AND OTHERS—OPPOSITE-PARTY.

Civil Procedure Code, (V of 1908), s. 73, Cls. (a), (b), (c)—Any property ; meaning of—Decree on the basis of security of moveable property, legality of.

There may be mortgage or hypothecation of movable properties. Such hypothecation or mortgage not accompanied by possession confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it.

Srish Chandra v. *Mungi Bewa*, 9 C. W. N. 14 ; *Damodar* v. *Atmaram*, 8 Bom. L. R. 344 ; *Haripodo* v. *Anathnath*, 44 *Ind. Cas.* 211 ; 22 C. W. N. 758; *Puninthavelu* v. *Bhashyam Ayyangar*, 25 M. 406; 12 M. L. J. 282.

The words 'any property' used in clauses (*a*) and (*b*) of the proviso to section 73 of the Civil Procedure Code as contradistinguished from the words "immoveable property" in clause (*c*) tend to show that hypothecations of moveables were intended to be included therein. Therefore, a decree based on a security of moveable property cannot be held to be without jurisdiction.

Civil rule in the matter of S. C. C. Execution case No. 548 of 1922 and of claim case No. 19 of 1922 (S. C. C. Suit No. 26 of 1922 of the Court of Sub-Judge-Rangpur).

Babu *Rishindranath Sarkar*, for the Petitioner.

Babu *Phanindra Lal Moitra*, for the Opposite-Party.

JUDGMENT.—The petitioner in this Rule challenges the validity of the order passed by the learned Subordinate Judge under section 73 (1), Proviso (*b*) of the Code of Civil Procedure in respect of the sale-proceeds of some moveable properties which were hypothecated with the opposite parties, the Rungpur Bank Limited and which have been sold in execution of a decree obtainted by the

petitioner. The petitioner contends that that proviso is confined in its operation to immoveable properties only as 'mortgage' or 'charge' as defined in sections 58 and 100 respectively of the Transfer of Property Act can only be in respect of such properties. The petitioner further contends that the only form of security for payment of a debt or performance of a promise by the bailment of goods recognised by the Indian Contract Act is 'pledge' as defined in section 172 of that Act, in which transference of possession of the goods to the pawnee is the essential ingredient, and that inasmuch as in the present case the possession of the goods was retained by the pawnor there was no security created, and therefore the decree obtained by the opposite party was a nullity and on the basis thereof no order for rateable distribution can be made.

The words 'mortgage' and 'charge' are not defined in the Code of Civil Procedure. Sections 58 and 100 of the Transfer of Property Act relate to 'mortgage' and 'charge' respectively of immoveable properties but that Act is not exhaustive and does not profess to be a complete Code as also appears from its preamble. *Satyabadi Behara* v. *Hirabati* (1), *Mohammad Shafikul Huq* v. *Krishna Gobinda Dutta* (2). The Indian Contract Act no doubt speaks only of bailment of goods by way of security; but it appears from its preamble that it deals only with a part of the law of Contract applicable to British India. From these, therefore, it by no means follows that there may not be mortgage or hypothecation of moveable properties. Such hypothecation or mortgage not accompanied by possession confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it. *Srish Chandra Roy* v. *Mungri Bewa* (3), *Damodar* v. *Atmaram* (4), *Horipada Sadhukhan* v. *Anathnath Dey* (5) and *Punintha velu Mudaliar* v. *Bhashyam Ayyangar* (6). The words 'any property' used in clauses (*a*) and (*b*) of the proviso as contra-distinguished from 'immoveable property' in clause (*c*) tend to show that such transactions were intended to be included therein. The decree based on a security of this character cannot, therefore, be held to be without jurisdiction.

The next contention urged, on behalf of the petitioner is that even if the proviso is given effect to the order of the Court below as passed is not right, for it must be ascertained what interest the Bank had in the property sold, inasmuch as the mortgage in their favour comprised other properties as well; and it is contended that to the extent of that interest only proviso, (*b*) would apply, but with regard to the balance, if any, there should be rateable distribution between the petitioner and the Bank. This contention to my mind is correct, though I am not sure that it would make much practical difference. However, as the order seems to be technically wrong I must make the Rule absolute to that extent, and set aside the order passed by the learned Subordinate Judge and send the case back to his Court so that it may be ascertained to what extent the Bank was interested in the properties sold, and then to allow the Bank the same interest in the sale proceeds. If any surplus is left after such allowance, then the same should be rateably distributed between the Bank and the petitioner.

The Rule is made absolute to this extent. No order is made as to the costs in this Rule.

M. B. *Rule made absolute.*

(1) 34 C. 223 ; 5 C. L. J. 192.
(2) 47 Ind. Cas. 428 ; 23 C. W. N. 284 ; 28 C. L. J. 77.
(3) 9 C. W. N. 14.
(4) 8 Bom. L. R. 344.
(5) 44 Ind. Cas. 211 ; 22 C. W. N. 758.
(6) 25 M. 406 ; 12 M. L. J. 282.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 174 OF 1923.

June 12, 1924.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

MATHURA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BALDEO RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (*V of* 1920), *ss.* 10, 25, *cope of—Insolvency petition, dismissal of—Procedure.*

ABDUL RAJJAK SIKDUR *v.* PROMADA SUNDARI DEVI

Sections 10 and 25 of the Provincial Insolvency Act are not to be employed as an excuse for getting rid of troublesome insolvency petitions. It is not enough for the Court simply to say that it is not satisfied that the petitioner is unable to pay his debts and to dismiss his petition. Such a finding must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance.

Appeal from an order of the District Judge, Ghazipur, dated the 18th August, 1923.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *K. Verma*, for the Respondents.

JUDGMENT.—We are afraid that it will become necessary to warn Judges that they must not seize on sections 10 and 25 of the Provincial Insolvency Act as an excuse for getting rid of troublesome applications. There seems to be a danger of Provincial Insolvency Courts going from one extreme to the other. The provisions in section 10 and section 25 of the new Act were intended to prevent the abuse of debtors filing their applications as a method of evading liability of arrest, and getting out of payment of their debts. On the other hand it would appear that these sections have been utilised on more than one occasion for getting rid of business before the District Judge, which is certainly not congenial and it gives a great deal of trouble to the Judge. We must press upon the lower Courts, that a finding that a Judge is not satisfied that the appellants are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a Judge to resort to a mere negative and say. "I do not know, you may be able or you may not, but I am not satisfied." As a general rule we should like a Judge to be able to say: "there is one piece of property realizable, there again is another piece of property which may be realized easily, there again is a flourishing business or stock, there again is a sum of money in the bank, and taking these matters into consideration and adding them up together and allowing for the difficulty of realization, I am satisfied that the debtor has liquid assets more than sufficient to pay his creditors". The Courts below must consider the matter from the point of liquid assets. A man may have property tied up either in land or securities, which, owing to the state of the market, he cannot realise and be insolvent although the face, value of his property may be more than his actual liabilities. Putting one's fingers on the weak spot in the judgment, the defect is that the Judge has said that he is "far from being satisfied that the applicants were unable to pay their debts". The statute requires him to be "satisfied that he is able to pay," and the learned Judge has given no reasons for being satisfied on that question of fact. Indeed he has not found it. The case must go back to the lower Court for reconsideration on these lines.

N. H. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2503 OF 1921.

March 24, 1924.

Present :— Mr. Justice Mukerjee.

ABDUL RAJJAK SIKDUR AND ANOTHER —DEFENDANTS—APPELLANTS
versus
PROMADA SUNDARI DEVI—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 116—Landlord and Tenant—Payment of rent—Estoppel—English Law.

Mere payment of rent to plaintiff by defendant not made under circumstances which would establish a relationship of landlord and tenant as between the parties would not entitle the plaintiff to a decree for rent nor would it estop the defendant from disproving the plaintiff's title.

According to English Law, if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the

ABDUL RAJJAK SIKDUR *v.* PROMADA SUNDARI DEVI

person from whom he took. For example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a will, the tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *prima facie* evidence. It is, like all *prima facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can.

Appeal against the decree of the Sub-Judge, first Court, Bakargunge, dated the 11th June 1921 reversing the decree of the Munsiff, 4th Court at Barisal dated 10th May 1920.

Babu *Brojolal Chakravarty* (for Babu *Mohini Mohan Chakravarty*, with Babu *Troilokhya Nath Ghose*), for the Appellants.

Babu *Rajendra Chandra Guha* for Babu *Suresh Chandra Talukdar*, for the Respondent.

JUDGMENT.—In the suit out of which this appeal arises plaintiffs claim rent from the defendants Nos. 1 to 4 for their 8½ annas share of a Nim Howla which is subordinate in the remaining 7½ annas share to a Nim Osat taluk belonging to the defendant No. 5 and in the said 8½ share to a pattan *miras ijara* held by the plaintiffs as dar-pattan *miras ijara*. The defendants Nos. 1 to 4 contested the suit alleging that the *dar-pattan miras ijara* was fictitious and fraudulent and there was no relationship of landlord and tenant as between the plaintiffs and themselves. The defendant No. 5 also challenged the *bona fide* character of the *dar-pattan miras ijara*, denied that the plaintiffs acquired any rights under it, and averred that he having purchased the *pattan miras ijara* in execution of a decree for arrears of rent thereof, he has become the landlord of the defendants Nos. 1 to 4 to the extent of the 16 annas share.

The suit was dismissed by the Court of first instance, but on appeal the learned Subordinate Judge decreed the same in favour of the plaintiffs.

The learned Subordinate Judge held agreeing with the Trial Court that the plaintiffs' *dar-pattan miras ijara* was a fraudulent and fictitious tenancy created by the holder of the *pattan-miras ijara* when the latter foresaw that her properties could not be saved as a large amount of arrears of rent had accrued therefor and the document was a *benami* one created to serve as a protection against such consequences. He held further that the plaintiffs were assignees from the landlords of the defendants Nos. 1 to 4 and there was no contract between the plaintiffs and the said defendants and the latter were not inducted on the land by the plaintiff and, therefore no estoppel arose on that ground. He, however, further observed as follows :—" When Biseswar Ray Choudhuri (meaning the defendant No. 5) brought a rent suit against him (meaning the tenant defendants or their predecessor), he set up the present plaintiffs' title and also produced rent receipts purporting to have been granted by them. It may be that he entered into this false defence at the instigation of the plaintiffs, but he went much further and produced dakhilas in support of his plea. It is the liability to pay rent which establishes the relation of landlord and tenant but in the case of this defendant actual payment of rent was made and acknowledged. I think that by this conduct this defendant did attorn to the plaintiffs and it is no longer competent to him to deny this title.

In my judgment this decision cannot be supported on any conceivable principle. It awards the plaintiffs a decree for rent after an adjudication held in the presence of and on contest with the defendant No. 5 in which it has been found that the plaintiffs have no title, it ignores the presence of the defendant No. 5 in whose presence a decree for rent cannot be passed on the finding that the Court arrived at it proceeds to make the defendants Nos. 1 to 4 liable on the erroneous supposition that mere payment of rent no matter under what circumstances the same was done amounts to attornment and establishes the relationship of landlord and tenant.

Learned Vakil appearing for the respondents has urged that the present appeal does not lie in view of the provisions of section 153 of the Bengal Tenancy Act. I am clearly of opinion that the decree in plaintiff's favour has decided a question relating to title to land and to some interest in land as between the plaintiffs and the defendant No. 5 who have conflicting claims thereto and, therefore, this objection of the respondents must fail. In fact the position

is much stronger here than it was in the case of *Mahommad Gauhar Ali* v. *Samiruddin Sheikh* (1) in which the tenant defendant pleaded that the lease granted by the alleged superior landlord in favour of the plaintiff therein was invalid, and the said superior landlord though a party to the suit did not contest it. The respondents further contend that in a simple suit for rent complicated questions of title should not have been gone into and their object in making the defendant No. 5 a party was not to get such questions decided but only to frame the suit as one in conformity with the provisions of section 148-A of the Bengal Tenancy Act and in support of this contention reliance has been placed upon the case of *Lodai Mollah* v. *Kally Dass Roy*, (2). My only answer to this contention is that it was very unfortunate and I quite sympathise with the respondents; but when this conflicting claim of title was set up it was bound to be decided and has been so decided, and it is too late now to repent. The historic judgment of Field, J., in the case referred to above is no authority for the proposition that when a co-sharer landlord has been brought on the record and a conflicting claim to title is set up it can be at all ignored.

In the case of *Baney Madhub Ghose* v. *Thakur Doss Mandal* (3), a full Bench of this Court decided, the judgment being delivered by Sir Barnes Peacock, C. J. that "According to English law, if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took. For example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a Will, the tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *prima facie* evidence. It is, like all *prima facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can. In a case, very similar to the one now before us, the case of *Ranee Tiles Suree Kooer* v. *Ranee Asmedh Kooer* (4), Romesh Chandra Mitter, J., observed as follows:—"One of the tenants we find also raised the same objection, and even if Ranee Ashmed Kooer had not been added as a party to the suit; this question of title must have been tried at the instance of that defendant. But it has been said that the plaintiff has already recovered a decree for rent against the ancestor of that defendant for a previous year, and he is, therefore, estopped from denying the title of the plaintiff who has thus become his Zemindar. This contention I do not think is correct. If the tenant had been installed in possession by the plaintiff, *i.e.*, if his tenancy has been created by her, no doubt he would not have been competent to question his admitted landlord's title. But that is not the present case. There the tenant has been allowed to question the title of the alleged assignee of his admitted landlord, and I do not know of any principle of law which prevents him from doing so. The decree for the rent of the previous year is not conclusive upon this point, and, therefore, cannot estop him."

The cases of *Durga Das Hazra* v. *Samash Akon* (5), and *Ketu Das* v. *Surendra Nath Sinha* (6) have been cited at the bar, but in my opinion they are not in conflict with the principles laid down in the other cases above referred to. It is quite clear upon the pleadings and the facts found that the payment of rent by the defendants Nos. 1 to 4 to the plaintiffs were not made under circumstances which would establish a relationship as between the parties which even in the face of the finding as to want of plaintiffs' title would entitle the plaintiffs to a decree. The plaintiffs' title to the rent claimed having been disproved, her

(1) 22 Ind. Cas. 383; 18 C. W. N. 33.
(2) 8 C. 238; 10 C. L. R. 581; 4 Shome. L. R. 275; 4 Ind. Dec. (N. S.) 175.
(3) 6 W. R. Act X, Rule 71.
(4) 24 W. R. 101.
(5) 4 C. W. N. P. 606 at. 607.
(6) 7 C. W. N. 596.

suit must fail, even if she had realised rent in previous year.

The appeal accordingly must be allowed and the decree of the learned Subordinate Judge reversed and that of the learned Munsif restored and the plaintiffs' suit dismissed with costs in all the Courts.

M. B. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1140 OF 1922.

May 15, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

SUBEDAR—DEFENDANT—APPELLANT
versus
DUBEY JAGAT NARAIN--PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Misconception of evidence—High Court, whether will interfere.

A finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it.

Govind, v. *Vithal*, 20 B. 753 ; 10 Ind. Dec. (N. S.) 1072, relied on.

Appeal from a decree of the District Judge, Mainpuri, dated the 15th July 1922.

Messrs. *P. N. Sapru* and *S. K. Dar*, for the Appellant.

Messrs. *J. M. Banerji* and *Saila Nath Mukerji*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for damages for defamation. The undisputed facts are that the defendant is the *mukhia* of villageBisalpur. About the 1st or 2nd of October one Ishura Banjara, who had been in the service of the plaintiff, disappeared from the village. Nothing was heard of him for a week or more, and his father was in great distress about him. The *mukhia* went to the Superintendent of Police and made a report about the disappearance. At the bidding of the Superintendent this report was taken down in writing, and it is in this that the defamation complained of is contained.

The report recited that it was rumoured that Ishura had stolen some gram belonging to the plaintiff, and that the plaintiff with two other men had beaten him till he fell down senseless. Since that time Ishura had disappeared, and it was rumoured in the village that he was dead. The *mukhia* had further been informed that the missing youth's parent had been warned to make no report on peril of a beating. He stated that he himself had made a search in the village, but could find no traces of the missing man, and he asked that enquiry should be made.

The plaintiff brought this suit claiming Rs. 1,000 as special damages.

The Trial Court in a long and careful judgment found that the libel alleged was true in substance, and that the report was made by the defendant in discharge of his duty as *mukhia* and not maliciously. It further found that no special damages had been proved, and that if the defendant were to be held liable for damages at all they should not exceed Rs. 200.

The lower Appellate Court in a very perfunctory judgment has stated that there is no evidence on the record that Ishura had ever been beaten by the plaintiff and that there is no evidence on the record that there was any rumour that Ishura had fallen down and had been removed, that he was dead. The learned pleader for the appellant contends that both these statements are incorrect, and that the learned Judge's findings though they purport to be findings of fact, for that reason are not binding on this Court in second appeal. He has taken us through part of the record and has shown that, as a matter of fact, there is evidence on the record to prove all these facts referred to. Two witnesses depose to the beating of Ishura by the plaintiff and six to the general rumour in regard to the other matters.

The learned Judge has wound up by stating, " when it is shown that the major portion of the report was false, malice would be implied." Before this can be accepted as correct state-

ment of the law the words " to the knowledge of the person making the report " must be inserted after the word 'false.' It is clear that in arriving at the finding as to the falseness of the report the learned Judge was misled by his failure to realise the existence of evidence as to the rumours referred to by the *mukhia* in his report. It is to be observed that the *mukhia* made none of the statements in this report as of his own knowledge but only professed to give information which he had derived from general rumour. As is observed by the Trial Court, it was part of his duty as *mukhia* to report to the police any mysterious disappearance, and failure to do so would have rendered him liable to punishment.

It has been held in *Govind* v. *Vithal* (1) that a finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it. In the present case it is clear that the lower Appellate Court has completely misconceived the real nature of the evidence. We dissent entirely from its findings and allow the appeal. The plaintiff's suit is accordingly dismissed with costs in all Courts including in this Court fees on the higher scale.

N. H. *Appeal allowed.*

(1) 20 B. 753 ; 10 Ind. Dec. (N. S.) 1072.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 408 OF 1921.

March 24, 1924.

Present :—Mr. Justice Mukerjee.

ABDUL HAKIM AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUL GANI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—Representative suit, maintainability of—Some of several representatives not joining in suit—Fresh leave, if necessary—Notice, service of—Duty of Court.

Where fifteen villages brought a suit on behalf of themselves and for all the villagers, for a declaration of a customary right and took the necessary leave under O. I, r. 8, Civil Procednre Code but subsequently it transpired that three of the plaintiffs had neither signed nor verified the plaint.

***Held*, that the remaining twelve persons should have obtained fresh permission and the suit was not maintainable.**

The wording of O. I, r. 8 of the Code of Civil Procedure shows that it is the duty of the Court to cause service of the notice of the institution of the representative suit, or the publication of the advertisement onbeing moved for the purpose. The Court is not relieved of the necessity of doing its duty or to treat tbe matttr as a mere matter of formality.

***Kali Kanta Sarma* v. *Gouri Prasad Sarma*, 17 C. 906 at p. 910 ; 8 Ind. Dec. (N. S.) 1149 followed.**

Appeal against the decree of the Sub-Judge, 3rd Court, Tipperah, dated the 11th February 1921, reversing the decree of the Munsif, 6th Court, Comilla, dated the 21st June 1920.

Babu *Girija Prosanna Rai Chaudhury* (with him Mr. *M. Nurul Huq Chowdhury* and *Gobinda Chandra De Roy*), for the Appellants.

Babu *Upendra Kumar Roy*, for the Respondents.

JUDGMENT.—This action was commenced on a plaint purporting to have been filed by fifteen persons on behalf of themselves and for all the villagers of *Mouza* Netra for a declaration of their customary pasture right to the lands in suit and for a declaration of their right to bury their dead in some portion of the same and also for certain consequential reliefs. The learned Munsif dismissed the suit, and the learned Subordinate Judge, on appeal, made a decree in favour of twelve of the plaintiffs, from which the defendants have preferred this appeal.

The validity of the decree is challenged upon various grounds of which it is necessary to notice only two: The first ground relates to the competency of the suit in view of the provisions of O. I, r. 8, Civil Procedure Code. The second one is based on the contention that the Maharaja of Tippera was a necessary party to the suit, and in his absence the suit could not proceed.

ABDUL HAKIM *v.* ABDUL GANI

With regard to the first ground the position is this : The plaint purported to have been filed by fifteen persons and to have been verified by them and an application on their behalf asking for the leave of the Court under O. I, r. 8, Civil Procedure Code, necessary for the institution of a representative action was also filed. The Court issued a notice stating that the first plaintiff (who was named) and others (whose names were not given) had instituted the suit and they had been granted the necessary permission and the said notice was duly advertised. It transpired in the course of the suit that three of the said plaintiffs had neither verified nor signed the plaint and, in fact, one of them deposed as a witness on behalf of the defence. The learned Munsif relied upon this, amongst other grounds, for dismissing the suit. The learned Subordinate Judge ordered the names of the said three persons to be struck out from he plaint, and decreed the suit in favour of the remaining twelve persons as I have stated above.

The objection of the appellants in the above circumstances of the case is two-fold. It is urged first that the notice of action that was advertised was not a proper or sufficient one, and secondly that when the permission was given to the fifteen persons collectively, twelve of them, without a fresh and express permission, were not competent to go on with the suit.

With regard to the objection as to notice the respondents contend that its validity was never challenged in the Court below, that all that was objected to in the written statement was as to the proper service thereof and upon that point the Court of first instance recorded a finding in its judgment in these words, "There is sufficient evidence of service of notice under r. 8 of O. I and so I find this point in plaintiff's favour," and this finding was not challenged in the lower Appellate Court. As to the competency of the twelve persons to prosecute the action the respondents rely upon the axiom that the greater always includes the less, and want to rely on it both for the proposition that the twelve persons were competent to avail of the permission that was granted in favour of fifteen and also for the proposition that the twelve persons could get the declarations which were sought for on their own behalf and on behalf of the other three and the rest of the villagers, and even if it held that they are not so entitled, the decree may be modified by granting them such declarations as they may be entitled to on the basis of their individual rights. Now in matters of this description, three classes of suits may easily be imagined. First of all a person may assert a customary right in himself, and may complain that that right has been infringed, violated or disturbed, and relying on that infringement, violation of disturbance as the cause of action, seek for a remedy. That would be an action institution in a purely character. econdly a person may found his claim upon a customary right belonging to all the villagers, and assert it on his own behalf, and basing his cause of action upon an infringement, violation or disturbance thereof so far as he himself is concerned seek for suitable reliefs. This also would be an action instituted in a personal character, though the foundation of the right lies in the fact that it belongs to all the villagers and, therefore, to him also as a member of that body. Thirdly, a person may institute a suit on behalf of himself and of all the other villagers, the customary right belonging to all the villagers, the cause of action affecting all the villagers as a body, and the remedy sought for being for himself and all the other villagers. Such a suit is instituted in a representative character, the success or defeat in the action being binding upon all the villagers, and the question that the rest of the villagers are not personally parties thereto not affecting their position in any way. The reliefs obtainable in such a suit enure to the benefit of all the villagers, it not being a matter of any consequence that they were not before the Court personally, as they must be deemed to have been parties to the action through their representative, who had instituted the suit and gone on with it in his representative capacity. The general rule is that all persons interested in the subject matter of a suit in respect of its object should be made parties, but in cases where there is a large class of individuals having the same interest the Courts for the sake of convenience, allow them to be represented by one or more of the class for himself and the others : *Cockburn* v. *Thompson* (1), *Chudasama*

(1) (1809) 16 Ves. 321 ; 149 R. R. 671; 33 E. R. 1005.

Sursangji v. *Partapsingh Khengarji* (2). It is a general rule that all persons interested ought to be made parties to a suit howsoever numerous they may be, so that the Court may be able to do complete justice by deciding upon and settling the right of all persons interested, and that the orders of the Court may be safely executed by those who are completed to obey them, and future litigations may be prevented; also that a person who ought to be, but is not, a party to a proceeding is not ordinarily bound by any decree or order passed therein. The great risk from abatement, and the inconvenience and the expense involved in a great number of persons being parties, led the Courts in Equity to recognise the representative system, as it was not inconsistent with general principles that certain judicial proceedings taken by or against a select number as representing a large class might, if fairly and honestly conducted, bind or benefit thewhole class: *Jenkins* v. *Robertson* (3). To this practice which long prevailed in the Equity Courts in England legislative sanction was given by the enactment of a rule, to which, with certain modifications the present r. 8 of O. 1 of the Civil Procedure Code corresponds. This provision of the law has been enacted only for the sake of convenience; it is an enabling one and does not debar certain members of a community, who did not represent the community from suing in their own right: *Baiju Lal* v. *Bulaklal* (4). This last mentioned case was relied upon by the respondents as an authority for the proposition that the decree passed in favour of the twelve plaintiffs was a good decree even if it be held that they hâd no right to represent the public. It will be seen, however, that the case is no authority for such a proposition. The facts of that case were that a suit had been instituted by seven Gayawals to restrain the defendant from taking certain action in respect of a masonry platform round a sacred tree in the town of Gaya and the plaintiffs came into Court upon the allegation that they formed a punch or committee which represented the entire Gayawal community, and further that even if that should not be found to be the case, they had the right individually to restrain the defendant from the action complained of. The Munsif found that the plaintiffs did not constitute the punch and, therefore, they could not represent the entire Gayawal community, and therefore they could not sue on their behalf except by leave of the Court as provided by section 30 of the Code of Civil Procedure. But at the same time he held that they had individually the right to restrain the defendant from the acts complained of and accordingly having found for the plaintiffs on the merits he decreed the suit. The District Judge on appeal did not regard the suit and did not deal with it in any way as a suit broughtt by the plaintiffs in their individual capacities, although he found that each of the plaintiffs had a valuable pecuniary interest and each of them had a cause of action, and being of opinion that they must obtain the necessary permission under section 30 held that the plaintiffs must be cast in the suit. That obviously was wrong; and it was held that section 30 did not forbid the plaintiffs to sue in their own right and it merely said that if they desire to sue on behalf of others, they must obtain the permission of the Court. It was held in that case that Section 30, Civil Procedure Code was an enabling Section and it did not debar the plaintiffs in suing in their own right as they did in that case. It will be seen seen that the suit in that case was one which came under the second class of suits mentioned above; and when it was found that they did not represent the entire Gayawal community there was no reason to refuse them a relief upon the basis of their individual rights which were found in the case. The case of *Gulba* v. *Basanta* (5) also upon which reliance has been placed on behalf of the respondents lays down the same principle. In that case the plaintiffs as being two of the members of the Lodh Community, sued for a declaration that the Chaupal with its appurtenant shops were owned and possessed by the plaintiffs and they sued as being owners thereof and sharers therein and for the protection of their own rights. The suit, therefore, came within the second class of suits referred to above. The present suit does not come within that class at all; the plaintiffs have sued not for

(2) 28 B. 209; 5 Bom. L. R. 937.
(3) (1866) 1 H. L. Sc. 117.
(4) 24 C. 385; 12 Ind. Dec. (N.S.). 924.

(5) 5 Ind. Cas. 547; 32 A. 284; 7 A. L. J. 238.

declaration of their own right but the right of the villagers and they have sued for themselves and the other villagers, the two bodies together comprising the entire body of villagers, and have stood not upon their own individual rights but upon those of the villagers, of which they are a part and the reliefs they have claimed are for the benefit of the entire body of villagers. This suit therefore comes within the third class of suits mentioned above, a class of which *Prestney* v. *Mayor of Colchester* (6) is a type. For such a suit, in order that it may be instituted on behalf of the entire body of villagers claiming the right, the necessary leave under O. 1, r. 8, C. P. C., must be obtained. The respondents urge on the strength of the case of *Ahmed Ali* v. *Abdul Majid* (7) that want of permision does not affect the jurisdiction of the Court to try the suit. The case is no authority for the proposition id support of which it was cited, to the effect that even if the permission was not obtained the plaintiffs' suit should not be dismissed and he should get a decree if he has proved all the necessary facts. On a careful review of the earlier authorities it was held in that case that the objection under Section 30 of the Old Civil Procedure Code which corresponds with O. 1, r. 8 of the present Code is not one affecting the jurisdiction of the Court and that permission can be granted subsequent to filing of the suit. It was held also that there is no doubt that the proper course is to obtain permission under O. 1, r. 8 before the suit is instituted, but there is nothing in the rule to show that if it is not so done, it cannot be granted afterwards : and that the suit should not be dismissed merely becausethe permission was not obtained before its institution. These propositions do not really affect the controversy in the present case. They do not profess to lay down that if in a representative suit, the plaintiffs have not been constituted as representatives they may yet get a decree in a representative character or if they fail to get such a decree they can ask the Court to award them a decree in their own personal rights on the basis of a cause of action on which they never sued. Of course the permission need not be express, it is enough if it can be reasonably inferred from the proceedings : *Dhanpat Singh* v. *Parcsh Nath Singh* (8), *Kalu Khabir* v. *Janmeah* (9).

The principles regulating these representative actions are well-settled. Where one sues he is the sole plaintiff and is *dominuslitis* until judgment ; he alone can discontinue, compromise, submit to dismissal etc. as he pleases but he must do so with the leave of the court: *In Re Calgary and Medicine Hot Land Co. Pigeon* v. *The Campany* (10). If he dies the suit abates. If he becomes bankrupt the action will be dismissed, unless the trustee in bankruptcy elects to continue : *Wolff* v. *Van Boolen* (11). But in such events the rights of others of the same class are not affected, they may take proceedings on their own account : *Handford* v. *Storie* (12). Where several sue they have like powers, but they must act together : *Leathley* v. *Mc. Andrew* (13). After judgment, no further action can be brought by the others: *In Re Alpha Co.*, *Ward* v. *Arpha Co* (14), *In Re Calgary and Medicine Hot Land Co.*, *Pigeon* v. *The Company* (10), *Walker* v. *Sur.* (15). The class of persons sought to be represented must be defined in the pleadings with sufficient clearness. A claim to represent some of the members of a class without defining which members would not be maintainable : *Markt* v. *Knight Steam Ships Co., Ltd.* (16). If one of the persons on whose behalf the plaintiff purports to sue objects to the plaintiffs so doing he may apply by summons to have himself added as defendant : *Wilson* v. *Church* (17), *Watson* v. *Cave* (18); *Fraser* v. *Cooper Hale & Co.* (19), *May* v. *Newton* (20). If some of the

(6) (1882) 21 Ch. D 111 ; 51 L. J. Ch. 805
(7) 39 Ind Cas 773 ; 44 C 258 ; 21 C. W. N. 1144.
(8) 21 C. 180 ; 10 Ind Dec. (N.S.) 752.
(9) 29 c. 100.
(10) (1908) 2 Ch. 652 at pp. 659 662
(11) (1906) 94 L. T. 502
(12) 1825 2 Sim. & St. 196; 3 L. J. (O. S.) Ch. 110; 57 E. R. 320.
(13) (1876) W. N. 38
(14) (1903) 1 Ch. 203 ; 72 L. J. Ch 91 ; 87 L. T. 646; 51 W. R. 201 ; 10 Manson 237
(15) (1914) 2 K. B. 930 at p 935 ; 83 L. J. K. B. 1188 ; 109 L. T. 888 30 T. L. R 171
(16) (1910) 2 K. B. 1021 at pp. 1033, 1034 ; 79 L. J. K. B. 939 ; 103 L. T. 369
(17) (1878) 9 Ch. D. 552 ; 39 L. T. 413 ; 26 W. R. 735.
(18) (1881) 17 Ch. D 13; 44 L. T. 40; 29 W.R. 433.
(19) (1882) 21 Ch. D. 718 ; 51 L. J. Ch. 575; 46 L. T. 371 ; 30 W. R. 654.
(20) (1887) 34 Ch. D. 347 at p. 349 ; 56 L. J. Ch. 313 ; 56 L. T. 140 ; 35 W. R. 363.

class represented by the plaintiff have also adverse interests or desire to stand aloof, he should except these and may if they are few, make them defendants; or if they are numerous sue one or more on behalf of all: *Fraser* v. *Cooper* (19), *Wilson* v. *Church* (17), *Watson* v. *Cave* (18). From a consideration of these cases these principles follow: that the plaintiffs where there are more persons than one as plaintiffs collectively are competent to represent the entire body, that they must act together, that if some of them are dissentient they may apply to be made defendants, that there can be no devolution of their interests as such representatives either on their death or their bankruptcy. It is abundantly clear therefore that when out of the fifteen persons in whose favour permission was granted by the Court three did not join the institution of the suit the remaining twelve were not competent to take upon themselves the capacity with which the fifteen collectively were clothed. The remaining twelve were bound to bring the matter to the notice of the Court and it would have been for the Court to grant them a fresh permission or not, making the dissentient or non-prosecution plaintiffs defendants to the action or taking such other steps as the Conrt thought just, safe and proper. The suit therefore was not maintainable without a fresh order for representation; and this defect cannot be cured by doing what the learned Subordinate Judge has done, viz., by striking ont the names of those three persons and making a decree in favour of the others.

As to the notice, the respondents are right in their contention that the objection was not taken in the Court below and therefore I should not have felt disposed to interfere with the decree on that ground if that ground had stood alone. I may however point out that the issuing of a notice under this Section is not such a mere matter of formality as it is sometimes thought. The persons whose interests are to be represented by the plaintiffs have a right to know who are the persons who are to represent them and they have a right to judge of their competency in order to enable themselves to take such other or further steps as they desire so that their interest may be safe-guarded. Where a person sues or is sued on behalf of himself and others, any decree that may be passed is binding upon all unless that decree has been obtained by fraud or collusion (Section 44 of the Evidence Act, and Section. II Civil Procedure Code. Explanation VI). It is therefore necessary that notice of the suit should be given to all the parties who would be so bound. It is open to a party to apply to be made a party to a representative suit provided he can satisfy the Court that his interest will be prejudiced if he is not allowed to be joined as a party: *Vasonji Tricaneji and Co.* v. *Ismaibhai Shivji* (21). The wording of O. I, r. 8 shows that it is the duty of the Court to cause the service of the notice or the publication of the advertisement, on being moved for the purpose. The suit may not be dismissed on account of the failure of the Court to perform its own duty: *Mukhlal Singh* v. *Jagdeo Tewari* (22). The Court, in my opinion, is not relieved of the necessity of doing its duty or to treat the matter as a mere matter of formality, the reason of the rule being based on cardinal principles of immense importance. I would follow the dictum of Banerji J. in the case of *Kali Kanta Sarma* v. *Gouri Prosad Sarma* (23) where the learned Judge observes as follows:- "It was argued on behalf of the plaintiffs respondents that the parties being numerous, the first Court followed the course laid down in section 30 of the Code of Civil Procedure, and permitted some of each group of persons interested and who ought to have been made parties, to represent the rest. We have heard the order of the first Court read out to us, and though that order purports to have been passed under section 30, it is clear that the provisions of that section have not at all been properly carried out. Section 30, as we understand it, requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the Court to give to the persons interested notice of the institution of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportu-

(21) 4 Ind. Cas. 130; 34 B. 420; 11 Bom. L. R. 1054.
(22) 35 C. 1021.
(23) 17 C. 906 at p. 910; 8 Ind. Dec. (N. S.) 1149.

nity of knowing who have been selected to represent them. Now in the present case no such thing was done. In the first place the Court did not give permission to any definitely named persons among those interested to represent the rest; and in the second place the notice issued by the Court did not show who the persons were that had been selected to represent the remaining persons interested."

In my opinion, therefore, this ground taken by the appellants in this appeal is well-founded. I therefore set aside the decrees of the Court below and send the case back to the Court of first instance, so that the Court may make a fresh proper representative order in accordance with the provisions of O. 1, r. 8, C. P. C., and in the light of the observations made above.

Before parting with the case I think I must also make a few observations on the second ground taken by the appellant as noticed above. The learned Munsiff held that "there was not the least doubt that the Maharaja of Tipperah was a necessary party." He however gave no reasons for this opinion of his. The learned Subordinate Judge observed that he failed to see how the Maharaja was a necessary party in the sense that the suit was not maintainable in his absence, though in his opinion it would have been better if the suit had been decided in the presence of the Maharaja. The pleadings of the parties have been read out to me and my attention has been drawn to the cases of *Durga Charan Sarkar* v. *Jotindra Mohun Tagore* (24) and *Jogendra Nath Singh* v. *Seeeretary of State* (25) and I have been invited to decide as to whether the Maharajah of Tipperah is a necessary party to the action and to make suitable orders in accordance with the view that I take of the question. I advisedly refrain from going into the question, as I am not sure what features the pleadings will assume when the suit will be taken up on remand, having regard to the agruments that have been addressed to me on the nature of the rights on which the plaintiffs mean to take their stand.

(24) 27 C. 493 at p. 497; 14 Ind. Dec. (N. C.) 825.
(25) 17 Ind. Cas. 921; 16 C. L. J. 385; 17 C. W. N. 885.

The costs of this litigation will be borne by the respective parties for themselves, up till now, and all orders as to costs passed heretofore are set aside.

M. B. *Case remanded.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 458 OF 1921.

May 21, 1924.

Present :—Mr. Justice Mukerjee and Mr. Justice Dalal.

Lala DARBARI LAL—PLAINTIFFS—APPELLANT
versus
Lala GOBIND SARAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r.2—Singlec ause of action—Defendant claiming on different grounds—Separate suits, whether maintainable—Hindu Law—Widow—Alienation—Necessity—Consent of reversioners—Deeds, recitals in—Evidential value.

A plaintiff cannot bring separate suits for recovery of different portions of property when his cause of action is one and the same. It is immaterial for him whether the defendant wants to justify his right to continue in possession of the different portions of the property on different grounds. The defence or the nature of it is rmmaterial for the purpose of finding out what is the cause of action of the plaintiff.

Nanda Lal Dhur v. *Jagat Kishore Acharajya*, 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 21 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P.C.) *Peare Lal* v. *Sunder Singh*, 68 Ind. Cas. 805; 44 A. 756; 20 A. L. J. 655; (1922) A. I. R. (A) 436, relied on.

The circumstance that the only reversioners at the time of an alienation by a Hindu widow gave their unqualified consent to it raises a very strong presumption that the alienation was supported by legal necessity. The presumption is, however, a rebuttable one.

A recital in a deed is admissible as good evidence.

Appeal from a decree of the Subordinate Judge, Aligarh, dated the 2nd July 1921.

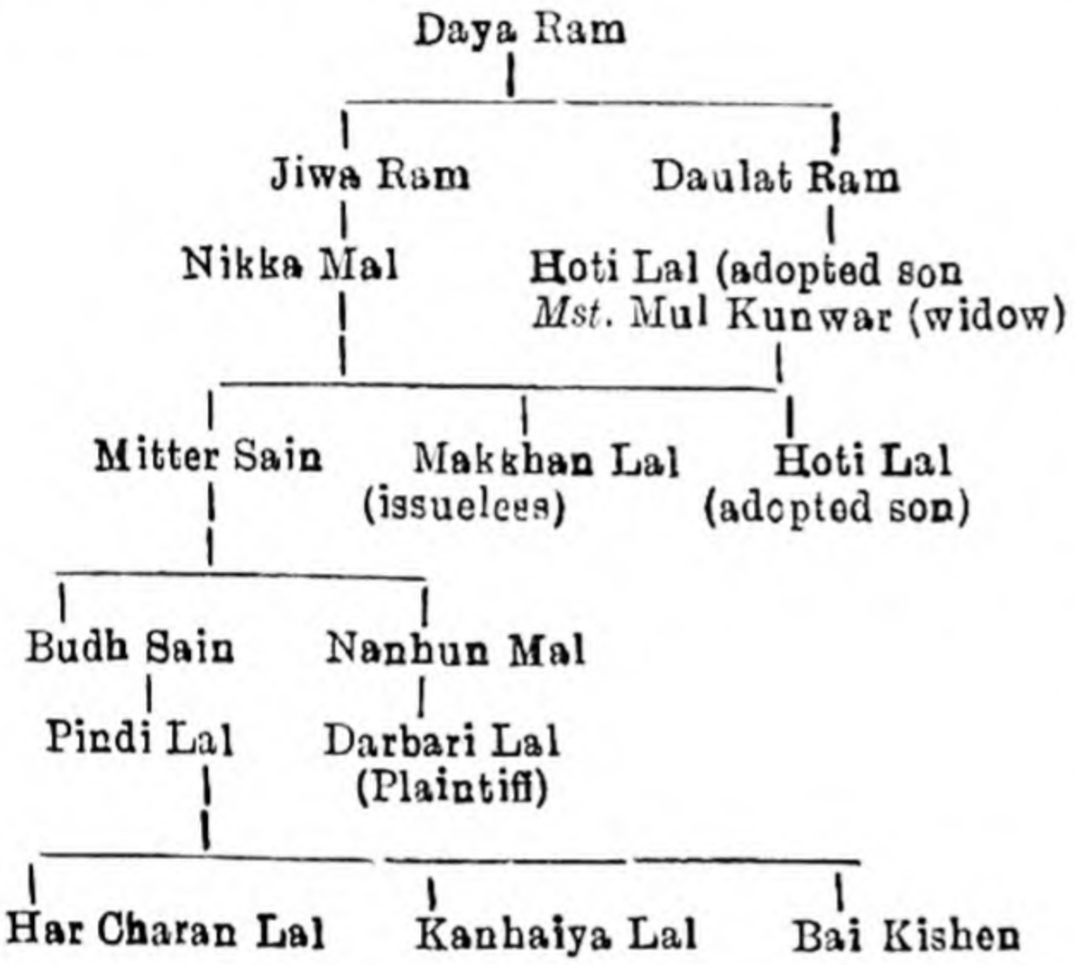
DARBARI LAL *v.* GOBIND SARAN

Mr. *G. Agarwala*, for the Appellant.

Dr. *S. N. Sen* and Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant against the respondent for recovery of property sold to his father Chhuttan Lal on foot of a sale-deed dated the 1st of February 1904 by a lady who has since died, namely *Mst.* Kul Kunwar,

The appellant claims as a reversioner and the pedigree given below,



will explain how he is related to Hoti Lal the last male owner of the property in suit.

It appears that Hoti Lal died, possessed of considerable amount of property, sometime in 1869. Mussmmat Mul Kunwar succeeded to the property as his widow and she died on the 16th of April 1916. On the 31st of October 1897 she executed a simple mortgage with respect to the properties in suit for the sum of Rs. 12,000 in favour of two persons Beni Ram and Janki Prasad. One Budh Sen joined with her in executing the deed. Budh Sen, it will be noticed, is a paternal uncle to the plaintiff-appellant.

A few days before the execution of the deed of mortgage, the plaintiff's father Nanhun Mal had executed a deed by which he gave his consent to the proposed mortgage by Musammat Mul Kunwar and Budh Sen. On the 1st of February 1904 Mul Kunwar alone sold the property to the respondent's father Chhuttan Lal for a sum of Rs. 24,800. The appellant's case was that the mortgage and the sale were made without legal necessity and he is, therefore, entitled to recover the property without any payment. He also asked for mesne profits.

The defence so far as it is relevant for the purposes of this appeal was this. The suit was barred under the provisions of O. II, r. 2 of the Code of Civil Procedure inasmuch as the plaintiff brought other suits against the defendant and his father for recovery of the property belonging to Hoti Lal, but omitted to ask for any relief with respect to the properties now in suit, and that the transfers were supported by legal necessaity.

The Court below decided the issue involved in the first plea, as noted above, against the respondent, but on the question of necessity it found for him.

In this Court the two points to be considered are what have been stated above.

On the first point it appears to us to be quite clear that the suit is barred under the provisions of O. II, r. 2 of the Code of Civil Procedure. That rule of law lays down.

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action..... "Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished."

By way of illustration it is said that where rent for the whole years 1905, 1906 and 1907 is unpaid if the plaintiff sues in 1908 in respect of the rent of 1906 only he shall not afterwards sue for the rents for the years 1905 or 1907. In this case the plaintiff's cause of action is this. He is the reversioner and rightful heir to Hoti Lal and the property in suit in the possession of the defendant belongs to Hoti Lal. This is his whole cause of action. It is immaterial for him whether the defendant wants to justify his right to continue in possession on different grounds The defence or the nature of it is immaterial for the purposes of finding out what is the cause of action of the plaintiff.

We find that the plaintiff brought at least two suits against the defendant or his father

He brought suit No. 45 of 1917, the plaint of which is printed at p. 103 of the record, for recovery of a portion of Hoti Lal's property from the respondent and his father. In paragraph 11 he said that his cause of action arose on the 15th of April 1916, the date of the death of *Musammat* Mul Kunwar. He brought again suit No. 282 of 1917, the plaint of which is printed at p. 99 of the record against the respondent and his father. In paragraph 13 of the plaint he said that his cause of action arose on the 15th of April 1916, the day on which *Musammat* Mul Kunwar died. In paragraph 10 of the plaint of the suit out of which this appeal has arisen he makes the same statement namely his cause of action arose on the 16th of April 1916, the date of the death of *Musammat* Mul Kunwar. The suit No. 45 of 1917 shows that the property in respect of which it was instituted was the property which had been purchased by Kundan Lal, grandfather of the present defendant. It is clear that when this suit of 1917 was brought the plaintiff could have, if he was so disposed, brought a claim with respect to the properties now in dispute. There is no authority so far as we are aware, to establish that any such suit would have been repugnant to any rule of law. On the other hand, there are numerous authorities to show that a reversioner is entitled to bring a single suit against any number of persons who may be holding different portions of the last male holder's property, though they may be holding under different title deeds, executed at different dates.

We are, therefore, clearly of opinion that the suit was barred under the provisions of O. 2, r. II of the Code of Civil Procedure and should have been dismissed on that ground alone.

Coming to the question of necessity, we find that so far as the bond of 1897 is concerned there is not much clear evidence. In the bond itself, which is printed at p. 33 of the record, the lady *Musammat* Mul Kunwar says that she wanted money for the performance of pilgrimage for the benefit of her husband's soul and that Budh Sen stood in need of money for the maintenance of children and for trade. It is not clear what amount of money was required by the lady for the pilgrimage and what amount was wanted by Budh Sen for his own purposes. Before we examine the question of necessity further it will be interesting to note a slight previous history of the family. It appears that on the death of Hoti Lal in 1869 *Musammat* Mul Kunwar executed a document dated the 23th of May 1869, a copy of which is on the record, but which unfortunately has not been printed, by which the lady stated that she regarded Budh Sen as her adopted son and was appointing him as the sarbarahkar or the manager of her property. She further stated that the manager would have no right to transfer any portion of her property without her consent. It further appears from the statement of Tika Ram who was for some time in the service of *Musammat* Mul Kunwar and held a general power of attorney from her that both Budh Sen and Nanhun Mal were living with the lady *Musammat* Mul Kunwar as dependent members of the family. His statement receives entire corroboration from the statement of the plaintiff appellant himself. The plaintiff's father Nanhun Mal, according to the plaintiff himself, had no *zamindari* property. He did not keep any shop and the appllent did not know if he had any income whatsoever from any source. The support, therefore, of dependent relations in the family would be a part of the family necessity.

Coming back to the actual evidence in the case, we find the recital in the bond already stated. According to the recital which would be admissible as good evidence under the Privy Council case of *Nanda Lal Dhur* v. *Jagat Kishore Acharjya* (1) and a decision of this Court in *Peari Lal* v. *Sunder Singh* (2), the money was needed for pilgrimage and to enable Budh Sen to earn a living of his own. It is true that Tika Ram has said that half the money was required by the lady for pilgrimage and the other half was taken by Budh Sen for the purposes of his trade. But Tika Ram was not in the service of the lady at the time and it is difficult to believe that he could definitely know how the money was disposed of. We have, however, his evidence

(1) 36 Ind. Cas. 420 ; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563 : (1916) 2 M. W. N. 336 ; 4 L. W. 458 ; 18 Bom. L. R. 868 ; 14 A. L. J. 1103; 21 C. L. J. 487 ; 1 P. L. W. 1 ; 21 C. W. N. 225 ; 10 Bur. L. T. 177 ; 43 I. A. 249 (P.C.).

(2) 68 Ind. Cas. 305 ; 44 A. 756 ; 20 A. L. J. 658 ; (1922) A. I. R. (A.) 436.

that the lady did go on pilgrimage and we have the deed of relinquishment executed by the appellant's father showing that the lady contemplated a pilgrimage. It is common ground that Hoti Lal owned a very large amount of property and was a highly respected gentleman of the palace. Spending Rs. 12,000—over pilgrimage and support of the family will not be at all considered an extravagant act. As held in the Privy Council case of *Rangasmi Gounden* v. *Nachiappa Gaunden* (3) the circumstance that the only reversioners at the time gave their unqualified consent to the mortgage raised a very strong presumption that the mortgage was supported by legal necessity. In this case there is no evidence which would rebut the presumption raised. There can be no doubt that the presumption is rebuttable as it was found rebutted in the case of *Ghisiawan Pande* v. *Raj Kumari* (4). But in this case, as has been stated, there is no evidence whatsoever to show that the consent of the reversioners was not justified. We hold therefore that the mortgage of 1907 was justified by legal necessity.

Coming to the sale-deed of 1904, the case is much easier. We find that the sale consideration is made up of three portions, namely Rs. 20,000 left with the vendee to pay the mortgage-deed of 1897. The sum of Rs.4,500 was obtained to pay land revenue was payable for the instalments for the months of November and December 1903 and the sum of Rs. 300 was taken in cash. We have got the evidence of Tika Ram that a sum of Rs. 300 was needed to meet the expense of the execution and completion of the bond. We have both documentary and oral evidence to prove that the purchaser deposited Rs. 4,700 in the Government Treasury on two dates, namely the 1st of February 1904 and the 4th of February 1904 towards the payment of land revenue due by the lady Musammat Mul Kunwar. Tika Ram says that on account of drought rent could not be realized from tenants and it was feared that the property of *Musammat* Mul Kunwar would be attached and the revenue would be realized by direct collection to be made by the Collector. There was therefore a pressing necessity to raise the money. We have evidence to show that the vendee had to pay a very large sum of money much exceeding the sum of Rs.20,000 left with him to pay off the decree which was passed on foot of the mortgage-deed of 1907. We hold therefore with the Court below that sale-deed was fully supported by legal necessity.

The result is that the appeal fails and is hereby dismissed with costs, including Counsel's fees in this Court on the higher scale.

N. H. *Appeal dismissed.*

(3) 50 Ind. Cas. 498 ; 42 M. 523 ; 36 M. L. J. 493 ; 17 A. L. J. 536 . 29 C. L. J. 539 ; 21 Bom. L. R. 640; 23 C. W. N; 777 ; (1919) M. W. N. 262 ; 26 M. L. T. 5 ; 10 L. W. 105; 46 I. A 72; 1 U. P. L. R. (P. C.) 66 (P.C.).

(4) 68 Ind. Cas. 556 ; 19 A. L. J. 476 ; 43 A. 534.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 317 OF 1921.

May 27, 1924.

Present :—Sir Justice Jwala Prasad, Kt., and Mr. Justice Kulwant Sahai.

PARMESHWAR PANDEY AND ANOTHER —DEFENDANTS—APPELLANTS

versus

RAJKESHORE PRASAD NARAYAN SINGH —PLAINTIFF—RESPONDENT.

Civil Procedure Code, (Act V of 1908), O. I, r. 9; O. XXXIV, r. 1—Parties to suit—Omission to join some of several parties—Suit, maintainability of—Hindu law alienation--Necessity—Interest—Transfer of Property Act (IV of 1882), s. 61—Mortgage-decree, form of—Consolidated decree for several mortgages.

All persons whose rights and interest may be adjudicated upon and determined in the suit ought to be added as parties under O. I r. 9 read with O. XXXIV, r. 1 of the Civil Procedure Code, but failure to add one or two persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it.

Sital Prasad Roy v. *Asho Singh*, 69 Ind. Cas. 677; 2 Pat. 175; (1922) Pat. 326; (1922) A. I.R. (Pat.) 651; 4 P. L. T. 698; relied on.

When a contract entered into by a head member of a Hindu joint family is sought to be enforced against the other member on the ground of necessity

PARMESHWAR PANDEY *v.* RAJKESHORE NARAYAN SINGH

it must be shown not only that there was necessity to borrow the principal sum but also for the rate of interest agreed upon.

In the absence of a contract to that effect the consolidation of mortgages is illegal, and where a suit is based on several mortgages the amount due under them cannot be consolidated in the decree.

Appeal from a decision of the Additional Subordinate Judge of Gaya, dated the 10th August 1921.

Messrs. *Sultan Ahmed*, *S. M. Mullick* and *Kailaspatti*, for the Appellants.

Messrs. *P. K. Sen*, *R. C. Bhaduri*, *Rai Guru Saran Prasad A. Prasad*, and *Ragkunandan Prasad*, for the Respondent.

JUDGMENT.

Jwala Prasad, J.—This is an appeal against a decree passed by the Subordinate Judge of Gaya, dated the 10th August, 1921, in a mortgage suit. That decree is based upon three mortgages:

(1) dated the 20th July 1916, for Rs. 1,500

(2) dated the 24th March 1917, for Rs. 33,000 and

(3) dated the 12th November 1917, for Rs. 8,000

The first bond was executed by defendants Nos. 1 to 3; the second was executed by defendants Nos. 1 to 4, the defendant No. 4 being son of defendant No. 2; and the third was executed by defendants Nos. 1 to 5, defendant No. 5 being son of defendant No. 1. Defendants Nos. 6 to 8 are subsequent mortgagees. Defendants Nos. 4 and 5 are minors. Defendant No. 1 is the *karta* of the joint family of defendants Nos. 1 to 5, defendants, 1 to 3 being brothers. In all the three bonds the properties described in Schedules I to VII attached to the decree are mortgaged, and property No. VIII is mortgaged only in the third bond. The defendant Nos. 1 to 3 did not enter appearance. The suit was resisted by defendants Nos. 4 and 5 only, and upon the pleas taken by them in their written statement the following issues were framed in the Court below:—

1. Is the suit as framed maintainable?
2. Is the suit bad for defect of party?
3. Are the bonds in suit genuine, valid and for consideration?
4. Was the money under the bonds in suit advanced for legal necessity and for the benefit of the family?
5. Were the defendants Nos. 4 and 5 born at the time of execution of the bonds, dated 20th July 1916? Was defendant No. 5 born at the time of the execution of the bond, dated 24th February 1917?
6. Are the rates of interest high and unconscionable? Was there any necessity for such rates of interest?
7. Had the defendants Nos. 1 to 3 authority to mortgage the properties covered by the bond in suit?
8. To what relief, if any, are the plaintiffs entitled?"

All these issues were decided in favour of the plaintiffs and against the defendants, with the result that the entire claim of the plaintiffs was decreed. Defendants Nos. 4 and 5 have come to this Court in appeal.

The appeal is directed against bond No. 2 only. It is urged that the suit is bad on account of two members of the defendant's family, Bootan Pandy and Rambilas Pandey, sons of defendant No. 2 Madho Pandey not having been impleaded in the suit. Their existence came to light in the evidence of Jadu Singh, the last witness on behalf of the defendants, who stated towards the end of his examination-in-chief that Mahno Pandey has got three sons Parmeshwar, Bootan and Rambilas. No doubt, in the written statement it was alleged that the suit was bad for defect of parties, but in what manner this was so was not disclosed. There is no reason why the plaintiffs would not have impleaded the said persons as parties if they had knowledge of their existence. It is, however, immaterial for the purpose of this case whether they were made parties or not, for the suit cannot be dismissed on that ground alone. The bond was executed by the *kartas* of the family and the suit was obviously for enforcement of the mortgage against the joint family impleading the kartas of the family and other members whose existence was known to the plaintiffs. No doubt all persons whose rights and interest may be adjudicated upon and determined in the suit ought to be added as parties under O. I r. 9 read with O. XXXIV r. 1 of the Civil Procedure Code, but failure to add one or two persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the right and interests of the parties

actually before it. Such was the view taken by this Court in the case of *Sital Prasad Ray* v. *Asho Sing*, (1) (Dawson Miller, C.J. and Mullick, J.).

It is then said that the defendant No. 4 was in existence at the time when the first bond was executed and that he should have joined in that bond. Similarly, it is said that defendant No. 5 was in existence at the time when the second bond was executed and he ought to have been joined in the execution of that bond. The bonds were executed by the *kartas* of the family and were for family necessities ,such as for payment of antecedent debts, etc. It was not necessary to join all the members of the family in the execution of the bonds in question. It is not very clear either upon the finding of the Court below or upon evidence as to whether defendant No. 5 was born before the second bond was executed. The learned Subordinate Judge having seen the boy is of opinion that he was not more than 4 years of age. If his estimate is correct, then he was born subsequent to the execution of the second bond. He has, however, not referred to any evidence in the case. The evidence that has been placed upon the point is not convincing. The horoscope of the boy has not been produced. The witnesses on behalf of the defendants are not quite competent to depose to the date of the birth or the exact age of the boy. It is, therefore, difficult to fix the age of defendant No. 5, and I would leave the matter as it is for, as observed above, nothing hinges upon that matter.

Next it is contended that the rate of interest mentioned in the bond is high and unconscionable, and that there was no necessity for agreeing to such a high rate of interest. Defendants Nos. 1 to 3 being the executants of the bond cannot question the rate of interest voluntarily agreed to by them and inserted in the bond in question; but the appellants, defendants Nos. 4 and 5 being minors can question the authority of the *karta* or head member of the family to enter into a contract with regard to the rate of interest so as to be binding upon them unless it was shown that the high rate of interest agreed upon was necessitated by the circumstances of the family. In other words, they can throw the onus upon the plaintiffs to prove that the rate of interest agreed to was the proper rate of intertst chargeable in the market. There is no evidence on the record as to what was the commercial rate of interest and, therefore, it is contended on behalf of the appellants that the rate of interest mentioned in the bonds should not be allowed. The debts incurred by means of the bonds in question were for the purpose of paying off antecedent debts. Those debts have been detailed in the bonds in question. It would appear from an arithmetical calculation that the debts paid off by the second bond carried interest at the simple rate of interest viz. Rs. 1-2-0 to Rs. 2.per cent. per mensem. It would seem that the rate was rising from 1911, and in or about the years in suit the rate of interest rose to 2 per cent. per mensem. The law on the subject was reviewed by me in the case of *Mayadeo Prasad* v. *Bissessar Prasad* (2). It will not be profitable to repeat the reasons advanced by me in that judgment. It will be sufficient to say that when a contract entered into by a head member is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was necessity to borrow the principal sum but also for the rate of interest agreed upon : in other words, that it was impossible for the *karta* or head member to obtain loan for family necessity at a rate of interest lower than that agreed upon. The question of necessity is one of fact, and as in the case of principal debt so in the case of interest necessity has to be proved by evidence. In the circumstances of that case and for the reasons given by me I reduced the rate of interest from Rs. 1-4 cent. per mensem with six monthly rests to one per cent, per mensem simple rate of interest vide also *Ram Bujhawan Prasad Singh* v. *Nathu Ram* (3).

Therefore, if we were to apply the principle laid down by the Privy Council and referred to above to the facts of the present case, we can at best cut down the compound interest and allow only simple interest at the rate varying from Rs. 1-2 to Rs. 2, probably the

(1) 69 Ind. Cas. 677 ; 2 Pat. 175 ; (1922) Pat. 326 ; 1922) A. I. R. (Pat.) 651 ; 1 P. L. T. 698.

(2) 74 Ind. Cas. 695; 4 P. L. T. 707 ; 2 Pat. 488 ; (1924) A. J. R. Pat. 71.

(3) 71 Ind. Cas. 933 ; 4 P. L. T. 29 ; (1923) A. I. R. (P. C.) 37 ; 32 M. L. T. 129 ; (1923) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25 ; 44 M. L J. 615 ; 25 Bom. L R. 568; 18 L. W. 767; 1 P. L. R. 445 ; 28 C. W. N. 446; 50 I. A. 14 (P. C.).

latter. But the rate of simple interest of Rs. 1 per cent. per mensem even does not seem to appreciably relieve the defendants of the burden of the debt. The first bond carried interest at Rs. 1 per cent. per mensem with six monthly rests; the second bond carried interest at fourteen annas per cent. per mensem with eight monthly rests and the third bond carried interest at Rs. 1-2 per cent. per mensem with three monthly rests. In this case we are concerned only with the second bond the rate of interest wherein is 14 annas per cent. per mensem with 8 monthly rests. This loan of Rs. 33, 000- was advanced on the 24th March 1917, and on the date of the suit, the 22nd November 1919, the interest came to Rs. 10,165-6-5, and on the due date fixed for payment by the decree the interest amounted to a further sum of Rs. 10,640-1-0 calculated from the date of suit up to the date fixed for payment in the decree. The interest allowed according to the bond rate has worked out at a little over 12 per cent. per annum. This is not a high rate of interest in consideration of what used to be the rate of interest on the previous loans mentioned in the bond. The rate of 14 annas per cent. per mensem with 8 monthly rests does not appear to be excessive, and, therefore, no case is made out for reducing the rate of interest.

It is then contended that the planitiffs have failed to show legal necessity for a portion of the loan advanced under the second bond. These sums are (1) Rs. 2, 130 said to have been paid in cash to the executants at the time the bond was executed, and (2) Rs. 713 received in cash also by the executants subsequently. Now, the bond was executed in order to pay off the debts amounting to Rs. 30, 870, and Rs. 2130 was taken in cash The sum of Rs. 30,000 was left with the mortgagee to pay off the prior debts mentioned in the bond. However, in making actual payments the mortgagee had to pay something more than the sums stated in the bond. The total sum paid by the mortgagee to the creditor is Rs. 22,261 leaving a balance of Rs. 8,609 with him. Out of this he paid to creditor Khub Rai Rs. 700; Rs. 1,025-7-3 to the mortgagors for Tilak ceremony in connection with the marriage of the daughter of defendant No. 1, and Rs. 93-7-8 was taken by them in cash for expenses, leaving a balance of Rs. 6,790 out of which the mortgagors paid Rs. 6,077 towards the decreed debt of Durga Prasad, and Rs. 713 was spent by them.

The learned Subordinate Judge says that the object for which the loan was taken was to pay off the antecedent debts specified in the bond, and the creditor is not required to prove that the money advanced was actually applied for those purposes Therefore, he holds that the appellants are not entitled to call upon the plaintiff to prove the necessity for Rs. 713.

As to the cash amount of Rs. 2,130 taken by the mortgagors at the time of the execution of the bond, the learned Subordinate Judge says that a portion of this money was spent for the price of stamp and scribe's fee. The details of these have not been given by the Subordinate Judge, but this would come to Rs. 300 to Rs. 400. There is certainly no proof of this sum having been taken for family necessity. Mr. Sen on behalf of the respondents relies upon the case of *Sinnachami* v. *Ramasamy Chettiar* (4) *Nawab Nazir Begum* v. *Raghunath Singh* (5) *and* (3) *Bissonath Prosad Mahta* v *Brindesri Prosad Singh* (6) *and* (4) *Maharaja of Bobbili* v. *Raja Kaninayani Bangaru* (7) and contends that the major portion of the debt has been proved to have been raised for the purporse of paying off antecedent debts and family necessity and the want of proof with respect to a small sum of about Rs. 2,000 will not invalidate the debt so as to exonerate the defendants from the liability of the same. We are, however, relieved from entering into that question, for it appears that the appellants are bound to pay the debts in question incurred by their respective fathers. The personal liability of the executants of the bond still subsists, inasmuch as the suit for personal liability is not barred by limitation. The learned Counsel who appears on behalf of the respondents concedes this point and says that practically there will be no gain to his clients even if it were held that the family necessity with regred to the sums has not been established by the plaintiff. The

(4) 13 Ind. Cas. 7 ; 10 M. L. T. 463 ; (1911) 2 M. W. N. 539 ; 22 M. L. J. 85.

(5) 50 Ind. Cas. 434 ; 23 C. W. N. 700 ; 46 I. A. 145 ; 36 M. L. J. 521 ; 17 A. L. J. 591 ; 21 Bom. L. R. 484 ; 26 M. L. T. 40 ; 50 C. L. J. 86 ; (1919) M. W. N. 498 ; 1 U. P. L. R. (P. C.) 49 (P. C.).

(6) 17 Ind. Cas. 577 ; 40 C 342 ; 17 C. W. N. 1025.

(7) 8 Ind. Cas. 860 ; 35 M 108 ; 9 M. L. T. 155; (1911), 1. M. W. N. 101 ; 21 M. L. J. 593.

aforesaid points although strenuously urged on behalf of the appellants have towards the close of the case been wholly abandoned for they have seen that no practical good could accrue to them even if those points prevailed. We have, however, thought it desirable to go into those points to give our own decision instead of relying wholly upon the admission of the lawyers appearing on behalf of the appellants. We think that they are perfectly right in the circumstances of the case in having abandoned those points.

The last point urged by the appellants, however, appears to be substantial. This is as regards the frame of the decree. The decree in question has consolidated the amounts due under all the three bonds in suit and has made all the mortgaged properties liable for the same. It must be remembered as observed above at the out-set that the property Nos. 7 and 8 were not at all mortgaged in the first bond but were mortgaged in the second and third bonds. The consolidation of all the debts in the manner that the learned Subordinate Judge has done impedes the right of redemption of the mortgagors. This is contrary to the provisions of O. XXXIV, r. 2 and is also contrary to section 61 of the Transfer of Property Act. There is ne specific contract on behalf of the parties with regard to consolidation and in the absence of such a contract the consolidation is illegal. Mr. Sen referred to certain English cases on the point, namely, *John Jennings* v. *Edwin Jordan and John Price* (8). This ruling has no application after the Conveyancing Act was passed in England. Section 17 of that Act purports to abolish the consolidation of mortgages. Similarily section 61 of the Transfer of Property Act abolishes the consolidation of mortgages, and we are bound by the Transfer of Property Act in force in this country.

I, therefore, hold that the decree as framed is illegal and not capable of execution. The decree is accordingly set aside and a fresh preliminary decree must be prepared in accordance with law. The rate of interest up to the date of grace fixed in the decree of the Court below will be at the bond rate, and the rate of interest after that will be 6 per cent. per annum on each bond up to the date of realization.

There should be a direction in the decree that the properties Nos. 1 to 6 should be sold first in their serial order and the sale-proceeds thereof should be utilised for satisfaction of the debts due under the several bonds in order of their priority, that is to say, firstly the dues under the first bond, then the dues under the second bond and thereafter the dues under the third bond. The properties Nos. 7 and 8 should be sold last of all, and the sale-proceeds thereof should be utilised for payment of the debt, if any, due under the second and third bonds. If the sale-proceeds of only a few of the aforesaid properties is found to be sufficient to pay off the debts due under the three bonds, the remaining properties will not be sold.

The appeal is, therefore allowed with costs.

Kulwant Sahay, J.:— I agree.

ORDER.—Our attention has been drawn to certain clerical mistakes in the judgment. It appears that properties Nos. 7 and 8 were not at all mortgaged in the first bond but were hypothecated in the two later bonds. It also appears that the share in property No. 2 covered by the second and third bonds is a little less than that mortgaged by the first bond, that is 4 as 3 dams. 0 cowry, 9 bowries, 1 phoury, 16 reories of property No. 2 is mortgaged in the first bond, whereas 4 annas, 2 dams, 15 cowries, 18 bowries, 3 phouries, 4 reories of property No. 2 is mortgaged in the second and third bonds. The share of property No. 3 seems to be larger in the second and third bonds than that hypothected by the first bond. The directions given in the judgment will, therefore, be modified as followed.

Properties Nos. 1 to 6 shall be sold first in their serial order and the sale-proceeds thereof shall be utilised for satisfaction of the debts due under the several bonds in order of their priority, and that the properties Nos. 7 and 8 along with any share of property No. 3 in excess of that covered by the first bond will be sold last of all and the sale-proceeds thereof shall be utilised for payment of the debt, if any due under the second and third bonds in order of priority.

P. D. *Appeal allowed.*

(8) (1881) 6 A. C. 698 ; 51 L. J. Ch. 129 ; 45 L. T. 598 ; 30 W. R. 369.

LACHMI NARAIN *v.* BRIJ RANI

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 106 OF 1923.

May 27, 1924.

Present :—Mr. Justice Sulaiman.

LACHHMI NARAIN—APPLICANT —APPELLANT.

versus

Musammat BRIJ RANI—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code, (V of 1908), ss. 20, 47—Stay of execution proceedings—Costs, order as to—Refusal to set aside order—Appeal whether maintainable—Costs, award of—Discretion of Court.

Under section 2 read with section 47 of the Code of Civil Procedure an order passed by the execution Court is a decree only when it determines a question relating to the execution discharge or satisfaction of the decree.

No appeal lies against an order in execution proceedings refusing to set aside an order as to payment of costs, on a stay of the proceedings, as such an order is not one involving a question as to the execution, discharge or satisfaction of the decree itself.

Order as to costs is ordinarily a matter in the discretion of the Trial Court and unless some question of principle is involved no appeal can ordinarily be entertained.

Appeal from a decree of the Subordinate Judge, Bareilly, dated the 27th January 1923.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—This appeal has been filed as an Execution First Appeal from an order dated the 27th of January 1923.

A compromise decree had been passed in favour of the respondent against the appellant under which the respondent was entitled to recover a sum of money. The appellant filed a declaratory suit to avoid this decree as he was a minor. His suit was dismissed and an appeal was filed in this Court. An injunction was issued from this Ccurt restraining the respondent from proceeding with the execution of her decree. On the 9th of August 1922 the Execution Court stayed proceedings and on the 10th of August it passed an order directing that the execution case should be struck off as the appeal might take a long time for disposal. It, however, ordered that the costs were to be borne by the decree-holder. On an application made by the decree-holder the Court modified its order on the 9th of October 1922 and directed that the decree-holder should get her costs but no notice of this application had been served on the present appellant.

On the 13th of October 1922 the present appellant applied for setting aside the order of the 9th of October 1922 on the ground that it had been passed *exparte* and was not a just and proper order. After notice had been served on the respondent and she had put in objections the Court on the 27th of January 1923 dismissed the application for restoration saying that the previous order was one correcting an obvious error in the earlier order and that the Court could not change the order.

I am of opinion that no appeal really lies from the order dated the 27th of January 1923. Under section 647 of the Code of Civil Procedure of 1882 there was a conflict of opinion whether procedure for setting aside *ex-parte* decrees could or could not be applied *in extenso* to applications to set aside orders passed by the Execution Department. By the Amending Act of 1892 an explanation to that section was added saying that the section did not apply to applications for the execution of decrees. In the mean-time an appeal from a judgment of this Court went up to their Lordships, of the Privy Council and Their Lordships independently of the explanation, held that the old section 647 did not apply to applications for execution. Vide *Thakur Prasad* v. *Fakir Ullah* (1). Accordingly the Legislature has now omitted the explanation for section 141 of the new Code of Civil Procedure as it was unnecessary. It has been held in the case of *Bharat Indu* v. *Asghar Ali Khan* (2) that no appeal lies from an order refusing to restore an application in the Execution Department.

What in the present case has happened is that the appellant made an application for setting aside the order, dated the 9th of October 1922 and the Court below has refused to set it aside. I cannot treat this last order dated the 27th of January 1923 as a decree so

(1) 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. P C. J. 526; 8 Ind. Dec. (N. S.) 393.

(2) 73 Ind. Cas. 458 ; 45 A. 148; 21 A. L. J. 135 ; (1923) A. I. R. (A) 460.

as to give the appellant a right of appeal. Under section 2 read with section 47 of the Code of Civil Procedure an order passed by the execution Court is a decree only when it determines a question relating to the execution discharge or satisfaction of the decree. In the present case the question before the Court was really one of staying proceedings and directing each party to bear costs. It really did not relate to the execution, discharge or satisfaction of the decree itself. No appeal, therefore, lies from this order.

Assuming, however, that an appeal lies, I am of opinion that even on the merits the appeal cannot succeed. It was no fault of the decree-holder that an injunction was issued restraining her from proceeding with the execution of her decree. If the execution is stayed in the interest of the present appellant there is no reason whatsoever why the decree-holder should be made to bear her own costs. Her application was made at a time when no injunction had been issued and the decree-holder was at that time perfectly entitled to apply for execution.

Furthermore, the order as to costs is ordinarily a matter in the discretion of the trial Court and unless some question of principle is involved no appeal can ordinarily be entertained.

This appeal accordingly fails and is hereby dismissed with costs.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 60 OF 1924.

May 30, 1924.

Present :—Wazir Hasan, J. C.

MOHAN LAL—DECREE-HOLDER—APPLICANT

versus

AMAR NATH AND ANOTHER—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Code of Civil Procedure (Act V of 1908), s. 73, O. XXI, r. 72, Sub-rule (2)—Sale-purchase by decree-holder—Set off—Rateable distribution—Receipt of assets—Jurisdiction—Revision,

The jurisdiction of a Court in entertaining an application for rateable distribution of the assets under section 73, Civil Procedure Code depends on the *Sine qua non* of its being made before the receipt of such assets.

A Court in receiving and disposing of an application under section 73, Civil Procedure Code in defiance of the conditions on the existence of which the jurisdiction rests, exercises its jurisdiction with material irregularity and its order is open to revision.

Where a decree-holder himself is the purchaser and claims a set-off against the price of property purchased which is allowed by the Court, no application for rateable distribution under section 73, Civil Procedure Code can be entertained after the termination of the sale. The Court in such a case obtains constructive seisin over the purchase-money immediately after the conclusion of the sale and the order allowing set-off under O. XXI, r. 72 of the Code is not equivalent to receipt of the assets but a mere disposal thereof.

Obiter : **In a case where an application for set-off is made and there are no obstacles to the granting of it, *e. g.*, absence of an application under section 73, Civil Procedure Code, it is doubtful whether there can ever be a 'receipt of assets' by Court within the meaning of section 73, Civil Procedure Code.**

Application against the order of the Munsif, Gonda, dated the 5th February 1924.

Mr. *M. Wasim*, for the Applicant.

Mr. *Hari Kishnan Dhaon*, for the Opposite Party.

JUDGMENT.—This is an application under section 115 of the Code of Civil Procedure. The applicant held a simple money decree against one Pirthi Nath and in execution of that decree he attached a house belonging to the Judgment-debtor. The house was afterwards sold on the 22nd September 1923 at an auction sale for a sum of Rs. 858 and purchased by the applicant, Mohan Lal, with the permission of the Court. The price for which the house was sold was exactly equivalent to the amount of the decree. On the 28th September 1923, Mohan Lal applied under O. XXI, r. 72, sub-rule (2) of the Code to the Court executing the decree that the amount due on the decree might be set-off against the purchase-money. He neither deposited the 25 *per cent.* on the amount of his purchase money under r. 84, sub-rule (1), of O. XXI of the Code nor the full amount of the purchase-money under r. 85 of the same Order. Both under r. 84 and r. 85 the deposit could be dispensed with where a claim to set-off under r. 72 is made as it was done in the present case.

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Under an injunction issued by a superior Court the applicant's claim for set-off still awaits decision, so does the confirmation of the sale. On the 29th September 1923 the opposite party, Amar Nath, obtained a decree against the same judgment-debtor and another person for a sum of Rs. 1,304 odd and on the 10th December 1923 he applied for a rateable distribution under section 73 of the Code of Civil Procedure of the assets received in execution of Mohan Lal's decree. This application was resisted by Mohan Lal mainly on the ground that Amar Nath's application of the 10th December 1923 was much too late in time. The lower Court however allowed rateable distribution and this application challenges the legality of that order. The ground taken in revision is that the Court below acted with material irregularity in the exercise of its jurisdiction by granting the application for rateable distribution. It is argued that Amar ath's application was not made before the "receipt of such assets" and could not consequently be entertained under section 73 of the Code of Civil Procedure.

There can be no doubt that the exercise of jurisdiction in entertaining an application under section 73 depends on the *sine qua non* of its being made before the receipt of assets and if the Court below has received and disposed of this application in favour of Amar Nath in defiance of the conditions on the existence of which the jurisdiction rests it has certainly exercised that jurisdiction with material irregularity if not wholly illegally. To establish this contention, the learned Counsel for the applicant argues that either there has never been and can never be 'receipt of assets' by the Court in the circumstance of this case or if there was such a receipt it was not a moment later than the termination of the sale on the 22nd September 1923.

On the statement of the facts stated above, it is perfectly clear that the Court has never received any assets in reality. The only question for consideration is whether it has received such assets constructively and if it has, when? Now since the sale was concluded on the 22nd September 1923, the Court could adopt either of the two methods in the matter of the payment of the purchase-money. Indeed no order was needed by the Court. The obligation resting on the purchaser is stated by the law itself. If he was not the decree-holder, he must deposit the purchase-money in its entirety within 15 days of the sale. If he was the decree-holder, he may not do so and claim the benefit of a set-off under section 72. In either event according to my judgment, the Court obtained constructive seizin over the purchase-money immediately after the conclusion of the sale. The subsequent order of set-off if passed in favour of the decree-holder, would be a disposal and not receipt of the purchase money over which the Court acquired dominion on the date of the sale. I am unable to accept the contention of the learned pleader for the opposite party that an order allowing a set-off under O. XXI, r. 72, is equivalent to receipt of the assets. It is merely an allotment of the purchase-money already received by the Court and that in this case constructively, not actually. It follows that Amar Nath's application for rateable distribution was not made before the receipt of assets. In this view of the case, it is not necessary to consider and decide the first line of argument advanced by the learned Counsel for the applicant, though I must acknowledge that there is a good deal of force in that argument also. In a case where an application for set-off is made and there are no obstacles to the granting of it, that is to say, no application exists under section 73 for rateable distribution at the time of making the application for set-off, the Court will ordinarily be bound to grant the set-off, and if that is done I doubt very much whether there will ever be a receipt of assets by the Court within the meaning of section 73 of the Code of Civil Procedure.

The result is that this application is allowed, the order of the Court below is set aside and Amar Nath's application for rateable distribution is rejected. The applicant will be entitled to his costs in this Court from the opposite party No. 1.

G. H. *Application allowed.*

RAM SAKHI KUAR *v.* LACHMI NARAIN LAL

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 245 OF 1923.

June 13, 1924.

Present :—Mr. Justice Sulaiman and
Mr. Justice Kanhaiya Lal.

Musammat RAM SAKHI KUAR—DEFENDANT—APPELLANT

versus

LACHMI NARAIN LAL—PLAINTIFF—RESPONDENT.

Benami transaction—Suit against benamidar—Real owner, whether bound—Pre-emption suit against benamidar—Pre-emptor not entitled to preference over real vendee—Pre-emption, whether allowable.

A suit against a *benamidar* binds the *benamidar* as much as the real purchaser, though the latter may not have been made a party to the suit, but the plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser, had he been brought on the record.

Where in a pre-emption suit it appears that the ostensible vendee is merely a *benamidar* the plaintiff cannot succeed if it is found that he is not entitled to any preference as against the real vendee, whom he has omitted to make a party to the suit.

Appeal from a decree of the District Judge, Ghazipur, dated the 6th December 1922.

Dr. *M. L. Agarwala*, for the Appellant.

Dr. *S. N. Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption and two questions arise for consideration. The first is whether a suit for pre-emption brought against an ostensible vendee without impleading the real purchaser is maintainable. The second is whether the plaintiff is entitled to preference as against the vendee real or ostensible. The Court of first instance was of opinion that the suit could not be entertained against an ostensible purchaser without the real purchaser being made a party to the suit. The lower appellate Court was however of opinion that the real vendee could not take advantage of a *benami* transaction to defeat the claim of the plaintiff, though he was not made a party to the suit. It then proceeded to consider whether the plaintiff was entitled to a preferential right as against the real vendee, and came to the conclusion that he was entitled to such a preference. A decree for pre-emption was accordingly awarded to the plaintiff subject to the payment of a sum of Rs. 300 in respect of each of the sales which form the subject of pre-emption.

It is a well-settled rule that a suit against a *benamidar* binds the *benamidar* as much as the real purchaser, even though the latter may not have been made a party to the suit. The purchase in the present instance was made by Jagannath Prasad in the name of his wife Musammat Ram Sakhi Kuar. Musammat Sakhi Kuar pleaded that she was only a *benami* purchaser and that the purchase had been really made by her husband. The plaintiff took no step to bring her husband on the record. Both the courts below found that her husband was the real purchaser, but while the trial court thought that the plaintiff was not entitled to a preferential right as against him, the lower appellate court thought otherwise.

It is admitted that Musammat Ram Sakhi Kuar the ostensible purchaser, is not a co-sharer in the village in which the property sold is situated, but it is clear from the *khewat* to which the lower appellate court has referred, that her husband, Jagannath Prasad the real purchaser, is a co-sharer in the patti in which the property in dispute stands. It appears from the wajib-ul-arz of 1860 that the village Sonrupur formed part of two mahals. One of the mahals called mahal Shanker Prasad included a half of the village Sonrupur and another village named Bhartipur, while the other called mahal Thammandas covered the remaining portion of the village Sonrupur. At that time mahal Thammandas was divided into two pattis known as patti Ram Jawakkul and patti Thammandas. The share of Raghunandan Prasad which has since passed to the defendant vendor was situated in Patti Ram Tawakkul. Subsequently in 1883 the village Bhartipur was separated from the former mahal; and the different portions of the village Sonrupur were brought together and divided into two mahals known as mahal Mahesh Lal and mahal Thammandas Shankar Prasad. According to the wajib-ul-arz of 1290 F Mahal Thammandas Shankar Lal was subdivided into two pattis known as patti Thammandas and patti Shankar Prasad. The *khewat* for 1325 F shows that patti

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Thammandas consisted of land situated in numbers 1 to 46 khewat, out of which khewat numbers 1 to 28 constitute about a 4 as. 4 pies and odd share while numbers 29 to 46 khewat constitute an equal share within the patti. The property in dispute is situated in No. 38 khewat which forms a part of patti Thammandas. The defendant vendor claimed to derive his title from Raghunandan Prasad who was a co-sharer in No. 38 khewat. The plaintiff is also a co-sharer in No. 38 khewat by virtue of a litigation in which a 3 pies share of Raghunandan Prasad was awarded to him. The defendant vendor Musammat Ram Sakhi Kunwar has admittedly no share in the village but her husband Jagannath Prasad, the real purchaser is a co-sharer in other holdings inside the same patti.

The wajib-ul-arz of the village Sonrupur mahal Thammandas provides that the right of pre-emption shall belong in the first instance to near relations who are descended from the same common ancestor and whose names are entered in the khewat, in the second place to nearer co-sharers (*hissedar garibi*) and in the case of their refusal to co-sharers inside the *patti* then to the other co-sharers in the mahal and to the co-sharers in other mahals in the order mentioned. The plaintiff claimed to be a nearer co-sharer inside the patti, but it is admitted that he is in no way related by common descent to the defen- and vendor. He merely claims to be a distant relation of Raghunandan Prasad to whom the vendee Jagannath Prasad is also related by a common descent. Neither of them is a relation or *hissadar qaribi* of the vendor within the meaning of the *wajib-ul-arz* and the plaintiff cannot on that ground claim any preference.

His contention is that the words "*hissadar garibi*" indicate nearness in space and that as he is a co-sharer in the same sub-division with the vendor, he is entitled to preference. But as the lower appellate court has rightly pointed out the first two categories given in the *wajib-ul-arz* deal with the relationship, while the last two categories deal with proximity in space. The *wajib-ul-arz* gives a right of premption to the near relations descended from the common stock then to the other near relations, not so descended, after them to the co-sharers of the same patti then to the other co-sharers of the mahal and then to the co-sharers in the other mahals. There is no preference granted between the co-sharers inside the same patti unless some of them happen to be the kinsmen of the vendor. The lower appellate court was of opinion that since the holding Nos. 1 to 28 in which Jagannath was a co-sharer formed a group of co-sharers distinct from those belonging to the holdings Nos. 29 to 46, in which the vendor and the plaintiff were co-sharers, the plaintiff was entitled to preference. But the copy of the khewat produced clearly shows that the holdings Nos. 1 to 46 belong to the same patti. The plaintiff is not therefore entitled to any preference as against the real vendee who is a co-sharer in the same patti, though not in the same holding. As pointed in *Harsaran* v. *Dilraji* (1) the plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would have been entitled to enforce against the real purchaser had he been brought on the record.

This appeal must therefore be allowed and the claim of the plaintiff will stand dismissed. As the purchase was made in the name of a person who was not a co-sharer in the village, we do not consider that it would be equitable to award any cost to the other party here or in the courts below. The parties must bear their own costs throughout.

N. H. *Appeal allowed.*

(1) 8 Ind. Cas. 527.

ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM

CALCUTTA HICH COURT.

APPEALS FROM ORIGINAL DECREES
Nos. 168, 212 OF 1921.

February 4, 1924.

Present :—Mr. Justice Newbould and Mr. Justice Ghosh.

In No. 168 of 1921.

Syed ABU MAHOMED BARAKAT ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUR RAHIM AND OTHERS—PLAINTIFFS—RESPONDENTS.

In No. 212 of 1921.

MAHABUT ALI—DEFENDANT—APPELLANT

versus

ABDUR RAHIM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss 11, 92, O. XXIII—Suit in respect of public charities—Compromise decree, validity of—Addition of stranger as defendant—Suit, maintainability of—Res judicata—*Decree, setting aside of—Mistake.*

Order XXIII of the Code of Civil Procedure dealing with adjustments of suits, does not restrict the jurisdiction of a Judge to pass a decree on the basis of a compromise in a suit brought under section 92, Civil Procedure Code.

Gyananda Asram v. *Krista Chandra Mukerjee*, 8 C. W. N. 404 ; *Abdul Rahim Abu Ahmed Khan* v. *Abdul Sobhani Choudhury*, 26 Ind. Cas. 360 ; 18 C. W. N. 1264, distinguished.

Rajwant Prasad Pandey v. *Ram Ratan Gir*, 30 Ind. Cas. 849; 37 A. 485; 13 A. L. J. 937; 29 M L. J. 165 ; 2 L. W. 671; 18 M. L T. 173; 17 Bom. L. R. 754 ; 20 C. W. N. 35; (1915) M. W. N. 736; 23 C. L J. 55 ; 42 I. A. 171 (P. C.), relied on.

In a suit brought under section 92 of the Civil Procedure Code with the sanction of the Advocate-General the addition of a stranger as defendant does not render the suit bad.

Sajedur Raja Chowdhury v. *Gour Mohan Das*, 24 C. 418 ; 12 Ind. Dec. (N. S.) 946, followed.

A suit under section 92 of the Civil Procedure Code is brought by the plaintiffs on behalf of themselves and the general public.

The decision in a previous suit under section 92 of the Civil Procedure Code would bar a subsequent suit under that section by different plaintiffs uuder section 11, explanation vi of the Code, if the provisions of the explanation are satisfied.

Anand Rao v. *Ram Das Daduram*, 62 Ind. Cas. 737; 48 C. 493; 13 L W. 318; (1921) M. W. N. 24; 17 N. L. R. 87; 25 C. W. N. 794; 30 M. L. T. 194 (P. C.), relied on.

A judgment passed by a competent Court having jurisdiction cannot be assailed in a subsequent suit on any ground of mistake.

Appeals against the decrees of the Subordinate Judge, 3rd Court, 24 Parganas, dated the 8th July 1921.

Babu *Mahendra Nath Roy* (with him Babus *Sasudhan Roy*, *Bimala Charan Deb*, *Mahesh Chandra Banerji*, for *Rama Prasad Mukerjee*, *M. Syed Nausher Ali*), for the Appellants.

Babu *Sarat Chandra Rai Chowdhury* (with him Babu *Amarendra Nath Bose* for Babu *Parma Lal Chatterjee*, Babus *Santosh Kumar Bose*, *Radhika Ranjan Guha* and *Sisu Kumar Ghosal*), for the Respondents.

JUDGMENT.—These two appeals arise out of a suit brought by five persons on the allegation that they as worshippers are interested in a Public Charitable Trust which was *wakf* property and they brought the suit on behalf of the general Musalman community as their representatives. The suit was brought against a number of defendants and the main prayer was that the compromise decree in suit No. 48 of 1910 should be declared to be not binding upon the plaintiffs and the *Masulis* of the *Musjid*. The defendants Nos. 1 to 18 are the descendants of one Mir Miran who was said to be the original *Mutwali* of the Mosque and the *wakf* property. The defendants Nos. 19 to 27 are purchasers of some of the properties which the plaintiffs alleged were included in the *wakf* estate; and the defendants Nos. 28 to 42 are the representatives of the plaintiffs who representing the Mahomedan community in general brought the previous suit No. 48 of 1910 under section 92 Civil Procedure Code. The defendants Nos. 43 and 44 also are transferees of certain properties from some of the defendants of Mir Miran, defendants Nos. 1 to 18. The defendants Nos. 19 to 22 are appellants in appeal 168 and defendant No. 44 is the appellant in appeal 212. Defendant No. 26 is a respondent in appeal 168. He appears in this Court and supports the appellants.

Various questions of law have been elaborately discussed before us and a large number of

rulings has been the subject of minute criticism' by both the learned vakils apppearing before us, but the main question as it seems to us involved in this case is as to the effect of the decree which was made on compromise in suit No. 48 of 1910. The Subordinate Judge has held that that decree is not binding on the present plaintiffs.

Two questions on this head have been argued on behalf of the appellants before us. The first is, whether the compromise decree in Title Suit 48 of 1910 is binding upon the present plaintiffs, and the next question is whether the Court had jurisdiction to set aside the decree in Suit 48 of 1910. Several other issues were raised before the Subordinate Judge and the most important of which is whether the disputed properties were *wakf* properties. That issue was decided in favour of the plaintiff and no question has been raised with regard to that point before us, as the argument of the appellants proceeded upon the ground that assuming that the property was valid *Wakf* property, whether the plaintiffs are entitled to succeed in this suit. The suit of 1910 was brought by seven persons as plaintiffs against one defendant originally on the 18th July 1910 under section 92, Civil Procedure Code, with the sanction of the Advocate General. Subsequently there appears to have been an application for amendment of the plaint and the amendment was allowed by the District Judge before whom the case was pending on the 15th December 1910. The amendment was by the addition of a certain number of defendants who were the descendants of Mir Miran, the original defendant being his son's widow. Another amendment was by the addition of a paragraph which was paragraph 16 of the plaint where it was stated that the defendant No. 1 had executed a document in favour of her son defendant No. 2 which was a collusive paper transaction and that the said defendant No. 2 and the other defendants claiming the property mentioned in the schedule was their personal property were taking steps to have them partitioned. The third amendment was the addition of a prayer (*f*) to the effect that the property in suit be declared wakf property and that the defendants had not any personal interest for a considerable time in Court, and on the 15th September 1911 there was a petition purporting to have been signed by six of the plaintiffs in the suit stating the terms of compromise of the suit. On the 16th September 1911 the presiding Judge made this order "The compromise has now been accepted by all parties to the suit. The terms are set out in the petition filed by the plaintiffs on the 15th September to which a plan is attached". Then the order winds up by saying, "Let a decree be drawn up in terms of the petition, a copy of the plan above referred to will form a part of the decree". A formal decree was drawn up subsequently in the presence of the pleaders of both parties, and it is the case of the appellants that the present suit is bound by the said compromise decree. The learned Subordinate Judge has held that the decree was not binding on the plaintiffs on several grounds. With regard to the question that was raised in the plaint and also in the issues as to whether the compromise decree was obtained by fraud the Subordinate Judge finds that there was no fraud and we agree with this finding. But he has held that the decree is not binding, first on the ground that one of the plaintiffs did not join, secondly that by the amendment of the plaint in the suit which was made under orders of the Court the character of the suit was changed and it ceased to be a suit under section 92, Civil Procedure Code. The Subordinate Judge says "The decree passed on the basis of the amended plaint was illegal and invalid and I may say without jurisdiction". The third point on which the learned Subordinate Judge holds that the decree is not binding is that in the previous suit the Judge was not competent to declare whether any portion of the property was secular or not, and he further holds that the suit brought under section 92, Civil Procedure Code cannot be compromised and the decree, therefore, is not binding on the plaintiffs.

One initial difficulty in the way of the plaintiffs is whether in this subsequent suit the previous decree of 1910 can be questioned on the ground, stated by the Subordinate Judge. There was no want of jurisdiction of the Judge to entertain the suit or to order the amendment as prayed for, or to direct a decree to be made on compromise of the suit. The authorities the learned Subordinate Judge has cited and to which reference has been made by the learned Vakil for the respondents are the cases of *Gyanananda Asram* v. *Kristo Chandra*

Mukherji (1), and *Abdul Karim Abu Ahamad Khan* v. *Abdus Sobhan Chowdry* (2). These cases only show that in a suit brought under section 92, Civil Procedure Code when a petition of compromise is filed it is open to the Judge to say that the compromise is not lawful and he could then refuse to pass an order on the basis of the compromise. But it is another thing to say that a Judge has no jurisdiction to pass a decree on the basis of compromise in a suit brought under section 92, Civil Procedure Code O. XXIII of the Code of Civil Procedure dealing with adjustment of suits makes no such distinction.

It is also argued that the amendment of the plaint ought to have been made with the consent of the Advocate-General. It is not necessary for us in this case to express any opinion on that question, because assuming that such sanction was necessary it is a matter to be decided by the Judge dealing with the case in the first instance. In other words the grounds that have been stated by the Subordinate Judge and which have been pressed before us by the learned Vakil for the respondents do not show that there was any want of jurisdiction on the part of the Judge making the decree.

With regard to the question of one of the plaintiffs not joining in the petition of compromise we have only to point out that the learned Judge stated in his order that the compromise was accepted by all parties to the suit. This is a question of fact which the learned Judge was competent to decide. It is possible that he made a mistake as regards this question of fact; but it was for the plaintiff who did not join in the compromise to bring it to the notice of the Judge, and the compromise could only be set aside by an application for review of the judgment or by appeal or such other procedure provided by the law. That a judgment passed by a competent Court having jurisdiction cannot be assailed in a subsequent suit on any ground of mistake is a proposition which has been well settled. We need only refer to one of the cases decided by the Privy Council *Rajwant Prosad Pandey* v. *Ram Ratan Gir* (3) in which Lord Shaw in delivering the judgment of the Privy Council says:—"It is said that the Court below decided objections wrongly and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships Bar. The familiar principle is laid down in a series of cases of which the judgment of Lord Hobhouse in *Malkarjan* v. *Narhari* (4) is not, a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still upon a new application to Courts of justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him."

The decree therefore in suit No. 48 of 1910 cannot be attacked in the present suit on any of the grounds set forth by the Subordinate Judge. In this view it is not necessary for us to consider one of the points which was very elaborately argued as to whether to amendments of the plaint mentioned above take the case out of the provisions of section 92 C. P. C. We may state however that the decision in the case of *Sajedur Raja Chowdhury* v. *Gour Mohan Das* (5) is against the contention of the respondents that section 92 does not contemplate a suit against a stranger and we are bound by that decision. Although that decision appears to have been dissented from in the case of *Budh Singh Dudhuria* v.

(1) 8 C. W. N. 404.
(2) 26 Ind. Cas. 360; 18 C. W. N. 1264.
(3) 30 Ind. Cas. 849; 37 A. 485; 13 A. L. J. 937; 29 M. L. J. 165; 2 L. W. 671; 18 M. L. T. 173; 17 Bom. L. R. 764; 20 C. W. N. 35; (1915) M. W. N. 786; 23 C. L. J. 55; 42 I. A. 171 (P. C.).
(4) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739. (P. C.)
(5) 24 C. 418; 12 Ind. Dec. (N.S,) 946.

Nirad Baran Roy by Mr. Justice Mookerjee that learned Judge stated that the particuar case before him could be decided upon another ground, and he therefore referred the question to a Full Bench for decision. We are however in agreement with the decision in *Sajedur Raja* v. *Gour Mohan Das* (6) and are of opinion that if a suit is brought under section 92 of the Code with the sanction of the Advocate General the addition of a stranger as defendant does not render the suit bad.

The question then remains whether the present plaintiffs are bound by the decree in the previous suit. The previous suit as we have already stated wss under section 92 Civil Procedure Code. Such a suit as it has been held in numerous cases is a suit brought by the plaintiffs for themselves and as representives of the general public. We need only refer to the case of *Anand Rao* v. *Ramdas Daduram*, (7) decided by the Privy Council. If that is so then under section 11 Explanation vi the plaintiffs would be bound by the decision of the previous suit if the provisions of the explanation are satisfied. Explanation vi runs thus:—"Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section be deemed to claim under the persons so litigating". Then the question is whether the plaintiffs in the previous suit were litigating *bona fide* in respect of a public right. It has been contended on behalf of the respondents that they were not doing so, and it seems to us that the question of litigating *bona fide* and the question of fraud were somewhat mixed up in the pleadings of the plaintiffs. What was argued before us is that one Imdad Ali Khan who happens to be a pleader, although he does not practise as a pleader, usually appeared in the suit of 1910 on behalf of some of the defendants on the day when the plaint was amended. This Imdad Ali and his spiritual director who is called Pir Brafiat Ali had afterwards purchased by separate conveyances portions of the disputed property themselves. It is urged that Imdad Ali appeared on the scene by reason of a prearranged conspiracy that the plaint should be amended and a compromise be effected by which a portion of the property should be declared to be trust and a portion of personal property of the defendants ; that this arrangement was carried out by the compromise, and then subsequently the purchases were made. This circumstance may at most raise some sort of suspicion but it cannot be said in the absence of any other evidence that there was a conspiracy to defraud a public endowment. As a matter of fact Imdad Ali Khan was one of the two pleaders for the defendants who accepted the *vakalatnama*, that after Imdad Ali Khan had accepted the vakalatnama the case was pending in the Court for about 10 months and the first purchase that was made by Pir Barkat Ali was in Agust 1912, that is, about 11 months after the compromise decree. From the various Kabalas to which our attention has been drawn by the learned Vakil for the respondents it does not appear that they paid low prices for these properties. We are therefore unable to hold on the materials before us that Imdad Ali Khan appeared on the scene with any preconceived plan having been settled between the plaintiffs and the defendandants in the suit of 1910. It may very well be that the plaintiffs in that suit were not quite sure whether they would be able to establish that the whole of the property was a public charitable trust. There was a considerable amount of money in deposit in the Collectorate on account of the acquisition of the portion of the land under the Land Acquisition Act, and it is quite possible that the plaintiffs in the previous suit thought that the compromise by which the Mosque and the money in deposit were declared to be public property was sufficient gain on their part in order that they might give up the claim with regard to the tenanted lands. It appears from the evidence also that after the compromise the mosque which was in a dilapidated condition has been rebuilt at the expense of the public and it may be that on account of the compromise the Mahomedan public became assured that the mosque was public property and thought it to be a fit subject of their generosity and spent money for its improvement. There is no question that when the plaintiffs

(6) 2 C. L. J. 431 at p. 438.
(7) 62 Ind. Cas. 737; 48 C. 493 ; 18 L. W. 318 ; (1921) M. W. N. 24 17 N. L. R. 87 ; 25 C. W. N. 794 ; 30 M. L. T. 194 (P. C.)

had brought the suit they had brought it *bona fide* with the object of benefitting the public. The only question that arises is whether the compromise was *bona fide* or not, and as we hold that there is nothing on the record to show that the plaintiffs were not acting *bona fide* in the matter the present plaintiffs are barred by the rule of *res judicata*.

There was one question raised on behalf of the appellants as to whether the present suit is competent without the sanction required by section 92 Civil Procedure Code. It does not appear that this question was argued in the lower Court, although we are informed that it was. The learned Subordinate Judge has not discussed the question at all The learned Vakil for the respondents has cited a number of cases in support of his contention that the present suit is maintainable by the plaintiff alone, although they described themselves as representatives of the Musalman Community. We entertain considerable doubt as to the maintainability of such a suit as this without the sanction of the Advocate General under section 92 of the Code of Civil Procedure having regard to sub-section 2 which has been added to the corresponding section 539 of the old Code of Civil Procedure. It is, however, unnecessary for us to give any decided opinion having regard to the decree we are going to make.

With regard to appeal No. 112 in which defendant No. 44 is the appellant the point in addition to the questions argued in the other appeal raised was that in the plaint the plaintiffs did not ask for any injunction against this particular defendant who purchased *pendente lite* from defendant No. 43. In the plaint no prayer was made for injunction against the defendant No. 43, but the learned Judge has made a decree against this defendant also. In our opinion without amendment of the plaint such a decree could not have been made against that defendant.

Having regard to the observations we have made both the appeals must be decreed and the plaintiffs' suit dismissed with costs of both Courts against the plaintiffs who are the contesting respondents here. The respondents other than the plaintiffs will bear their own costs in both Courts.

M. B. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

REFERENCE NO. 1 OF 1924.

July 4, 1924.

Present :—Mr. Pullan, A. J. C.

W. E. PURVES—APPELLANT

versus

THE MUNICIPAL BOARD, SITAPUR—RESPONDENT.

U. P. Municipalities Act (Act of 1916), s. 162—Tax on Salary of municipal servant—Absence from duty on account of leave—Right to refund.

A municipal servant is not entitled to refund of the tax assessed on his Salary under municipal bye-laws during any period in which he is absent from the Municipality.

Case reported by the District Magistrate, Sitapur, under section 162, Municipal Act of 1915.

Order.—The District Magistrate of Sitapur has referred under section 162 of Municipal Act the following question for the decision of this Court :—

"Is a Municipal servant entitled to refund of the tax assessed on his salary under Municipal Bye-laws during any period in which he is absent from the Municipality ?"

The answer must be in the negative. The income on which the tax is assessed is earned by the assessee for work done by him in the Municipality, whether he is actually performing his duties or is absent on leave. The District Magistrate has submitted the question apparently because he is of opinion that it is of importance to every Government servant. I am unable to see any parallel between the case of a Municipal Secretary who is paid by the Municipality for work done for a municipality and that of a Government servant, e. g. a District Magistrate who draws his pay as such without any reference to his place of residence in or outside a Municipality. With regard to the particular case on which the reference is based the appellant did not appear before the District Magistrate or before this Court and under the rules he is not entitled to any refund. His appeal, therefore, should be dismissed.

G. H. *Appeal dismissed.*

RAMJI *v.* ZIBLAJI

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 335-B OF 1922.

March 29, 1924.

Present :—Mr. Kinkhede, A. J. C.

RAMJI AND ANOTHER—DECREE-HOLDERS —APPELLANTS

versus

ZIBLAJI—JUDGMENT-DEBTOR— RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 141' 144, 151, scope of—Money decree—Execution—Attachment of standing crops—Crops delivered to decree-holder for safe custody—Decree-holder, position of—Security Bond—Decree, satisfaction of—Restitution of crops, application for—Executing Court, Jurisdiction of—Separate suit, whether necessary.

An executing Court, which entrusts to a party to the decree or to a third person as a depository or *supratdar* property taken by it under attachment or in execution of its process, has, either acting on its own motion or at the instance of a party to the decree power.

(1) to order him to produce it for sale if necessary, or even to return it to the judgment-debtor or to the objector or any other person from whose possession it was attached or taken, upon the decree being satisfied or objection being allowed or upon the termination of any proceedings in execution, or for any cause whatever, and also if necessary.

(2) to visit him with any penalty for his default in obeying its orders by proceeding against him in a summary manner, in order to prevent the abuse of its own process and for shortening the litigation or for the ends of justice.

The mere fact that the decree-holder becomes a depositary of the property taken in execution of a decree does not make him a stranger to the decree, so as to prevent the Court from exercising its jurisdiction over him.

Khetsidas Radhakishan Marwari v. *Harba Marathe*, **47 Ind. Cas. 956 ; 16 N. L. R. 178, overruled.**

Section 151 of the Civil Procedure Code gives ample jurisdiction to a Court to pass orders for the restoration of or for the proclamation of the withdrawal of attachment of moveable property also.

The word 'decree' in section 141 of the Civil Procedure Code covers on 'order' and the word 'Court' includes Courts of every grade.

Section 244 of the old Civil Procedure Code corresponding to section 47 of the new Civil Procedure Code is meant to provide "a cheap and expeditious remedy" by empowering the Court executing a decree to determine questions that may arise in execution proceedings, without requiring the parties to bring a separate suit in respect of *any questions* that may arise between them in such proceedings.

Prosunno Kumar Sanyal v. *Kali Das Sanyal*, 19 C. 683 ; 19 I. A. 166 ; 6 Sar. P. C. J. 209 ; 9 Ind. Dec. (N. S.) 898 (P. C.), **followed.**

The surety bond which the supratdar has to execute, should be drawn up in such form as to clearly bring home to him the nature of his liability.

Appeal against the decree of the District Judge, Amraoti, dated the 7th April 1921, in Civil Appeal No. 231 of 1921.

Mr. *Gangadhur Sitaram*, for the Appellants.

Mr. *M. B. Niyogi*, for the Respondent.

ORDER OF REFERENCE.

Kinkhede, A. J. C.—In Civil Suit No. 69 of 1919 one Barkaji obtained a money-decree against Ziblaji on 9th February 1920 for Rs. 600. He took out execution of the decree and attached the judgment-debtor's standing crops on 28th October 1920. The crops attached were entrusted on 28th October 1920 to the decree-holder for safe custody and a security bond popularly known as *Supratnama* or *Jimmepatrak* was taken from him under that date. The judgment-debtor on 16th November 1920 deposited the decretal amount and costs into Court and prayed for the attached property being re-delivered to him from the possession of the custodian. The Executing Court passed the following order on 16th November 1920. "The judgment-debtor has deposited full claim in Court this day. His property be released from attachment". On 26th November 1920 which was the date fixed for hearing in the case, the parties remained absent and the Judge recorded an order striking the case off as fully satisfied. The decree-holder returned to the judgment-debtor only $2\frac{1}{4}$ *Khandis* 1 *Pasari* of cotton on 2nd December 1920 but failed to return the rest of the crops which came to his possession as custodian. The Judgment-debtor thereupon made an application on 31st January 1924 purporting to be one under section 47 of the Civil Procedure Code and prayed that the decree-holder be ordered

to pay him Rs. 416 on account of the value of the undelivered crops, and in the alternative, if this prayer could not be granted on the execution side, that the application may be treated as a plaint in a suit and a decree may be passed in his favour for Rs. 416 claimed by him. This application was, however, dismissed in default and was therefore followed by another similar application under date 12th April 1921. It was heard *ex parte* by the Sub-Judge of Morsi who after going through the evidence as to the value of the property which came into the possession of the decree holder as custodian ordered Rs. 300 to be paid to the judgment-debtor ; in doing so he purported to act under section 145 read with section 47 of the Civil Procedure Code. Against this order an appeal was preferred to the Court of the District Judge Amraoti by the decree-holder contending that the application was not maintainable. It was held that the custodian in the present case was not a third person but the decree-holder himself, and that under the terms of the security bond given by him he was liable as a surety under section 145 clause (*b*) of the Civil Procedure Code, and on the analogy of a case where the decree-holder himself is the auction purchaser it was held that proceedings could be taken for the recovery of the property or its value on the execution side. He accordingly held that there was no necessity for filing a separate suit and dismissed the appeal.

The decree holder has now come up in second appeal to this Court and has urged on the authority of the ruling of Mittra, A. J. C. in *Khetsidas Radhakisan Marwari* v. *Harba Marathe* (1), which followed an earlier ruling of Sir Stanley Ismay, J. C. in *Joshi Powar* v. *Jiwraj Hazarimal* (2) in which that learned Judicial Commissioner dissented from the view taken by Obbard, J. C., in *Nathoo Ram* v. *Kamal Ram* (3), that the judgment-debtor's remedy lay in a regular suit and not in a proceeding under section 47 of the Civil Procedure Code, and the Courts below ought to have followed the reported decisions of this Court and held that section 145 did not apply to this case.

(1) 47 Ind. Cas. 956 ; 16. N. L. R. 178.
(2) 13 C. P. L. R. 104.
(3) 12 C. P. L. R. 149.

With a view to find out for myself how the security bond taken in the case decided by Mittra, A. J. C. was worded and whether the *Supratdar* was a party to the decree either as decree-holder or as judgment-debtor or a third person, I caused the record of the original Court to be sent for, and asked the Deputy Registrar to put up any precedents in this connection. He has brought to my notice that Sir Henry Drake-Brockman, J. C. in his letter No. 4060|1-39-15|11 dated the 29th November 1911, to all Divisional Judges, pointed out that it is " more than doubtful whether section 145 Civil Procedure Code is applicable. But section 151 may not unfairly be regarded as supplying the authority the existence of which Mr. S. Ismay, late Judicial Commissioner doubted in *Joshi Powar* v. *Jiwraj Hazarimal* (2) ; until the point is judicially decided with reference to the provisions of the present Code, the Courts would do well to act on the view expressed by Mr. Obbard, Judicial Commissioner, in *Nathoo Ram* v. *Kamal Ram* (3)" and that latterly the question of the failure of the custodians who are either parties to the decree or strangers has been the subject of some correspondence in office by reason of several complaints having been brought to the notice of some of the District Judges by their subordinate Courts. It is pointed out that the custodian if he happens to be the decree-holder, generally when his execution is struck off in default or when an objection preferred in respect of the attached property is allowed, evades delivery of the property entrusted to him with a view to ensure re-attachment of the same without any further trouble, or to prevent the objector from getting it back. Similarly if the custodian happens to be either a judgment-debtor or his fast friend, the entrusting of the attached property to them has resulted in a practical release of the said property because of their failure to produce them for sale when so ordered by the Court. It also appears that the forms of the security bonds taken do not in many instances contain a clause entitling the Executing Court to execute its own *order for production* by realising the value of the property by issuing a warrant of arrest or attachment against the custodian or his property, on the execution side. Other instances in which a decree-holder may not take interest in the welfare of the live-stock or proper

care of the attached property or may claim heavy charges for fodder or expenses of management so as practically to reduce the value of the attached property to nothing have also arisen in several Courts.

It stands to common sense that a Court which entrusted the property to the custodian should have jurisdiction to cause its production when ordered or to penalise any failure or neglect to obey the order, by effecting recovery of its price from the defaulter. It is, however, a debatable point: firstly, whether the remedy of a party to the decree as against the custodian lies in a proceeding under section 47 Civil Procedure Code or in a proceeding under section 145 read with section 47 Civil Procedure Code 'or in a separate suit, and whether it makes any difference if the custodian happens to be either a decree-holder, or a judgment-debtor, to the enforcement of the liability on the execution side; secondly, whether the executing Court which entrusts a custodian with property under attachment, should or should not have any power, either under section 144 read with section 141 of the Civil Procedure Code, or under the inherent jurisdiction given by section 151 of the Civil Procedure Code, for the ends of justice and in order to prevent abuse of its own process and to shorten litigation, to order a person put in charge by it to produce it for sale thereof, or to return it to the judgment-debtor upon the decree being satisfied or upon the termination of the execution proceedings for any cause whatsoever, and, also, if necessary, to visit the penalty on the defaulting custodian, by proceeding, in a summary manner, against him, in the same execution proceedings.

In view of the apparent conflict of view that prevailed in this Court under the old and the new Code, and of the tendency on the part of the custodians to set at naught the authority of the executing Court, and of the general importance of the question, I think an authoritative decision by a Bench of this Court is necessary. The record is, therefore, submitted to the Judicial Commissioner for referring the case to a Bench of two Judges. Pending the reference I put off my decision of this second appeal.

OPINION.

The question of law raised in this second appeal was in view of the general importance referred for decision to a Bench by one of us and as the facts of this case are set out in full detail in the order of reference we need not recapitulate them here. We will, therefore, proceed to give our decision on the point referred to us. The point for consideration, is:— whether any executing Court, which entrusts, to a party to the decree or to a third person as a depositary or *supratdar*, property taken by it under attachment or in execution of its process, has, either acting on its own motion or at the instance of a party to the decree, any power, under any of the sections 47, 141, 144 or 151 of the Civil Procedure Code, 1908.—

(1) to order him to produce it for sale if necessary, or even to return it to the judgment-debtor or to the objector or any other person from whose possession it was attached or taken, upon the decree being satisfied or objection being allowed or upon the termination of any proceedings in execution, or for any cause whatever, and also if necessary,

(2) to visit him with any penalty for his default in obeying its orders by proceeding against him in a summary manner, in order to prevent the abuse of its own process and for shortening the litigation or for the ends of justice.

We have had the advantage of hearing the arguments on both sides and of discussing the pros and cons of the question or the respective advantages or disadvantages of enforcing the remedy against the depository by a summary proceeding or by a regular suit, and we are of opinion that the view taken by the lower Appellate Court that the remedy can be enforced in a summary manner in the execution proceedings, is correct, and that it accords not only with common sense but has ample support in law, and that the case of *Khetsidas* v. *Harba* (1), which held the contrary view was incorrectly decided.

In the case before us the depository is a party to the decree being the decree-holder himself. The mere fact that he becomes a depository of the property taken in execution of a decree does not make him a stranger to the

decree so as to prevent the Court from exercising its jurisdiction over him. Moreover in this case the decree having been satisfied by a payment, and the Court having, therefore, ordered that the property be released from attachment as it was bound to do and order restitution, the decree-holder had no business to retain the property or any portion thereof, after such satisfaction or order for restoration. It is this withholding of the property which has led to the judgment-debtor's application to the executing Court for an order to the depository to put him back into possession of the property so withheld or for payment of its money value. O. XXI, r. 66, Civil Procedure Code, provides for the withdrawal of attachment being proclaimed in the case of immoveable property; it does not in so many words deal with a similar question regarding moveables. We know, however, that as a matter of practice an order is issued to the Nazir to restore back moveable property to the person from whose possession the same is attached, or at any rate to notify the release. We think section 151 gives ample jurisdiction to a Court to pass similar orders for the restoration of or for the proclamation of the withdrawal of attachment of moveable property also. The power of ordering restitution of property taken under colour of its process must, for obvious reasons, be recognised as existing in every executing Court. Section 145 clause (*b*) Civil Procedure Code recognises the authority of an executing Court to proceed summarily against a person who has, by a contract of suretyship, rendered himself liable for the restitution of property taken in execution of the decree. The authority of a Court to order restitution exists even apart from express contract; that it can be exercised when a decree is reversed or superseded or varied is contemplated by section 144 of the Civil Procedure Code. Even where the wording of section 144 may not expressly cover any particular case, the principle underlying that section has also been made applicable, and restitution has been ordered by Courts. In *Radha* v. *Sakhu* (4), Sir Henry Drake-Brockman, J. C., recognised the force of an argument advanced on these lines, and held that a Court has inherent power to order restitution in cases not covered by section 144, Civil Procedure Code. The following observations are very instructive. They are at page 64 of the report: "The obvious reason is that the Court having by its temporary injunction deprived the respondent Sakhu of what she was legally entitled to, should *ex debito justitiae* restore her to the possession which she had thus lost and also compensate her for the profits which she had been precluded from earning." In that case both the Courts below had held that while section 144 was not in terms applicable, the applicant Sakhu "had an equitable right to the compensation claimed and that the Court had inherent power to grant her this relief without relegating her to a separate suit." If authority is wanted for the view that the word "decree" in section 144 covers an "order" and the word "Court" in the said section includes Courts of every grade, it is to be found in *Tangtur Subbarayudu* v. *Yerram Setti Seshasani* (5), *Shivbai Babya Swami* v. *Yesu Cheoo Nayakin* (6) and *Jai Berham* v. *Kedar Nath Marwari* (7). Their Lordships of the Privy Council have laid down at page 16 the duty of every Court in this respect, in the following words of Cairns, L. C. in *Rodger* v. *Camptoir d'Escompte de Paris* (8). "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court,' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case." They have further made this very clear by their own following observations "It is the duty of the Court, under section 144 of the Civil Procedure Code, to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied

(4) 52 Ind. Cas. 664; 17 N. L. R. 62.

(5) 33 Ind. Cas. 739; 40 M. 299; 3 L. W. 236; (1916) 1 M. W. N. 155; 30 M. L. J. 366.

(6) 48 Ind. Cas. 130; 20 Bom. L. R. 925; 43 B. 235.

(7) 69 Ind. Cas. 278; 2 Pat. 10; (1922) A. I. R. (P.C.) 269; 4 P. L. T. 61; 32 M. L. T. 10; 37 C. L. J. 351; 27 C. W. N. 582; 44 M. L. J. 735; 21 A. L. J. 490; 25 Bom. L. R. 643; (1923) M. W. N. 368; 18 L. W. 802 (P.C.).

(8) (1871) 3 P. C. 465; 40 L. J. P. C. 1; 24 L. T. 111; 19 W. R. 449; 7 Moor P. C. (N. S.) 314; 17 E. R. 120.

or reversed ". Nor indeed does this duty or jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. In our opinion, the words " according to circumstances towards all parties involved " are very wide and cover *all sorts of cases*, whether of parties or of third persons *involved* in each particular case.

Looking at the case from a still another point of view and regarding the property attached as being in *custodia legis* we say that the depository or custodian having been entrusted with it by the order of the Court, it is in the fitness of things that he should be subject to the jurisdiction of the Court, and also to be legally compellable to produce it whenever ordered by it to do so, as if he were an officer of the Court. If he owes his position, as also his authority to possess the said property to the authority which created him or delegated that authority to him, it stands to reason that he should not be permitted to ignore any order for production or redelivery, issuing from that very authority, and set it at naught and thus drive it to the necessity of filing a regular suit against him for that purpose, or of authorising any of the parties to the decree, or its officer such as the *Nazir*, or if an objection be preferred and allowed, the objector, from whose possession the property was attached and in whose favour it was released, or any other person who may be interested in its recovery to file such a suit. There is no logic in the obstructive attitude of the depository. He being constituted a bailee, under the order of the Court, of the property attached or taken in execution of the decree, is under law bound to restore the property so bailed with him, to or to the order of, the bailor namely the Court. The underlying idea of appointing a *Supratdar* is to facilitate the execution of the decree by keeping the property in the custody of the Court so that it may be readily available for sale etc. in execution of the decree. It could never have been the intention of law, to authorise, a person appointed by the Executing Court for taking charge of the property, to put obstacles in the way of the execution of the decree, and, in case of obstruction, to compel the Executing Court to say to the claimant that it had the power to do a wrong to him but had no power to undo the effect of that wrong, and that if he has any grievance he should seek his remedy in a regular suit. It may have to put off even the execution of the decree in some cases until the disposal of the regular suit against the depository for the recovery of the property so made over. To countenance such a wrongful with-holding of property by a depository would militate against the very essence or principle of section 244 of the old or 47 of the new Civil Procedure Code, as laid down by the Privy Council in *Prosunno Kumar Sunyal* v. *Kalidas* (9), which as we understand it is as under:—

Section 244 of the old Civil Procedure Code corresponding to section 47 of the new Civil Procedure Code is meant to provide " a cheap and expeditious remedy " by empowering the Court executing a decree to determine questions that may arise in execution proceedings, without requiring the parties to bring a separate suit in respect of *any questions* that may arise between them in such proceedings. This section has been enacted for the beneficial purpose of checking needless litigation and it is for this reason that its benefit is made available even to a third party—auction-purchaser—if he seeks it.

We take this opportunity to point out that the surety bond or security bond, which the *Supratdar* has to execute, should be drawn up in such form as to clearly bring home to him the nature of his liability. He must know that his obligation both contractual and legal is to restore the property to or to the order of the Court, which entrusted it to him, and that any neglect or failure on his part, to obey any orders of that Court or of the Court whose duty it will be to pass them or carry them out would render him liable to the summary jurisdiction of the Executing Court, in addition to any other steps which the Court may think fit to take against him for his contumacious conduct. Much of the difficulty that is at present experienced in resorting to summary remedies against the *Supratdar* will thus be obviated. We also suggest that if the person selected as the depository or custodian is also appointed a Receiver under O. XL of the Civil Procedure Code, the further procedure of the Court will be rendered easier than it at pre-

(9) 19 C. 683 ; 19 I. A. 166 ; 6 Sar. P. C. J. 209 ; 9 Ind. Dec. (N. S.) 898 (P. C.).

sent appears to be.

We have already adverted to the case which is expressly covered by section 145 Civil Procedure Code which lays down that in a case where a person whether he be a party or a stranger to the decree, has "become liable as surety for the restitution of any property taken in execution of a decree, the decree or the order may be executed against him." We have no doubt that the depository or surety can and does come within the purview of a "surety" within the meaning of the said section. In applying the provisions of section 145 (*b*) Civil Procedure Code to the depository or *Supratdar* all we wish to point out is that a properly worded surety bond should be taken from him clearly stating that he executes it *as a surety* and will be liable *as a surety* and then, there will be no difficulty to put the decree or order into execution against him, as the wording of section 145 of the Civil Procedure Code is clear on the point.

We have not touched the question of the inherent jurisdiction which every Court possesses or ought to possess under law to pass any orders necessary for the ends of justice or in order to prevent the abuse of its own process or to shorten litigation. Such a power is always recognised and can be invoked by a party, or exercised by the Court of its own motion for the benefit of any person "involved" in the "proceedings" and we do not think that a custodian or *Supratdar* is such a being as cannot be brought under or be made amenable to, such inherent jurisdiction.

For all these reasons our considered opinion on the point referred to us for decision is that the view taken in *Khetsidas* v. *Harba* (1), which gives to the *Supratdars* an immunity from the summary jurisdiction of an Execution Court was not correctly decided, and we therefore, overrule that decision. That was a case of *Supratdar* who was not a party to the decree, and, therefore, some doubt may have been entertained by the learned Judge who decided the case. But in the view which we take, that question seems to be immaterial, and the depository, whether he be a party or no party, is liable. We accordingly hold that the security given by a depository or custodian for the safe custody of the property entrusted to him by the orders of a Court be realized by issue of a summary process in execution against him.

JUDGMENT.— The relevant facts which gave rise to this appeal are given in the order of reference, as also in the opinion delivered by the Bench.

As a result of the opinion recorded by the Bench this appeal stands dismissed with costs in all the Courts to be paid by the appellants, 29th March 1924.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 3 OF 1924.

July 3, 1924.

Present:—Mr. Kendall, A. J. C.

Thakur JAGMOHAN SINGH, INSOLVENT—APPELLANT

versus

THE DEPUTY COMMISSIONER, FYZABAD—RESPONDENT.

Provincial Insolvency Act (*V of* 1920), *s.* 41—*Order of discharge—Refusal to grant discharge, propriety of.*

Where an insolvent's assets were not of a value equal to eight annas in the rupee and the insolvent far from helping the Receiver to pay his debts, had obstructed him.

Held, that the order refusing to grant a discharge was perfectly reasonable.

Appeal against the order of the Judge, Fyzabad, dated the 5th October 1923.

Mr. *Naimullah* for Mr. *Niamat Ullah*, for the Appellant.

Mr. *R. B. N. N. Ghoshal*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the learned District Judge of Fyzabad refusing to grant a discharge to the appellant under section 41 of the Provincial Insolvency Act. The appellant was adjudicated insolvent on March 1st, 1912. Two of his creditors had secured debts, and the other

was the Court of Wards which had a decree for nearly Rs. 4,000. The only property possessed by the appellant, apart from that mortgaged to the secured creditors, was an occupancy tenancy. This, it appears, was handed over to the Receiver when the appellant was adjudicated insolvent. When he applied for discharge the Court found that the insolvent's assets were not of a value equal to 8 annas in the rupee, and it also found from a report of the Receiver that the insolvent, so far from helping the Receiver to pay his debts, had rather obstructed him. In these circumstances it would have been improper to grant a discharge, and I am of opinion that the District Judge's order is a perfectly reasonable one. There does not appear to be much prospect of the appellant's ever being discharged as he is now an old man, and he has practically no property, and the debt is a large one. It really rests with the creditors. The appeal is, therefore, dismissed with costs.

G. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1169 OF 1923.

April 1, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Graham.

CHANDRA KUMAR MUKHOPADHYA —PETITIONER

versus

SM. SUDHANSU BADANI DIN AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code, (Act V of 1908), ss. 151, 152, O. XX, r. 6, *Decree, amendment of—Decree not in conformity with judgment—Court, duty of—Inherent jurisdiction of Court.*

When it is discovered that a decree does not agree with the judgment it is the duty of the Court to amend the decree so as to bring it into conformity with the judgment.

The power of the Court to amend the decree is not confined to the provisions of O. XX, r. 6, or to section 152 of the Civil Procedure Code for it is a matter within the inherent jurisdiction of the Court and it may be exercised under section 151 of the case which does not restrict the illimitable inherent jurisdiction of the Court.

Brijratan v. *Jaymarain*, 7 Ind. Cas. 876; 37 C. 649; *Barhamdeo Singh* v. *Harmonage Narain Singh*, 23 Ind. Cas. 419; 20 C. L. J. 18; 18 C. W. N. 572, relied on.

The word "may" in section 152 of the Civil Procedure Code does not make it discretionary with the Court to order the correction but merely enlarges the power of the Court' by proving that such correction can be done 'at any time.'

Shivapa v. *Shivapanch Lingapa*, 11 B. 284 ; 6 Ind. Dec. (N. S.) 186; *Kalu* v. *Latu*, 21 C. 259; 10 Ind. Dec. (N. S.) 805 ; *Menat Ali* v. *Amdar Ali*, 9 C. W. N. 605; *Basanta* v. *Khulna Loan Co.*, 26 Ind. Cas. 197 ; 20 C. L. J. 1 ; 19 C. W. N. 1001 ; *Surendra Nath Roy* v. *Girija Nath Roy*, 15 Ind. Cas. 910; 15 C. L. J. 658, followed.

The only exception to the general rule as to correction of decrees is that the Court will refuse to make the amendment where it offends against the principles of equity

Hatton v. *Harris*, (1892) A. C. 547 ; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722, relied on.

Rule in the matter of Suit No. 41 of 1919 (partition) of the Sub-Judge, 1st Court, Dacca; decree dated the 10th April 1919.

Babu *Jatendra Kumur Sen Gupta*, for the Petitioner.

Babu *Nripendra Chandra Das*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule was issued on the opposite party to show cause why the decree passed in suit No. 41 of 1919 in the Court of the First Subordinate Judge of Dacca should not be amended as prayed in the petition. The suit was a partition suit and on the 10th April 1919, the Subordinate Judge of Dacca passed a decree on it. There was an appeal to the District Judge by the party other than the petitioner and the Defendant No. 7. The decree of the first Court was affirmed on the 7th August 1920. There was a Second Appeal to this Court which was dismissed under O. XLI r. 11 on the 14th March 1921. The decree was executed and possession was delivered to the different parties on the 8th February 1922. It is stated that the petitioner at that time discovered the mistake, namely, the omission

of a certain direction in the decree and he applied on the 18th July 1922 to the Court of the Subordinate Judge of Dacca for its amendment. That application remained pending till the 9th June 1923 when it was dismissed on the ground that the application should have been made to this Court, the original decree having merged in the decree of this Court in the Second Appeal. Hence the petitioner moved this Court and obtained the present Rule. The defect in the decree complained of is this. The petitioner was the Defendant No. 8 in the Court below. In the partition suit a Commissioner was appointed; and the parties by mutual consent agreed to the allotments made by him. The real dispute in the present matter lies between Defendant No. 8 who is the petitioner and the defendant No. 7 who is the contesting opposite party. The two plots allotted to these two defendants are contiguous. It was agreed that Defendant No. 8 (the petitioner) should give a road over his plot No. 8 to Defendant No. 7; and in exchange get a 2 feet wide strip of land from east to west being the northern portion of plot No. 7 which was allotted to Defendant No. 7. All these terms are embodied in the judgment. The decree, however, though it mentions that a way will be kept over plot No. 8 for access to plot No. 7, from the north does not mention of the 2 cubits, wide strip of land to be allotted to Defendant No. 8. The defendant No. 8 has accordingly applied to have that clause inserted in the decree and thus make it conform to the judgment.

It is not seriously disputed that there has been this omission; but it is argued by defendant No. 7 that the amendment should not be allowed at this stage, first, because it is not proved that he had consented to the giving up of this strip of land and secondly, because, his right to appeal from the amended decree will now be barred. I do not think that these considerations ought to prevail against a plain duty of the Court. The real question that arises in this case is, that, conceding that the decree is at variance with the judgment, whether it is in the discretion of the Court, considering the length of time after which the application for amendment is made and the other circumstances, to refuse to bring it into conformity with the judgment. The learned Vakil for the petitioner contends that when it is discovered that the decree does not agree with the judgment, it is the duty of the Court to amend the decree so as to bring it into conformity with the judgment. In my judgment that is the true view of the law. A decree has been defined in section 2 of the Code of Civil Procedure as the formal expression of an adjudication which completely determines the right of the parties with regard to the matter in controversy in the suit. This formal expression of adjudication means that the decree is a concise statement of the adjudication of the rights of the parties by the Court as expressed in the judgment. A decree, therefore, does not and can not travel beyond or short of the judgment and must follow it. The law with regard to amendment of decree was expressed in section 206 of the Code of 1882. That Section was in these terms: "If the decree is found to be at variance with the judgment or if any clerical or arithmetical error be found in the decree, the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment or to correct such error." It made it obligatory on the Court if there is any variance between judgment and decree, to bring them into conformity. That section in the old Code was split up and its several parts embodied in different sections of the new Code. The first portion of the section made it obligatory that the decree should conform to the judgment and is reproduced in r. 6, O. XX. The latter portion of the old section is re-enacted in section 152 of the present Code. The power of the Court to amend the decree is not confined to provisions of O. XX, r. 6 or to section 152 for it is a matter within the inherent jurisdiction of the Court and it may be exercised under section 151 which, however, does not restrict the illimitable inherent jurisdiction of the Court as is observed in the cases of *Brijratan* v. *Jaynarain* (1) and *Barhamdeo Singh* v. *Harmonage Narain Singh* (2).

It is, however, urged that section 152 gives the Court a discretion to allow or not an application for amendment of a decree. In my opinion, this is not the correct reading of the section. It no doubt says that when a clerical

(1) 7 Ind. Cas. 876; 37 C. 649.
(2) 23 Ind. Cas. 419; 20 C. L. J. 18; 18 C. W. N. 772.

or arithmetical mistake is discovered in the decree, the Court *may* at any time correct it. The word 'may' in the section does not make it discretionary with the Court to order the correction but merely enlarges the power of the Court by proving that such correction can be done 'at any time' or in other words, the section simply emphasises that no lapse of time would disentitle the Court to make the correction. As has been observed the intention of the law is to make it obligatory upon the Court whenever any such mistake is discovered to correct it and section 152 merely emphasises that duty of the Court by saying that it may be done at any time without limitation. This view, namely, that it is the duty of the Court to amend the decree when it is brought to its notice that it does not agree with the judgment, is supported by a number of cases of which reference may be made to the cases of *Shivapa* v. *Shivapanch Lingapa* (3), *Kalu* v. *Latu* (4), *Menat Ali* v. *Amdar Ali* (5), *Basant Kumar Bose* v. *Khulna Loan Co.* (6), and *Surendra Nath Roy* v. *Girija Nath Roy* (7). The only exception to this general rule is that the Court will refuse to make the amendment where it offends against the principles of equity; for instance, it may not be desirable to amend the decree where the interest of a third party (who may be a *bona-fide* transferee for valuable consideration) may be jeopardised. *Henry Hatton* v. *Harris* (8). A reference to the reported cases on this point shows that amendment has been allowed even long after the passing of the decree without limit of time. I am, therefore, of opinion that the decree should be amended by inserting the following words: "Defendant No. 8 will get a space 2 cubits broad throughout the entire length of plot No. 7 and contiguous to plot No. 8 in consideration of the space that he shall have to keep open for ingress and egress to and from plot No. 7 over the land of plot No. 8."

Both parties further pray that another omission in the decree should also be supplied by inserting the words: "The eastern boundary of plot No. 8 may fluctuate but the way must always be 2 cubits broad from its eastern limit whatever that may be" after the direction about the keeping of a road 2 cubits broad from plot No. 7 northwards over the eastern limit of plot No. 8. These words should also be inserted.

This Rule is accordingly made absolute. In the circumstances of this case we make no order as to costs.

Graham, J.—I agree with my learned brother that this Rule should be made absolute. It has not been disputed thas the decree is not in conformity with the judgment. Under O. XX, r. 6 of the Code the decree must be in conformity with the judgment and it is the duty of the Court to see that there is such agreement. No question of limitation arises and under section 152, Code of Civil Procedure an omission of this nature in the decree can be corrected by the Court at any time. There are reported cases in England where such amendment has been made after the lapse of many years. Where property has changed hands subsequent to the passing of the decree and delivery of possession, other considerations arise. But this is not a case of that nature. I agree that the omission ought to be rectified by amending the decree so as to bring it into conformity with the judgment.

M. B. *Rule made absolute.*

(3) 11 B. 284; 6 Ind. Dec. (N. S.) 186.
(4) 21 C. 259; 10 Ind. Dec. (N. S.) 805.
(5) 9 C. W. N. 605.
(6) 26 Ind. Cas. 197; 19 C. W. N. 1001; 20 C. L. J. 1.
(7) 15 Ind. Cas. 910; 15 C. L. J. 658.
(8) (1892) A. C. 547; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 96 OF 1923.

May 23, 1924.

Present:—Mr. Pullan, A. J. C.

SARDAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. IQBAL NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (IV of 1872), s. 91—Receipt for payment of money—Oral evidence, whether admissible.

SARDAR SINGH *v.* IQBAL NARAIN

A receipt acknowledging payment of money is not a contract, grant or disposition of property within the meaning of section 91 of the Evidence Act.

Therefore, where a receipt is found to be suspicious or is unregistered, oral evidence as to its contents is admissible.

Appeal against the decree of the Fourth Additional District Judge, Lucknow, dated the 8th January 1923, in an appeal preferred against the decree of the Subordinate Judge, Lucknow, dated the 17th May 1921.

Mr. *Niamatullah*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This is a second appeal in a suit brought on the basis of a mortgage-deed. The suit was decreed in part against certain of the defendants and various issues were raised in the lower Court. In the grounds of appeal two main points have been raised :—(1) That the debt not being an antecedent debt is no charge on the joint family property ; (2) that the respondents having set up a written receipt as evidence of payment to the prior mortgagee and that receipt having been held by the Courts below as suspicious, oral evidence in proof of the said payment was inadmissible in law. The first of these grounds of appeal has been dropped in view of the recent decisions of the Privy Council, and a third ground of appeal on the question of limitation has also not been pressed. Only the second ground of appeal remains. Part of the mortgage money consisted of a sum of Rs. 477 alleged to have been paid in execution of a decree in favour of certain prior mortgagees. The plaintiff produced as evidence of this payment a receipt signed by the payee and also by two witnesses. The payee was examined as a witness and he attested the receipt and admitted that he received the money and also showed that he acknowledged the payment in Court on 20th October 1905. The Court of first instance made no comment on the receipt but the First Appellate Court thought that it was in some way suspicious. In spite of this the Court admitted the evidence of the payee and found the payment proved. It is now argued that the oral evidence was inadmissible under section 91 of the Evidence Act. Now section 91 of the Evidence Act excludes oral evidence when the terms of a contract, or of a grant or of any other disposition of property have been reduced to the form of a document, and the meaning of the section is clearly this that oral evidence shall not be admitted in substitution for a document of a certain nature. The document in the present instance is a receipt. It is not a contract or a grant nor in the ordinary sense of the term is it a disposition of property. It is true that the money was intended to pay off a decree passed on a mortgage and in a certain sense there was still a charge on the property until the money was paid. But I am not prepared to hold that a receipt of this kind is intended to fall under section 91 of the Evidence Act, and it has always been accepted that even where a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. A further point was raised in argument, though it was not in issue in the lower Courts, nor stated in the grounds of appeal, namely, that this receipt ought to have been registered. But lack of registration does not bring the document within the scope of section 91 of the Evidence Act and there is direct authority of the Madras High Court in the ruling reported in *Appamma Nayuralu* v. *Ramanna* (1), that a receipt of this nature could be received in evidence of payment even though it was not registered and that in any case oral evidence of the same would have been admitted. In the present case I am not satisfied that there is any definite finding that the receipt is suspicious. Even if it were suspicious oral evidence was admissible and that oral evidence coupled with the further documentary evidence afforded by the payee's acknowledgment in Court proves without any doubt that this sum of Rs. 477 was actually paid. As it is no longer alleged that this sum is not binding on the appellants if it were actually paid the appeal is bound to fail. I dismiss the appeal with costs.

G. H. *Appeal dismissed.*

(1) 23 M. 92 ; 9 M. L. J. 124 ; 8 Ind. Dec. (N. S.) 458.

SULTANALI *v.* BALAJI

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 209-B OF 1923.

March 29, 1924.

Present:—Mr. Kinkhede, A. J. C.

SULTANALI—PLAINTIFF—APPLICANT

versus

BALAJI—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 39, O. XXI, rr. 7, 8, 10, 11—Decree, transfer of—Court to which decree transferred, when can execute—Fraudulent decree—Remedy—Injunction to restrain institution of proceedings—Cause of action, when accrues—Jurisdiction.

Where a Court transfers its decree for execution to another Court, the latter Court although clothed with jurisdiction to execute the decree as soon as the Judge orders that the necessary copy of the decree and certificate be filed in Court, will not and cannot execute it unless and until regular application for execution is made to it under O. XXI, rr. 10 and 11, Civil Procedure Code.

In the case of a fraudulent decree the remedy is by way of injunction to restrain the party from executing the decree.

The India Provident Company Limited v. *Gobinda Chandra Das*, **65 Ind. Cas. 318, followed.**

Injunction can be legally claimed and granted in order to restrain the institution of proceedings, that is in anticipation.

Besant v. *Wood*, **(1879) 12 Ch. D. 605, at p. 630; 40 L. T. 445; *Hart* v. *Hart*, (1881) 18 Ch. D. 670; 50 L. J. Ch. 697 ; 65 L. T. 13 ; 30 W. R. 8, followed.**

The right to the relief of injunction to restrain the decree-holder from applying to execute his decree on the ground that it was obtained fraudulently accrues and is enforceable by suit even though the decree-holder defendant has not applied for execution, or the Court has not actually put it into execution.

In cases other than those substantially falling within the scope of suits respecting immoveable property or suits for land, if the cause of action to sue for injunction has wholly or in part arisen within the jurisdiction of any Court that Court has jurisdiction to entertain the suit, under section 20, clause (c) of the Civil Procedure Code.

Appeal against the decree of the District Judge, Amraoti, in Miscellaneous Appeal No. 25 of 1923, dated the 29th September 1923.

Mr. *M. Y. Shariff*, for the Applicant.

Mr. *M. B. Bowe*, for the Non-applicant.

JUDGMENT.—The applicant is a judgment-debtor and the non-applicant is a decree-holder under a decree passed by the Small Cause Court, Bombay, in Civil Suit No. 1007|10509 of 1922. The decree is dated 14th July 1922 and was passed *ex parte* against the applicant. The decree-holder applied to the Court, which passed the decree to send it for execution under section 39 of the Civil Procedure Code to the Court of Subordinate Judge, Amraoti.

On 22nd December 1922, by which time no application for execution of the decree as prescribed by O. XXI, rr. 10 and 11, Civil Procedure Code, was made to the said Court, the applicant filed his suit in that Court (of Subordinate Judge, Amraoti) that is, the very same Court through which the decree-holder was desirous of executing his aforesaid Bombay decree, and prayed that a decree granting injunction restraining the defendant (decree-holder) from applying for execution of the said decree and recovering the decretal amount, on the ground that the decree was obtained fraudulently be passed against him. The defendant raised the plea that as the decree was not actually put into execution within the jurisdiction of the Amraoti Court, that Court had no jurisdiction to entertain the suit. The first Court upheld the contention and returned the plaint for presentation to the proper Court. Against this order an appeal was preferred to the Court of the District Judge, Amraoti, by the plaintiff, but he dismissed the appeal after discussing some case-law. In the Courts below a large number of rulings were discussed and the Judges have tried to justify their conclusions by reference to them or by distinguishing them. The following were amongst the cases so discussed: *Banke Behari Lal* v. *Pokhe Ram* (1), *Umrao Singh* v. *Hardeo* (2), *Dan Dayal* v. *Munna Lal* (3), *Jawahir* v. *Neki Ram* (4), *Khushali Ram* v. *Gokul Chand* (5), *Lakshmi*

(1) 25 A. 48 ; A. W. N. (1902) 179.
(2) 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392.
(3) 24 Ind. Cas. 978; 36. A. 564; 12 A. L. J. 955.
(4) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.
(5) 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638.

SULTANALI *v.* BALAJI

Charan Saha v. *Nur Ali* (6), *Ram Lal-Izhar Das* v. *Salig Ram* (7), and *The India Provident Company Ltd.* v. *Gobinda Chandra Das* (8). The plaintiff has come up to this Court and asks for interference in revision.

Two questions arise for consideration. (1) Whether the plaintiff's cause of action to sue the defendant for injunction to restrain him from executing the fraudulent decree could arise even though no application for execution of the decree had been made; and (2) Whether that cause of action could arise within the jurisdiction of the Court of the Subordinate Judge, Amraoti, which received the decree and the certificate for execution and ordered the same to be filed as laid down in O. XXI, rr. 7 and 8 of the Civil Procedure Code. Under section 42 of the Civil Procedure Code the Court to which the decree is so sent has the same powers of executing the decree as if it had been passed by itself. Section 51 lays down the powers of the Court to enforce the execution of the decree and specifies the several modes in which a decree could be executed. O. XXI, rr. 5 to 8 of the Civil Procedure Code prescribe the mode of transfer and the procedure to be adopted and the documents to be forwarded and the record to be made by the Courts concerned, whenever a decree is transferred by one Court for execution within the jurisdiction of another Court. Rules 10 and 11 of the said Order lay down the essential steps for actually starting execution of the decree. It will thus be seen that where a Court transfers its decree for execution to another Court, the latter Court although clothed with jurisdiction to execute the decree as soon as the Judge orders that the necessary copy of the decree and certificate be filed in Court, will not and cannot execute it unless and until regular application for execution is made to it under O. XXI, rr. 10 and 11, Civil Procedure Code. In the case of a fraudulent decree the remedy is by way of injunction to restrain the party from executing the decree as laid down in *Kunhamed* v. *Kutti* (9).

(6) 11 Ind. Cas. 626; 33 C. 936; 15 C. W. N. 1010.
(7) 59 Ind. Cas. 2; 7 P. W. R. 1921.
(8) 65 Ind. Cas. 816.
(9) 14 M. 167.

It is argued that both the Courts have misread the real stand-point in the case with reference to which the case could be decided. If the view that has prevailed in the lower Courts is accepted as correct then no judgment-debtor against whom a fraudulent decree has been obtained by another person will be in a position to sue for injunction until the decree-holder actually makes the application for execution under O. XXI, rr. 10 and 11, Civil Procedure Code or the decree is actually executed by attachment or any of the modes prescribed for executing the decree; in other words he would not be entitled to obtain relief against a threatened infringement of his rights but must wait until his rights are actually infringed. It must be remembered that the grant of an injunction is not limited to infringements of rights already taken place, but that the basic idea of a suit for injunction to restrain the doing of any act is to prevent future or threatened injuries or infringements the repetition of which must be stopped in order to prevent multiplicity of suits or judicial proceedings. A suit in which a plaintiff seeks the relief of injunction is in essence based on the principle of a *quia timet* action (because he fears). It has been held that injunction can be legally claimed and granted in order to restrain the institution of proceedings, that is in anticipation. *Besant* v. *Wood* (10), *Hart* v. *Hart* (11), Kerr on Injunctions, 5th Edition page 13, Woodroffe's Law of Injunctions, 4th Edition page 159. It has similarly been held in India that even if the proceedings be not pending at the date of the institution of the suit in which the injunction was sought, but is contemplated and threatened only, there is nothing, the case being otherwise proper, to prohibit an injunction being granted against the actual institution of such threatened proceedings: see *Moran* v. *River Steam Nivagation Co.*, (12), *Appu* v. *Raman* (13).

In the case of *Appu* v. *Raman* (13), the Subordinate Judge prohibited certain parties from executing a decree which had been passed in their favour and which was on the file of the District Judge, it however, ap-

(10) (1879) 12 Ch. D. 605 at p. 630; 40 L. T. 445.
(11) (1881) 18 Ch. D. 670; 50 L. J. Ch. 697; 65 L. T. 18; 30 W. R. 8.
(12) 14 B. L. R. 352.
(13) 14 M. 425 at p. 430; 5 Ind. Dec. (N. S.) 298.

pearing that no application for execution had been made, it was held that the prohibition was not an injunction to stay proceedings in the Court of the District Judge, but that the effect of the injunction granted by the Subordinate Judge was to prevent those parties from applying to the District Court to execute its decree. As no application for execution had till then been made in that case, and so long as the injunction was in force none could be made, no pending proceedings of a Court could be said to be restrained by the injunction. The decided cases clearly contemplate the granting of a preventive relief by issue of an injunction even where the injury to one's rights is merely threatened or contemplated. The previous making of the application for execution is not, therefore, a necessary condition precedent to the enforcement of the plaintiff's right to demand the relief of injunction. If such an application is as a matter of fact made and the Court has ordered execution of the decree, that will of course give him a right to further relief and even to ask for an *ad-interim* injunction staying further proceedings.

I, therefore, hold that the right to the relief of injunction to restrain the decree-holder from applying to execute his decree on the ground that it was obtained fraudulently accrues and is enforceable by suit even though the decree-holder defendant has not applied for execution, or the Court has not actually put it into execution.

The next question is whether the transfer or receipt of a copy of such a decree and certificate thereof for execution within the territorial limits of the jurisdiction of the Court of Subordinate Judge, Amraoti, gives jurisdiction to that Court or to any other Court of competent jurisdiction exercising powers within those limits, to try a suit for injunction to restrain the execution of the decree, the other conditions and limitations prescribed for giving jurisdiction to such Court being complied. If the plaintiff has got under law a right which is either a right *in Personam* or a right to property, to say that his person and property wherever situate is free from arrest or attachment, or that they are not subject to any other process of execution open under law to an executing Court to issue in execution of a decree on the ground that the decree is fraudulent, and if such right is threatened or contemplated or likely to be infringed by a possible execution of that decree by the Court which has received it for execution against the judgment-debtor or his property on any of the grounds mentioned in section 39 and in any of the modes prescribed in section 51, Civil Procedure Code, I dare say that the plaintiff's cause of action must be taken to have arision, if not wholly at least in part, within the territorial limits of the jurisdiction of such executing Court. There is the right of the plaintiff and there is the threat of aninfringement of that right held out and likely to be translated into action through the instrumentality of the Court receiving the decree and certificate for execution against him. Where such executing Court is also the Court in which the suit is instituted there ought to be no difficulty on the ground of jurisdiction in the matter of obtaining the necessary relief of injunction from that very Court.

In cases other than those substantially falling within the scope of suits respecting immoveable property or suits for land, if the cause of action to sue for injunction has wholly or in part arisen within the jurisdiction of any Court that Court has jurisdiction to entertain the suit under section 20 clause (*c*) of the Civil Procedure Code. I, therefore, hold that the Court of the Subordinate Judge, Amraoti, was competent to entertain the suit for injunction.

In this view I need not discuss at length the cases cited by the lower Courts and show how some of them are distinguishable or beside the point. I, however, note my express dissent from the observations in the case of *Banke Behari Lal* v. *Pokhe Ram* (1), quoted by the Court of first instance in its judgment as they appear to me to be opposed to the very principle on which preventive reliefs can be granted by law Courts, in anticipation in order to avert a threatened injury. The order returning the plaint for presentation to proper Court is, therefore, liable to be set aside under section 115 of the Civil Procedure Code as an erroneous decision involving a question of jurisdiction cf : *Ganesh Prasad* v. *Rewa Bai* (14).

The application is allowed and the order returning the plaint for presentation to proper

(14) 41 Ind. Cas. 883; 18 N. L. R. 116.

Court is set aside and the Court of first instance is directed to take the plaint on its file and to proceed with the suit and decide the same according to law. Counsel's fee Rs. 30. The applicant's costs of this and the lower Appellate Court will be paid by the non-applicant. Costs in the first Court will abide the result.

K. S. D. *Revision allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 147 OF 1923.

May 23, 1923.

Present :—Mr. Wazir Hasan, J. C.

IBAD ASHRAF AND ANOTHER—
DEFENDANTS—APPELLANTS
versus
Sheikh INAYET ULLAH—
PLAINTIFF—RESPONDENT.

Specific Relief Act (*I of* 1877), *s.* 39—*Suit for cancellation of mortgage—Want of mortgagor's title—Estoppel.*

The priniciple of estoppel between the mortgagor and the mortgagee works in favour of and against both of them.

A mortgagee in possession is estopped from denying the title of his mortgagor during the continuance of the mortgage, just in the same way as the mortgagor is estopped from varying his own authority to mortgage the property.

Therefore, a mortgagee after he has obtained possession of the mortgaged property in pursuance to the contract of mortgage cannot claim the relief of cancellation of the mortgage under section 39 of the Specific Relief Act on the ground that his mortgagor had no authority to mortgage the property.

Appeal against the decree of the First Additional District Judge, Lucknow, dated the 16th March 1923.

Mr. *M. Wasim*, for the Appellants.

Dr. *J. N. Misra* for Mr. *Haidar Husain*, for the Respondent.

JUDGMENT.—On the 13th August 1920 one Muhammad Ashraf, the father of the defendants Ibad Ashraf and Hamid Ashraf appellants, executed a deed of mortgage in favour of the plaintiff respondent, Inayatullah. It is admitted in the plaint that in pursuance of this mortgage the mortgagee was put in possession of the property conveyed to him under the deed of mortgage and that on the date of the suit out of which this appeal has arisen he was in such possession. He brought this suit to have the instrument of mortgage cancelled. This relief was open to him to claim under section 39 of the Specific Relief Act if it were established that he had a title to such a relief. The Courts below have granted this relief to him. The accuracy of the decisions of those Courts is impugned in second appeal before me.

The judgments of the Courts below have digressed into several points which to my mind appear to be wholly immaterial for a right decision of the present suit. The plaintiff's case as disclosed in the plaint is a simple one. He says that the mortgage in question was executed, that he paid a part of the consideration to the mortgagor, that the mortgagor put him in possession of the mortgaged property, that mutation proceedings followed, that in the course of those proceedings he discovered that the mortgagor had previously to the mortgage in question executed a deed of *waqf* with regard to a large number of properties including the one which was mortgaged under the deed in question and that, therefore, the mortgagor had no title which he could transfer to the mortgagee under the said mortgage. On this cause of action he asks for the relief mentioned above. In his oral pleadings he also stated in a general way that the claim rested on the ground of fraud as well but no particulars of fraud were ever stated, and considering the findings of the lower Appellate Court the whole case with respect to fraud comes only to this that the mortgagor abstained from disclosing the existence of the *waqf* at the time when the contract of mortgage was completed between the parties. This by itself is no fraud whatsoever and, therefore, no relief can be granted on that basis. The case must, therefore, be decided with reference to the sole question as to whether the absence of title of the mortgagor

as discovered by the mortgagee after he had obtained possession will entitle the latter to a decree for cancellation of the instrument of mortgage.

My answer to this question is in the negative. The mortgagee when put into possession by the mortgagor in pursuance of the contract of mortgage is estopped from denying the title of his mortgagor certainly during the continuance of the mortgage. That the mortgage still continues is admitted on the pleadings as I have already said. The principle of estoppel between mortgagor and mortgagee works in favour of and against both of them. The mortgagor is estopped from denying his own authority to mortgage the property. On the other hand, the mortgagee is estopped from denying the authority of the mortgagor to make the mortgage. See the decision in the case of *Hillayas Subbaya Hedge* v. *Narayanappa Timmaya* (1).

It is satisfactory to note that the conclusion at which I have arrived is eminently equitable also in the circumstances of this case. The Court below has found that the deed of *waqf* contained provisions for redeeming the mortgage existing on the trust property anterior to the date of the plaintiff's mortgage. The creator of the trust is a trustee also. He, therefore, had authority to exercise the powers vested in him as a trustee to carry out the provisions of the deed of *waqf* mentioned above and in the mortgage in question express obligation was laid on the mortgagee to pay off the prior mortgages. Indeed the whole of the mortgage money except a very small portion of it was left with the mortgagee for that purpose. So far, therefore, as the mortgagee is concerned, he has suffered no harm nor is there an apprehension of any injury in future. The present defendants are trustees under the *waqf* in succession to their father. In the present litigation they have expressed their willingness to abide by the mortgage in suit.

These being the facts it is not possible to comprehend the reasons which impelled the plaintiff to rush into Court. If he is disturbed in possession of the mortgaged property by a previous mortgagee he can save the situation by paying him off and this will be merely discharging the obligation which he took upon him under the mortgage in dispute.

The result is that I allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in both the Courts below but without any order as to costs in this Court.

G. H. *Appeal allowed.*

(1) 12 Ind. Cas. 913; 36 B. 185; 13 Bom. L. R 1200.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 52 OF 1921.

June 12, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

Saiyid ISMAIL HASAN —DEFENDANT —APPELLANT

versus

Saiyid MAHDI HASAN AND OTHERS —PLAINTIFFS —RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76—Contract Act (IX of 1872), s. 73—Surplus mortgage-money—Interest, award of—Interest by way of damages.

In the absence of a stipulation to that effect a mortgagor who sues for redemption is not entitled to any interest prior to the institution of the suit on the surplus mortgage-money that is found with the mortgagee after the satisfaction of the mortgage. Nor can such interest be allowed by way of damages. The mortgagor, however, can recover interest as from the date of the suit, for the institution of the suit is really a notice to the mortgagee calling upon him to hand over the surplus money.

Janoji v. *Janoji*, 7 B. 185 ; 4 Ind. Dec. (N. S.) 125 ; *Leake* v. *Bell*, (1887) 34 Ch. D. 462 ; 56 L. J. Ch. 307 ; 55 L. T. 757 ; 35 W. R. 212, relied on.

Haji Abdul Rahman v. *Haji Noor Muhamed*, 16 B. 141 ; 8 Ind. Dec. (N. S.) 570, distinguished.

Appeal from a decree of the Subordinate Judge, Aligarh, dated the 8th September 1920.

Dr. *M. Wali Ullah* and Mr. *S. Raza Ali*, for the Appellant.

ISMAIL HASAN *v.* MAHDI HASAN

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was originally instituted by Saiyid Mahdi Hasan, respondent No. 1, for the redemption of a mortgaged property and for the recovery of the surplus usufruct realized by the mortgagee from the plaintiff. In the course of the trial other plaintiffs were added mainly because the original plaintiff's property had been transferred to them.

The original mortgagor was one Muhammad Zahur Hasan, whose son is the plaintiff No. 1, and whose widow was the defendant No. 5. The original mortgagee was one Muhammad Sadiq, whose descendants are the defendants Nos. 1 to 4. The other defendants are subsequent transferees.

The original mortgage was made for the sum of Rs. 5,500. It appears that at the date of the mortgage, which is the 17th of February 1895, the properties mortgaged, nine in number, were all held by prior mortgagees. It was agreed that the mortgagee Mahammad Sadiq should advance a sum of Rs. 900 in cash and should keep the balance of the consideration money to redeem the prior mortgages. It was also argeed that till the mortgages were redeemed the mortgagee Muhummad Sadiq should recover from the prior mortgagees sums of money payable by them to the mortgagor on account of certain stipulations contained in the mortgage-deeds. It appears that the prior mortgages were in the shape of *zar-i-peshgi* leases, by which the mortgagees advanced a sum of money and agreed to take a part of the usufruct of the property to compensate them for the money advanced and to pay to the mortgagor a portion of the usufruct. It was this portion that was orginally payable to the mortgagor and was made payable to Muhammad Sadiq.

There is no longer any dispute about the original plaintiff's right to redeem. The lower Court has decreed the suit, and has granted a decree for Rs. 13,000 and odd to the plaintiffs as surplus usufruct payable to the mortgagor. A substantial portion of this amount consists of interest.

It appears that the mortgagor died shortly after the mortgage, and his son Mahdi Hasan put as much obstruction as possible in the way of Muhammad Sadiq in obtaining possession. Muhammad Sadiq had to bring several suits, which will be mentioned in detail where necessary, and ultimately he succeeded in receiving a portion of the profits (*zar-i-nankar*) payable to the mortgagor, and later on, he succeeded in redeeming three of the nine properties and in obtaining possession thereof. It is in respect of these three villages, namely, Imamnagar, Rahmatpur and Bhainsara, that the present suit has been brought.

Only two points have been argued before us. It has been urged for the defendant No. 1 (appellant) Ismail Hasan that, the lower Court was not justified in awarding interest on the surplus amount, and that it was wrong in finding what was the money actually received by the mortgagee.

The account which was prepared in the Court below is printed at pages 28 and 29 of the printed record. It will be noticed that at page 29 in column one are the items which the mortgagee is supposed to have received since the execution of the mortgage. We have been told that the mortgagee never received anything out of the property, for years prior to 1307 *Fasli*, and that in 1307F and in subsequent years running up to 1311 *Fasli* the mortgagee received only a sum of Rs 176 a year. It is further stated that in the year 1312F the mortgagee received only a sum of Rs. 376. The learned Subordinate Judge in the account has allowed for the years 1302, 1303 and 1306F. different items as having been received by the mortgagee; and for subsequent years he has allowed a much larger amount than is admitted by the mortgagee.

There is not much of oral evidence in the case. The judgment at page 59 of the printed record will show that the plaintiff Mahdi Hasan started denying the title of the mortgagee Muhammad Sadiq almost immediately after his father died. Muhammad Sadiq had accordingly to bring a suit against Madhi Hasan to obtain a declaration that his mortgage was a valid transaction. In the course of the trial Mahdi Hasan was examined, and his deposition is to be found printed at page 55 of the record. In it he clearly stated that he instituted a suit against the prior mortgagee Muhammad Ali, and he received the money which was payable by him. Again, at page 56

he said that all the properties which should have been in the possession of the mortgagee were really in his possession and he was realizing all the profits which were to go to Muhammad Sadiq by agreement. It is clear, therefore, that on the date of the deposition, namely, 26th September 1898, Mehdi Hasan was in possession of all the properties, and the mortgagee Muhammad Sadiq had not succeeded at this date in realizing anything. September 1898 would correspond to 1306 Fasli (agricultural year). Thus it is clear that the first three items shown at page 29 of the printed record as the receipts by the mortgagee must go.

It appears that there was further litigation with the plaintiff. But this did not prevent the mortgagee Muhammed Sadiq from suing the previous mortgagees for redemption and for recovery of *zar-i-Nankar* or profit money which was to go to him under the terms of the lease of 1895. The decree at page 79 of the printed record shows that Muhammad Sadiq sued the prior mortgagees and obtained a decree for arrears of profits at the rate of Rs. 322-8 (which sum is admittedly the profits recoverable from the villages Rahmatpur and Bhainsara) for the years Rabi 1308 to Kharif 1311 F. Thus for at least a part of 1308 to a part of 1311 F. the mortgagee succeeded in realizing in the absence of evidence to the contrary, the money payable to him. It follows that for the years 1308 to 1311 he must be credited with the receipt of the profits as shown in the account framed by the Court below. It is admitted by the mortgagee that for the years 1307 to 1311 he received a sum of Rs. 176 from the village of Imamnagar. This sum, with Rs. 46, the amount of cess payable by Muhammad Sadiq would make up the profits from Imamnagar which is about Rs. 214 a year. If we add this sum to the sum decreed, the full amount debited to him for the years 1308 to 1311 would be debitable against him. There remains the year 1307. There is nothing to show that the mortgagee received anything from the property beyond the sum of Rs. 176 as admitted by him. It was, indeed, the duty of the mortgagor to put the mortgagee in possession, but he having failed to perform his duty the mortgagor cannot debit the mortgagee with any amount which is not shown to have been actually received by him. As regards the year 1312, it appears that the mortgagee obtained possession of the villages Rahmatpur and Bhainsara in the year 1904 A. D., that is to say, he actually got possession after the redemption of the property. It is admitted by the parties that the actual profits of the three villages are to be taken at the figure Rs. 950. Thus the lower Court was right in debiting the morgagee with the sum of Rs. 950 from 1312 onwards.

The next question is one of interest. The question is whether a mortgagor who sues for redemption is entitled to any interest on the surplus mortgage-money that is found with the mortgagee, after the satisfaction of his mortgage. It is admitted (and we have gone through the deed itself) that there is no express stipulation as to payment of any interest on the surplus mortgage-money. There is a stipulation that interest at 12 per cent. per annum would be paid on the money advanced by the mortgagee. The law on the subject would be found in section 76 of the Transfer of Property Act (IV of 1882). Sections 72 and 76 lay down the duties of the mortgagee in possession of the mortgaged property, and as to how he is to keep accounts. Under section 72 a mortgagee is given the right to spend money for the preservation of the mortgaged property, for making his own title good against the mortgagor and so forth, and is permitted to charge interest on the money so expended at the rate of nine per cent. per annum where no interest is fixed to be payable on the principal amount. In section 76, the mortgagee is directed as to how he is to keep accounts, and it is mentioned that as against the receipts from the mortgaged property he is to deduct the expenses mentioned in clauses (*c*) and (*d*) and *the interest thereon*. Further on, it is stated that the surplus, if any, shall be paid to the mortgagor. It is not mentioned that the surplus is to be paid with interest. It does not seem likely that the framers of the Code overlooked the fact that interest might be payable. They made an express mention of the term 'interest' in section 72 and also in section 76 itself. So it is not probable that the non-mention of the word 'interest' in connection with surplus usufruct was due to any oversight. Coming to cases decided in India, we find that the Bombay High Court in the case of *Janoji*

v. *Janoji* (1) awarded interest on the surplus profits only from the date of the institution of the suit. This was a suit decided in accordance with English practice and Setons on decrees was quoted. In the English case of *Lake* v. *Bell* (2), interest was allowed at 4 per cent. from the date of the claim. In the case of *Haji Abdul Rahman* v. *Haji Noor Mahomed* (3), Mr. Justice Telang allowed interest from the date of the surplus money coming into the hands of the mortgagee. But it was an entirely different case. In that case the mortgagee exercised his private right of sale given him under the mortgage, and it was on the surplus amount that remained in his hands after the sale that the interest was allowed. This case is different in principle from the case reported in *Janoji* v. *Janoji* (1), referred to above. In deciding this case the learned Judge purported to follow an English case, namely, *Charles* v. *Jones* (4). In that case, too, it was on the surplus money that remained in the hands of the mortgagee after the exercise of the right of private sale that the interest was allowed. On a consideration of the language of the Transfer of Property Act and on the authorities quoted we are of opinion that no interest is payable on the surplus mortgage money till the date of the institution of the suit. The institution of the suit is really a notice to the mortgagee calling upon him to hand over the surplus money. From that date the mortgagor will be entitled to interest. Before leaving the point we may mention here that the mortgagor was being paid annually the sum of Rs. 333, and he never told the mortgagee that his money had been paid up out of the usufruct of the property and it was time that he handed over the property to him. It has not been urged before us that interest might be allowed on the surplus mortgage-money by way of damages. But we have considered the point and we think that it is not proper to allow interest by way of damages. Interest by way of damages can be allowed only under section 73 of the Contract Act. In most of the cases for redemption usually it is not till an account has been taken that it is discovered on what date there was a surplus in the hands of the mortgagee. Under section 73 of the Contract Act the party who suffers from a breach of contract is entitled to compensation for any loss or damage caused to him thereby. In the case of surplus profits coming into the hands of the mortgagee, it cannot be said that any contract has been broken especially where there is no express contract. Further, damages can be awarded only when they are not too remote. Only those damages which naturally arise in the usual course of things from such breach can be allowed. It is not in all cases where a sum of money due to one party is in the hands of another that interest may be allowed by way of damages. In a recent case decided by us we held that interest could ordinarily be allowed either on the Interest Act or where there is a stipulation. We have quoted authorities for our opinion. We have shown in that case that in every case interest cannot be claimed simply because some money is due. We, therefore, do not think it possible to award interest by way of damages.

The result is that the appeal succeeds to the amount of Rs. 6,278-1-0 interest and Rs. 1,701-12-0 principal amount. Deducting these two sums from the sum decreed by the Court below as surplus amount the plaintiff's would be entitled to the sum of Rs. 5,914-1-0. The appeal is allowed as stated above for the sum of Rs. 7,979-13-0 with proportionate costs to parties which will include counsel's fees in this Court on the higher scale.

It appears that the appeal has been valued at the surplus amount plus a sum of Rs. 5,100, the valuation of the claim as made in the Court below. The total valuation, therefore, was at Rs. 18,000 and odd. The appellant challenged the right of the plaintiff to redeem. This part of the appeal was not pressed and has been disallowed. In calculating the proportionate amount of costs, the total amount of the value of the appeal will be taken to be Rs. 18,000 and odd.

N. H. *Appeal partly allowed.*

(1) 7 B. 185; 4 Ind. Dec. (N. S.) 125.
(2) (1887) 34 Ch. D. 462 ; 56 L. J.. Ch. 307 ; 55 L. T. 757 ; 35 W. R. 212.
(3) 16 B. 141 ; 8 Ind. Dec. (N. S.) 570.
(4) (1887) 35 Ch. D. 544 ; 56 L. J. Ch. 745 ; 56 L. T. 848 ; 35 W. R. 645.

HEM SINGH *v.* BHAGWAT SINGH

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 216 OF 1921.

May 7, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

HEM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGWAT SINGH AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Contract Act (IX *of* 1872), *s.* 13—*Consent—Signing of document—Document signed by blind man—Misrepresentation of contents of document*—Non-est factum, *plea of*—Bona fide *purchaser for value, position of.*

The mere signing of a document does not necessarily imply consent. Thus if a blind man, or a man who cannot read, has a written contract falsely read over to him, the reader mis-reading to such an extent that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing it, then the plea of *non-est factum* is available to him and the signature so obtained is of no force.

The rule does not apply to a man who can read but who forbears to read the document. But the question is important only when it is raised between two innocent parties, for unless the document is wholly void, as it would be if the plea of *non-est factum* succeeds, an innocent party giving consideration cannot be deprived of an interest which he has taken under the deed; but where the question arises between a party deceiving and a party deceived it is immaterial whether the deed is void or voidable; and, even if the party deceived fails in his plea of *non-est factum*, that is to say, that there was no consent on his part within the meaning of the term as defined in the Contract Act, it is still open to him to prove that there was a mis-representation and to ask the Court to relieve him from the consequences of the transaction.'

Howatson v. *Webb*, (1908) 1 Ch. 1; 77 L. J. Ch. 32; 97 L. T. 730, followed.

Appeal from a decision of the Subordinate Judge, Darbhanga, dated the 6th May 1921.

Messrs. *Sultan Ahmed* and *N. N. Sinha*, for the Appellants.

Messrs. *C. C. Das*, *Hasan Jan*, *Janak Kishore* and *Jalgobind Prasad Singh*, for the Respondents.

JUDGMENT.

Das, J.—In my opinion there is no ground for interfering with the judgment of the learned Subordinate Judge. The short question which we have to decide in this case is whether in the circumstances of the case the plaintiff is entitled to take up the position that his rights are unaffected by the deed of release executed by him on the 10th August 1918 and the consent decree of the 12th August 1919 to which he was a party. The plaintiff is a blind man, aged 70. He was undoubtedly entitled to a half share in the joint family properties and he instituted a suit sometime in 1917 to have his share partitioned by metes and bounds. His case in the plaint was that the family had separated many years ago but that the properties which were the subject-matter of the litigation had never been partitioned by metes and bounds. Being a blind man and having no one to look after his interests he entrusted his case to one Harihar Prasad Singh who has been cited as defendant second party in this litigation and who is the father-in-law of one of his daughters. The plaintiff's case is that sometime in July 1918 Harihar Prasad suggested a compromise on the terms that he (the plaintiff) should execute a *thika-patta* in respect of the landed property in favour of the defendants. The plaintiff says that he readily consented to the suggestion made by Harihar Prasad Singh and executed a document on the 10th August 1918 which he believed to be a *thika-patta*, but which in fact was a deed of release. This was followed by the consent decree in the partition suit on the 12th August and according to the plaintiff he never agreed to the terms on which the case was settled although he was always ready and willing to settle, and thought that he did settle the case, on the terms that he had agreed to give a *thika-patta* of his properties to the defendants. He instituted the present suit on the 10th February 1919 in substance to have it declared that the deed of release and the consent decree are not binding upon him. The defendant's case is that the terms of settlement as contained in the consent

decree were in fact consented to by the plaintiff and that those terms were arranged by certain punches in Dhobgama to whom the matter was referred by the parties.

As I have said the plaintiff is a blind man aged 70 years having no one to look after him except a wife and a widowed daughter. The critical question in the case is did the plaintiff consent to relinquish his interest in the family property for a mere annuity. The term "consent" has been defined as follows in the Indian Contract Act—"Two or more persons are said to consent when they agree upon the same thing in the same sense." In England a plea of *non-est factum* is open to a party when there is a mis-representation as to the character of the document and the party deceived proves that his mind was directed to one thing and what he put his hand to was a document of an altogether different character. Whether the statement of the law in *Foster* v. *Mackinnon* (1), would be wholly supported to-day is a matter of some doubt. A distinction has been drawn in the more modern cases between misrepresentation as to the character of a document and misrepresentation as to the contents of a document and it seems to be the modern view that *when there is a misrepresentation as to the contents of a document, but not as to the character of the document the plea of* non est factum *is not available* to the party deceived, unless—and this is very important,—he is blind or illiterate. The point is put in this form in Halsbury's Laws of England Vol. 7 page 355. *The mere signing of a contract does not necessarily imply consent.* Thus, if a blind man, or a man who cannot read, or one who for some reason (not involving negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing, then, at any rate if there is no negligence, the signature so obtained is of no ...ce." In the passage quoted the rule appears to be confined first to a blind man, secondly, to a man who cannot read; and, thirdly, to a man who for some reason forbears to read. This was undoubtedly the view established in *Foster* v. *Mackinnon* (1), but so far as I understand the more modern decision is *Howatson* v. *Webb* (2), the rule does not apply to a man who can read but who forbears to read the document. But the question is important only when it is raised between two innocent parties, for unless the document is wholly void, as it would be if the plea of *non-est factum* succeeds, an innocent party giving consideration cannot be deprived of an interest which he has taken under the deed; but where the question arises between a party deceiving and a party deceived it is immaterial whether the deed is void or voidable; and, even if the party deceived fails in his plea of *non-est factum*, that is to say, that there was no consent on his part within the meaning of the term as defined in the Indian Contract Act, it is still open to him to prove that there was a mis-representation and to ask the Court to relieve him from the consequences of the transaction.

The question whether there was a consent on the part of the plaintiff to the terms of the deed of release and of the consent decree is a question of fact and the Subordinate Judge has accepted the evidence tendered on behalf of the plaintiff. The decision of the Trial Court on a question of fact is entitled to great weight and having anxiously considered all the evidence for myself I am unable to say that the conclusion at which the learned Subordinate Judge has arrived is not supported by the evidence in the record.

The case of the defendants is that the dispute between the parties was settled at the instance of punches at Dhobgama. Rambalak Singh one of the defendants in his evidence gave the names of the punches. He said that Rownak Singh, Adhiram Singh and Chaturi Singh were the punches and he added that there were no other punches. Now, none of these gentlemen has been examined on behalf of the defendants to support their case. It has, however, been suggested by Rambalak Singh that they have been won over by the plaintiff. The suggestion is in these words: "As far as I can remember all of them were

(1) (1869) 4 C. P. 704; 38 L. J. C. P. 310; 20 L. T. 887; 17 W. R. 1105.

(2) (1903) 1 Ch. 1; 77 L. J. Ch. 32; 97 L. T. 730.

summoned as witnesses They declined to come here as witnesses on our side, when they heard of the talk of *beeh*." We are informed that the term " beeh " refers to the sale of an interest in his share by the plaintiff Bhagwat Singh to Biseswar Lal. The suggestion is that Biseswar Lal who has purchased an interest in the share of Bhagwat Singh in the family properties is such an influential man in the village that he persuaded the punches not to give evidence on behalf of the plaintiff. But suggestion is not proof ; and on the evidence it is impossible to come to the conclusion that these three gentlemen Rowaak Singh, Adhiram Singh and Chaturi Singh have been won over by the plaintiff. The fact remains that none of the punches named as such by Rambalak Singh, the defendant, has come to the witness-box on behalf of the defendant. But one Kuldip later on came to the witness-box and said that he was one of the punches in the case. Kuldip undoubtedly is a resident of Dhobgama. Having regard to the evidence of Rambalak it is quite impossible to accept Kuldip as a truthful witness and we cannot regard Kuldip as one of the punches to whom, according to the case of the defendant, the dispute between the parties was referred. That being so, it is certainly a matter of comment that not a single witness from Dhobgama has come to support the case of the defendants. On the other hand the plaintiff has examined numerous witnesses from Dhobgama who swear that the case was in fact settled between the parties. They give the terms of the settlement and according to them the case was settled on the terms that the plaintiff would give a *thika-patta* of his interest in the joint family properties to the defendants. As I have said the question is a question of fact, and the learned Subordinate Judge who undoubtedly was in a far better position than this Court to arrive at the truth, accepted the plaintiff's case on this point. The oral evidence in my opinion did not support the case of the defendants, whereas numerous witnesses were called by the plaintiff who satisfactorily established the plaintiff's case.

Mr. Sultan Ahmad appearing on behalf of the defendants asked us to consider the terms of the deed of release and invited us to hold that the terms were such as a man in the plaintiff's position would readily agree to. Under the deed of release the plaintiff took an annuity of Rs. 400 per year ; an orchard of graft mangoes 1 *bigha* 10 *kathas* in area ; an orchard of seedling mango trees 10 *kahtas* in area and 6 kahtas of zerait land. The deed provided that the annuity of Rs. 400 would be reduced to Rs. 300 on the death of the annuitant's wife if she should predecease him ; and on his death, if he should predecease her, an annuity of Rs. 250 would be made to the widow. The deed also provided that upon the death of husband and wife Rs. 200 would be paid to each of the three daughters. Lastly it was provided that all debts due on bonds should be paid by the defendants. The evidence establishes that there was a sum of Rs. 2,600 due on a bond at the date of the transaction in suit.

Now these are the terms of the deed of release and in order to consider whether the terms are such as the plaintiff would readily agree to, we have to see what was the value of the plaintiff's share in the joint family properties. For the purpose of Court-fee the plaintiff valued his share at Rs. 10,000 but the learned Subordinate Judge arrived at the conclusion on the admission of one of the defendants that the nett income available to the plaintiffs was Rs. 700 a year. He based his conclusion on the evidence of Rambalak Singh, one of the defendants, who said as follows :— " Our zerait land has increased since the survey, to the extent of about 40 *bighas*. We had 70 to 80 *bighas* of *Serait* at the time of survey. We got orchards to the extent of 7 to 8 *bighas*. We have orchards of about 2 *bighas* at Dhobgama. Our cash income was about Rs. 800 at the time of survey. But it is about Rs. 500. We are to pay about Rs. 125 as revenue and Rs. 125 as cesses. The *zerait* lands are near about " Dhobgama." On this evidence the learned Subordinate Judge says as follows : " It is, therefore, clear that their total income from *zerait* and *nagdi* lands would be 16 times the amount of cesses *i. e*, about Rs. 2,000. Half the amount belongs to the plaintiff. In his share, the income would be about Rs. 1,000 a year. Making all deductions, his net income would not fall much short of Rs. 600 a year, even according to the admission of Rambalak (defendant's witness No. 3). It is, therefore, highly unlikely that he would

forego his half share in these properties, yielding an annual income of about Rs. 1,000 or a net income of about Rs. 700 (in his half share) for a life annuity of Rs. 400 a year, which has been made a charge on the half share of on of the tauzis only." Now undoubtedly the cess payable forms a *basis* for calculating the value of the property, and it cannot be doubted that the learned Subordinate Judge with his local knowledge was in a position to arrive at a correct conclusion on this question. Mr. Sultan Ahmad has contended before us that there was no issue, and that the parties did not really give any evidence on this point. In my opinion the question of the value of the plaintiff's share was not a matter which it was for the plaintiff to put in issue. The plaintiff was called upon to prove that his mind did not accompany his signature. As a reply to that case the defendants assert that the terms in the deed of release were such as a man in the position of the plaintiff would readily agree to. It was,therefore, necessary for the defendants to establish that the terms were proper terms upon which the plaintiff might agree to settle the dispute between him and the defendants. In my opinion it was for the defendants to prove the value of the plaintiff's share in the property. That being so, it is only necessary to refer to the deed of release to see that this old man of 70 gave up his interest in the joint family properties which would yield him an income of Rs. 700 per year for an annuity of Rs. 400. As I have said, he was an old man of 70 and it is impossible to say how long he would live to enjoy this annuity. Under the terms the daughters are not provided for; they are only entitled to receive Rs. 200 each, not forthwith, but upon the death of both the parents. In my opinion it is impossible to say that the terms offered by the defendants to the plaintiff were such as would be readily accepted by him.

Mr. Sultan Ahmad has strongly relied upon the evidence of Mathura Prasad, the Sub-Registrar, and Nath Prasad and Kamaluddin, pleaders. It is suggested that if the plaintiff did not in fact put his signature to the deed of release with knowledge of its terms he would not have been taken first to the Sub-Registrar and then to the pleaders in the case. The Sub-Registrar in his evidence says as follows: "My practice was to enquire about the nature of the document from the executants. When the nature and the description of the documents stated by them were found to be correct then I used to register them." In cross-examination he admitted that he did not read the document nor did he get the entire document read over to him. Now, the Sub-Registrar was only speaking as to the practice of his office. He did not pretend to say what happened on the particular occasion on which the plaintiff went to his office to have the deed of release registered. But I am not very much troubled by the evidence of the Sub-Registrar. The plaintiff's own case is that he thought that he had executed a deed conveying the properties to the defendants for a term. The defendants' case is that he conveyed the properties to them for ever. That was the difference between the parties and I do not see that there was much risk of the difference being brought to his notice at the Registry Office. So far as the evidence of Nath Prasad is concerned he undoubtedly said that the plaintiff went to him. The plaintiff denies that he ever went to Nath Prasad. It is not necessary for me to express any opinion on the question whether Nath Prasad's evidence should be accepted on this point. It is sufficient to point out that Nath Prasad admits that he did not explain to the plaintiff the terms of the sulehnama. He merely asked the plaintiff whether he had entered into a compromise and on the plaintiff's giving an answer in the affirmative he took the thumb impression of the plaintiff on the sulehnama. This is not a very satisfactory state of affairs. Obviously Nath Prasad was engaged in the case for the purpose of putting his signature on the sulehnama. He appears to have done nothing else for the plaintiff. It is a remarkable feature in this case that the plaintiff's pleaders at no time had any opportunity of expressing their opinion on the terms of settlement. His pleaders were Babu Krishna Ballav Prasad, Babu Lachman Prasad and Babu Dharanidhar. Nath Prasad, the pleader, says that he asked Babu Krishna Ballav why he did not sign the compromise petition and that he said that there was a difference between him and Bhagwat about fees and that was the reason why he refused to sign. It is perfectly clear from the evidence that neither Babu Krishna Ballav, nor Babu

Dharanidhar nor Babu Lachman Prasad who were the plaintiff's pleaders, had at any time an opportunity to express an opinion on the terms of settlement. The document was drafted by the defendant's pleader Kamaluddin. Nath Prasad was engaged only for the purpose of putting his signature to the compromise petition. Apart from that the plaintiff's pleaders had nothing whatever to do with the deed of release. It is impossible to overlook these circumstances when it is remembered that an old blind man of 70 was giving up all his interest in the joint family properties for an annuity of Rs. 400. So far as the evidence of Kamaluddin is concerned it is sufficient to say that he does not say that the plaintiff saw him at any time. There was undoubtedly some evidence that the document was read over and explained to the plaintiff, but although Kamaluddin and Nath Prasad, both pleaders, had something to do with the settlement it was not thought necessary that either of them should explain the document of settlement to the plaintiff. In these circumstances it is impossible to say that the document was actually read out to the plaintiff. In my opinion the view taken by the learned Subordinate Judge is right and ought to be affirmed.

I would dismiss the appeal with costs.

Ross, J.—I agree.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 71 OF 1923.

May 23, 1924.

Present :—Mr. Wazir Hassan, J. C.

CHHOTEY LAL—PLAINTIFF—APPELLANT
versus
CHANDRA KUNWAR—DEFENDANT—RESPONDENT.

***Guardian and Wards Act** (VIII of 1890), s. 25—Guardianship of son—Father, position of—Custody of child.*

An order appointing a father guardian of his child under the Guardians and Wards Act is wholly *ultra vires*.

The fact that a child has never been in the actual custody of his father who is also not a certificated guardian cannot prevent the application of section 25 of the Guardian and Wards Act and deprive him of his right to the custody of the child.

Appeal from the order of the Officiating Additional District Judge, Sitapur, dated the 20th September 1923, in Miscellaneous Case No. 79 of 1923.

Mr. *H. D. Chandra*, for the Respondent.

ORDER.—The appellant, Chhote Lal, is the husband of the respondent, *Mt.* Chandra Kuar. Two children were born of the union. The elder boy is with his father under an order of this Court. The younger one is with his mother *Mt.* Chandra Kuar. The child is now about 18 months old. Chhote Lal applied to the Additional Judge of Sitapur under section 25 of the Guardians and Wards Act for an order that the younger child be delivered into his custody. His application has been dismissed mainly on the ground that it was not maintainable under section 25 of the Guardians and Wards Act.

With this ground of decision I do not agree. Neither the fact that the child has never been actually in the custody of Chhote Lal nor does the fact that Chhote Lal has never been appointed guardian of the child by an order of the Court prevents the application of section 25 to this case. The first point is covered by the decision of Mr. (now Mr. Justice) Lindsay in the case of *Mushaf Husain* v. *Muhmmad Jawad* (1). I am content to follow it. As to the second point, it is equally clear that Chhote Lal being the natural guardian of his infant child cannot be placed in a worse position than a certificated guardian. In fact an order appointing a father guardian of his child under the Guardians and Wards Act would be wholly *ultra vires*. Chhote Lal could, therefore, seek the aid of the Court under section 25. This point is again supported by the decision mentioned above. The order of the learned Additional Judge, therefore, cannot be upheld on the first ground.

(1) 48 Ind. Cas. 60 ; 21 O. C. 194 ; 5 O. L. J. 616.

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At the end of this judgment, the learned Judge observes "that it is to the interest of the minor that he should be left to live with his mother during his infancy." This would have been a perfectly valid ground to support the order under appeal if it had been arrived at on a consideration of the merits of the case but no enquiry was made at all. On the 18th September 1923 Chhote Lal filed his application. Two days later, that is, on the 20th September 1923, the learned Judge dismissed it. Thus Chhote Lal had no opportunity to substantiate his claim for the custody of the child. Whatever may be the fate of Chhote Lal's application at the end I do not think it was possible for the learned Judge to deprive Chhote Lal of the opportunity of proving his case.

I, therefore, allow this appeal, set aside the order of the Court below and remand the case to that Court with the direction that it should be restored to its original number in the register and be proceeded with according to law. No order as to the costs of this appeal.

G. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1181 OF 1922.

June 5, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

ABDUL RAHIM—PETITIONER
versus
ABDUL RAHMAN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss 80, 100—Suit against public officer—Tortious act—Notice, whether necessary—Second appeal—Finding of fact, when can be disturbed—Precedents—Case distinguished, effect of.

For a suit against a public officer notice under section 80 of the Civil Procedure Code is equally necessary whether the act complained of was not in good or bad faith.

The section does not require that the act should have been done in good faith ; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term "purport." The motives with which the act was done do not enter into the question at all.

Findings of fact must be accepted in second appeal unless it can be said that there was no evidence to support them or that they are based on some error of law.

The fact that a decided case was distinguished in a judgment in a subsequent case does not show that it was accepted as good law. If a case is distinguished it is unnecessary to express any opinion as to its correctness, and it is notorious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them.

Dakshina Ranjan Ghose v. *Omar Chand Oswal*, 75 Ind. Cas. 173, 38 C. L. J. 104 ; 50 C. 992 ; 28 C. W. N. 10 ; (1924) A. I. R. (c.) 145 ; *Somanthala Koti Reddi* v. *Pothuri Subbiah*, 46 Ind. Cas. 86; 41 M. 792; 7 L. W. 586 ; 34 M. L. J. 494; 23 M. L. J. 357; (1918) M. W. N. 414 (F. B.) ; *Jogendra Nath Roy Bahadur* v. *Price*, 24 C. 584 ; 12 Ind. Dec. (N.S.) 1058, followed.

Muhammad Saddiq Ahmad v. *Panna Lal*, 26 A. 220 ; A. W. N. (1903) 241, not followed.

Appeal from a decree of the Officiating District Judge, Budaun, dated the 18th May, 1922.

Messrs. *L. M. Banerji*, *Iqbal Ahmad* and *P. N. Sapru*, for the Petitioner.

Messrs. *B. E. O. Conor*, Dr. *S. N. Sen*, and *H. C. Desanges*, for the Opposite Party.

JUDGMENT.—This second appeal arises out of a suit against a Sub-Inspector of Police for damages for libel. The cause of action is thus stated in para. 2 of the plaint :

"The defendant taking undue advantage of his post as a Thanedar, through avarice, malice and enmity without any reasonable and sufficient ground and in order to cause loss to the plaintiff made some wrong entries on different occasions, without the knowledge and information of the plaintiff, and eventually after secretly obtaining the permission of the higher authorities dishonestly misrepresenting facts, entered the name of the plaintiff in the register of badmashes."

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The real name of the register thus described is a "History Sheet". These History Sheets are confiidential documents of the police department, of which not even the persons regarding whom they are prepared are supposed to be aware.

The learned Judge of the Court below seems to have been in some doubt whether the suit was one for libel, or partly for libel and partly for some unnamed kind of tort, but in this Court at any rate the latter contention has not been put forward. The learned Subordinate Judge who tried the case came to the conclusion that the defendant was not responsible for the plaintiff's name being entered in the history sheet, that the plaintiff had, therefore, no cause of action and that in any case the suit was barred by limitation under Article 24 of the Limitation Act. He was also of opinion that whatever part the defendant had taken in reference to the plaintiff had been taken in good faith. He omitted and this is the only flaw in his otherwise excellent judgment to consider an issue which lay at the threshhold of the proceedings and which had been raised before him, namely whether the suit must fail on the ground of want of proper notice as required by section 80 of the Code of Civil Procedure. The case came in appeal before an Officiating District Judge who reversed the Subordinate Judge's findings on all points. The judgment of the learned Officiating District Judge is not a satisfactory one, and if this were a first appeal some of his findings might be difficult to accept even on the face of the judgment itself. As, however, this is a second appeal his findings of fact must be accepted unless it can be said that there was no evidence to support them or that they are based on some error of law. His principal findings are that it was the defendant who caused the history sheet to be opened, and that in doing so the defendant acted out of malice and from improper motives. The second finding is not open to attack in second appeal. The first finding can be, and has been, attacked on the ground that it is based largely on a misreading of the pleadings. The learned Judge was under the impression that the defendant admitted in his written statement that the history sheet was opened at his instance. The defendant had in fact denied that he was in any way responsible for the entry. On the question of notice the learned Judge held that no notice was necessary because the defendant acted from improper motives, and on the question of limitation he held that Article 120 of the Limitation Act was applicable and that in any case so long as history sheet was in existence there was a continuing wrong which entitled the plaintiff to the benefit of section 23 of that Act. The history sheet was not closed till 1919 which was within one year of the filing of the suit.

The first question which we have to decide is whether the defendant was entitled to notice of the suit under section 80 of the Code of Civil Procedure. The plaintiff did in fact send a notice to the defendant, but it is admitted that he filed his suit without waiting for the expiration of the two months prescribed by the section. If, therefore, notice was necessary the suit must fail and should have been dismissed. The contention urged on behalf of the respondent in this court is that which was adopted by the Court below, namely that section 80 has no application unless the act complained of was done in good faith. On the language of the section the question seems to us to admit of no doubt. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his offiicial duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term "purport". The motives with which the act was done do not enter into the questions at all. Here the act complained of, namely causing of the plaintiff's name to be entered in the history sheet was an act which came within the scope of the ordinary functions of a police officer; indeed it was one which could only be done by an officer of police acting in that capacity; and there is no doubt that in reporting to his superiors with a view to the history sheet being opened he understood himself to be acting and would be understood by his superiors to be acting in the capacity

of Sub-Inspector. We agree with the observation of the learned Chief Justice of the Calcutta High Court in *Dakshina Ranjan Ghose* v. *Omar Chand Oswal* (1) that if the Courts would be satisfied to give effect to the natural meaning of the language used in the sections of the Code a great deal of time would be saved.

This view of the sections stated above was taken by the Calcutta High Court in the case just cited, and was taken by a Full Bench of the Madras High Court in *Samanthale Koti Reddi* v. *Pothuri Subbiah* (2). It is suggested that the course of decisions in this Court is in favour of the opposite view, and reliance is specially placed on a decision of Mr. Justice Banerji in *Muhammad Saddiq Ahmed* v. *Panna Lal* (3). That case certainly lends some support to the view put forward by the respondent. The case was one against a Sub-Inspector, and the acts alleged against him were that he wrongfully searched the plaintiff's house, kept him for some hours in confinement at the thana, and publicly used abusive language to him. The first two of these acts were acts which came within the ordinary scope of a Sub-Inspector's duties; the third was one which was entirely outside them. That case was distinguished in two later cases to both of which the same learned Judge was a party, *Bakhtawar Mal* v. *Abdul Latif* (4) and *Jugal Kishore* v. *Jugal Kishore* (5). It was argued before us that because Mahammad Saddiq Ahmad's case was distinguished in the two later cases, it must be considered to have been accepted as good law. This argument cannot be maintained either as a general proposition or with reference to these particular decisions. If a case is distinguished it is unnecessary to express any opinion as to its correctness, and it is notorious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them. In the very case with which we are dealing we find that in the case in *Bakhtawar Mal* v. *Abdul Latif* (4), Banerji, J. referred, with approval to a Calcutta case *Jogendra Nath Roy Bahadur* v. *Price* (6) which is inconsistent with his own earlier dicision. In the Calcutta case the defendant was alleged to have acted maliciously and the main defence was that this dispensed with the necessity of notice. The learned Judges say—

> "We are not aware of any instance certainly no such case has been cited to us in which it has been held that the section does not apply to the case of a public officer charged with a tortious act done by him in his official capacity. The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise."

The most important of the latter cases for our purpose is however that of *Bachcha Singh* v. *Jafar Beg* (7). It was suggested that the decision in it is consistent with the rule laid down in Muhammad Saddiq Ahmad's case but we have examined the paper book and we find that this was not the case. The suit was brought jointly against a Sub-Inspector and a private person, the allegation being that the Sub-Inspector at the instigation of the defendant and knowing full well that Bachcha Singh was innocent of the effence charged against him, had implicated him in a criminal trial in place of Bachcha Ahir the real accused. The case was actually decreed by the District Judge against the other defendant on the ground that he had acted maliciously and without reasonable and probable cause. It was dismissed against the Sub-Inspector solely on the question of want of notice, without determining whether the Sub-Inspector was actuated by malice or not. This decision was upheld by the High Court. The effect of the decision was therefore that the Sub-Inspector purported to act in his capacity of a public officer whether he was actuated by improper motives or not. It is unnecessary for us to consider the English cases which have been cited on this question because those decisions all proceed upon enactments the language of which is different from that of the section which we have to construe. It is further unnecessary to deal with other issues, though we think that

(1) 75 Ind. Cas. 173; 38 C. L. J. 104; 50 C. 952; 28 C. W. N. 10; (1924) A. I. R. (C). 145.
(2) 46 Ind. Cas. 86; 41 M. 792; 7 L. W. 586; 34 M. L. J. 494; 23 M.L. T. 357; (1918) M.W. N. 414 (F.B.).
(3) 26 A. 220; A. W. (1903) 241.
(4) 29 A. 567; A. W. N. (1907) 170.
(5) 10 Ind. Cas. 1; 33 A. 540; 8 A. L.J. 509.
(6) 24 C. 584; 12 Ind. Dec. (N. S.) 1058.
(7) 30 Ind. Cas. 173; 13 A. L. J. 783.

the case would have failed on the ground of limitation if not on other grounds also. We are in complete agreement with the view laid down by the Full Bench of the Madras High Court in *Samanthala Koti Reddi* v. *Pothuri Subbiah* (2), and we accordingly allow the appeal and dismiss the plaintiff's suit with costs in all Courts including in this Court, fees on the higher scale.

N. H. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 4 OF 1924.

May 27, 1924.

Present :—Mr. Pullan, A. J. C.

Syed SHAMSHAD MEHDI—DEFENDANT—APPLICANT

versus

MAHBUB KHAN—PLAINTIFF, AND LEAGRAT HUSSAIN—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (*Act* V *of* 1908), *O. IX, r.* 9—*Dismissal of suit for default—Restoration against some defendants only Restoration against others beyond time by Court, Validity of.*

On a suit being dismissed for default against two defendants the plaintiff made an application for restoration against one of the two defendants, which was granted. Subsequently the Court on its own initiative and after the limitation for restoration had expired, restored the suit against the other defendant also :

Held, that the order was *ultra vires*.

Application for revision of the order of the Munsif, Fatehpur at Bara Banki, dated the 4th December 1923.

Mr. *H. C. Dutt*, for the Applicant.

Mr. *S. M. Ahmad*, for the Opposite Party.

ORDER.— This is an application to set aside the order of a Munsif to restore the suit which was previously dismissed for default against the present applicant. In this suit there were two defendants. On the date

fixed for hearing the plaintiff was absent and the suit was dismissed for default. Subsequently the plaintiff applied for restoration of the suit as against one of the defendants. His application was allowed and the suit was restored as against that defendant on payment of certain damages. No order was passed restoring the suit against the other defendant who is now the applicant before me and no application was made by the plaintiff for the restoration of the suit as against him. Subsequently on his own initiative the Munsif restored the suit against the present applicant.

This order was passed without any application on the part of the plaintiff and beyond the period of limitation. The order is entirely *ultra vires* and cannot be upheld. I allow the application with costs and set aside the order of the Munsif.

G. H. *Order set aside.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION
SUIT NO. 1859 OF 1923.

June 20, 1923.

Present :—Mr. Justice Pratt.

PARSHURAM DATTARAM SHAMDASANI —PLAINTIFF.

versus

TEH TATA INDUSTRIAL BANK, LTD. —DEFENDANTS.

Companies Act (*VII of* 1913) *s.* 79—*Company—Meeting of share-holders—Irregularities—Interference by Court—Right of shareholder to speak at meeting—Adjournment of meeting—Articles of Association, construction of.*

Irregularities in the procedure at a meeting of share-holders of a company are not a matter for the interference of a Court, but for a majority of the share-holders to deal with. A Court will interfere with the proceedings of the meeting only if the rights of the share-holders are infringed or if a case of fraud or *ultra vires* action is made out.

Foss v. *Harbottle* (1843) 2 Hare 461 ; 62 R. R. 185; 67 E. R. 189; *Macdougall* v. *Gardiner*, (1875) 1 Ch. D, 13 ; 45 L. J. Ch. 27, relied on.

PARSHURAM *v.* TATA INDUSTRIAL BANK, LTD.

A share-holder is not entitled to speak as much as he pleases at a meeting of share-holders, but has a right to be heard in reasonable terms for a reasonable time.

Wall v. *London and Northern Assets Corporation*, (1898) 2 Ch. 469; 79 L. T. 249 ; 14 T. L. R. 547, relied on..

Where the articles of Association of a Company empower the Chairman to adjourn a meeting with the consent of the meeting, the Chairman has a discretion to adjourn, and he can exercise that discretion only with the consent of the meeting but even if the meeting desires an adjournment the chairman is not bound to adjourn.

Salisbury Gold Minning Co. v. *Hathorn* (1897) A. C. 268 ; 66 L. J. P. C. 62 ; 76 L. T. 212 ; 45 W. R. 591, relied on.

Mr. *Kanga*, for the Defendants.

Judgment—The first and the second plaintiffs who are share-holders in the Tata Industrial Bank, a company registered under the Indian Companies Act VII of 1913, file this suit against the Company by their directors for a declaration that the proceedings of a general meeting held on May 1, 1923, were improperly conducted and that certain appointments made at that meeting of directors and auditors are invalid. The plaint also prays for an injunction restraining the Company from having its accounts audited by the auditors appointed at the meeting and also for a mandatory injunction to take *de novo* proceedings which I suppose means to compel the Company to hold a fresh meeting.

A rule was granted restraining the Company pending the hearing of the suit from having its accounts audited by the appointed auditors. When the rule came on for hearing last Thursday plaintiff No. 1 wished to adjourn the rule to the hearing of the suit, and the defendant company on the other hand contended that the suit was not maintainable. The suit was, therefore, set down for trial of the preliminary issue as to whether it was maintainable, and the hearing of the rule was adjourned to the hearing of this preliminary issue.

The allegations in the plaint are briefly as follow :—

On April 14, 1923 a notice was given under section 79 of the Indian Companies Act of a general meeting to be held on May 1. In conformity with Article 68 of the Articles of Association the notice specified the business to be transacted at that meeting. That business was, as set out in paragraph 7 of the plaint, namely :—

"1. To receive the directors report and to adopt the audited accounts for the year ended March 31, 1923."

"2. To elect two directors in place of the two retiring directors," and

"3. To elect three other directors in place of three retiring directors who had been appointed under Article 99 of the Articles of Association," and

'4. To appoint auditors for the current year."

On April 21, 1923, the plaintiffs Nos. 1 and another gave notice under Article 112 of the Articles of Association that they intended to propose two gentlemen for election to the office of directors of the Bank. They also requested that information of this notice should be sent to each and every share-holder. On April 30, 1923, the plaintiffs put in a list of fifty questions referring to the management of the Bank and giving notice that they meant to ask these questions at the meeting.

The general meeting was held on May 1, and one of the directors was elected to the chair. After the formal business of the meeting had been transacted the first plaintiff put the questions of which he gave notice in the interrogatory filed on April 20. The Chairman was unable to answer these questions without notice and the first plaintiff then moved for an adjournment. But the Chairman refused to put the motion for an adjournment.

The plaintiff then moved that the director's report of the account should be examined by the appointed committee of share-holders. This motion was put to vote and lost. The plaintiff complains that he was not allowed to speak on this motion.

When the motion was lost the plaintiff demanded a poll. This poll was taken and the motion was lost. The plaintiff's grievance on this point is that two scrutinizers of the votes taken at this poll were not authorised to act and the plaintiff's objection to the validity of the votes given was not heard.

After the motion was lost in the poll the business of the meeting was proceeded with, the accounts were passed, and new directors

and auditors appointed. The plaintiffs complain that at this stage the meeting had ceased to function as a meeting and that the Chairman did not propose the two gentlmen whose names had been sent in by notice under Article 112 as candidates for the office of directorship.

This concludes the list of the plaintiff's grievances and except as to his right to speak which I shall deal with presently they amount to nothing but irregularities in the procedure at the meeting held on May 1.

Irregularities are not a matter for the Court but for a majority of the company to deal with. The Courts will interfere only if the rights of the share-holders are infringed; or if a case of fraud, or *ultra vires* action is made out. Otherwise the Court does not interfere to correct an irregularity or to do that which the majority of the company have the power to do. This rule is well established in *Foss* v. *Harbottle* (1) and *Macdougall* v. *Gardiner* (2) and indeed officious interference by the Court in such matters would paralyse the working of all joint stock companies.

However, to take the plaintiff's grievance *seriatim*, there was in the first place no occasion for the Secretary of the company to give notice of the candidature of the plaintiff's nominees. The notice was sent by the plaintiff under article 112 of the Articles of Association and such notice is under that article a condition precedent to the candidate named being eligible for election. But the election of the candidates so proposed can be proceeded with at the meeting without special notice to the share-holders. Notice had been given under article 68 that the business has to be transacted at the meeting of the company for the election of directors in succession to the five who had vacated their seats. Now the total number of directors sanctioned for the company is fifteen and there were at that time ten directors out of fifteen who were actually holding the office. The notice issued by the company stated that the business to be transacted at the meeting was by election of five new directors to take the places of five of these ten who were retiring. When the Secretary received the plaintiff's notice of April 21, proposing two gentlemen as candidates he would naturally interpret the notice to mean that these two gentlemen were candidates for election in the places of the five retiring directors and there is no doubt that that was the reason why no special notice of these candidature was given to the share-holders. But the plaintiff says that what he meant by that notice of April 21 was to propose these two gentlemen as candidates not in the places of any five of the directors who were retiring but in the places of the five posts of the directors which had never been filled up. That does not appear clear from the plaintiff's notice. Even if that had been the intention there seems no necessity to give any particular information to the directors because article 109 of the Articles of Association clearly distinguishes two classes of vacancies. Article 109 is as follows:

"The company at any general meeting at which any directors retire in manner aforesaid shall fill up the vacated office by electing a like number of persons to be directors; and without notice in that behalf may fill up any other vacancies; provided, etc."

It is clear, therefore, that this article makes a distinction between vacancies which occur by reason of the retirement of the directors actually holding office and other vacancies. Other vacancies could occur in no other way than as in this case, that is, the vacancies of the five directorships which had never been filled up. Therefore, it was competent to the plaintiff at the meeting to propose the election of his two nominees, and article 109 makes it clear that he might have done so without special notice being given on that behalf.

Then as to the second grievance, if the Chairman was unable to answer the questions put by the plaintiff, it was for the majority of the share-holders present to consider whether the accounts should be passed and the directors' report confirmed in the absence of the information which those questions were designed to elicit. The majority could have secured this object by an adjournment. It is true that the plaintiff did ask for an adjournment and then the Chairman refused to put the motion for the adjournment to the meeting. Now it is clear under the Articles of Association that

(1) (1843) 2 Hare 461; 62 R. R. 185; 67 E. R. 189.
(2) (1875) I Ch. D. 13; 45 L. J. Ch. 27.

the Chairman has a discretion whether to adjourn or not. Article 77 says:—

"The Chairman, with the consent of the meeting, may adjourn any meeting from time to time and from place to place in Bombay, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place."

The Chairman, therefore, has a discretion to adjourn and he can exercise that discretion only with the consent of the meeting. Even if the meeting desired an adjournment the article does not make it compulsory on the Chairman to adjourn. An article similar to article 77 was so construed in the case of *Salisbury Gold Mining Co.* v. *Hathorn* (3). But if the Chairman had no intention of adjourning the meeting it would be futile for him to put the motion for an adjournment and then refuse to act upon it. But it is evident that a majority of the company did not desire to adjourn because the same matter was put to the vote in the guise of a motion made by the plaintiff for the appointment of a committee of share-holders with power to examine the accounts and to elicit answers to all the questions framed in the plaintiff's interrogatory. If this motion had been passed the desired adjournment would have been secured. But when that motion was put to the vote it was lost on a show of hands. The plaintiff's complaint on this point is that he was not allowed to speak on this motion. But the plaint paragraph 13 says: "Thereupon the plaintiff No. 1 moved his amendment." Then paragraph 14 sets out: "After the aforesaid amendment was duly seconded and handed over to the Chairman, the plaintiff No. 1 wanted to speak on his said amendment but the Chairman deliberately ruled him out of order." It is thus clear from the plaint that the plaintiff had an opportunity of speaking and he did speak to his motion at the time when he moved it. A share-holder is not entitled to speak as much as he pleases but has a right to be heard in reasonable terms for a reasonable time. That is decided in *Wall* v. *London and Northern Assets Corporation* (4). On this point Lindley, M. R., commenting on the dictum of Lord Eldon, said:—

"But Lord Eldon does not mean that a minority who are bent on obstructing business and resolved on talking for ever should not be put down. He means that the majority are not to be tyrannical. After hearing what is to be said, they might say, 'We have heard enough. We are not bound to listen till every body is tired of talking and has sat down."

So here the Chairman heard the plaintiff when he moved the amendment and it is obvious from the admission in the plaint that the plaintiff moved his amendment that the plaintiff had a fair hearing. After the amendment was lost on the show of hands, the plaintiff No. 1 demanded a poll and it was taken, and the motion was again negatived. But as to the poll the plaintiff objects that the poll was illegal because the scrutiny of the poll should have been taken by the Chairman himself. The plaint, paragraph 20, clause 10, says:—"That the Chairman of the meeting failed in his duty to act as a scrutineer at the taking of the poll." No doubt under articles 93 and 94 the Chairman takes the poll and his decision as to the validity of every vote given is conclusive. But it does not follow that the Chairman cannot employ an agent for scrutinising the poll or that he cannot employ a clerk to count the number of votes so taken. I construe articles 93 and 94 which direct the Chairman to take the poll as giving the Chairman authority to delegate the ministerial function of scrutinising the votes and totalling them to others besides himself. Therefore, the fact that the poll was not scrutinised by the two gentlemen seated at the Chairman's table and under Chairman's directions does not make the poll invalid.

The plaintiff's next grievance is that after the business of the meeting was transacted the meeting had ceased to function as an ordinary meeting. But this is mere verbiage. The plaintiff admits that the Chairman was at the meeting, share-holders were at the meetting and he even admits that some share-holders voted when he says in his plaint that several share-holders abstained from voting.

His last grievance is that the Chairman failed in his duty to propose election of the plaintiff's nominees to the office of directors.

(3) (1897) A. C. 268; 66 L. J. P. C. 62; 76 L. T. 212; 45 W. R. 591.

(4) (1898) 2 Ch. 469; 79 L. T. 249; 14 T. L. R. 547.

I am not aware that this is the function of the Chairman. If the plaintiff had proposed a list of certain nominees for the office of directorship, it was quite open to him to propose that election at that meeting and the plaint does not say that he did so or that he was prevented from doing so.

On the whole the averments made in the plaint do not import any such illegality as to justify the interference of the Court or to constitute a cause of action for a suit. I, therefore, decide the first issue in the negative, and dismiss the plaintiff's suit.

The rule fails with the suit but as to this I would observe that it is curious that the plaintiff No. 1 has not asked for an injunction restraining the directors appointed at the meeting from officiating. He has taken out a trumpery rule merely to prevent the auditing of accounts by auditors nominated at the meeting. It is impossible to imagine that this rule can be a *bona fide* one or there can be any good ground for these auditors for not acting. This rule seems to me to be damning revelation as to the real character of the suit.

I accordingly dismiss the suit with costs and discharge the rule with costs.

Z. K. *Suit dismissed.*
Rule discharged.

Solicitors for the Defendants: Messrs. *Wadia, Gandhy & Co.*

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 172 OF 1921.

February 11, 1924.

Present :—Mr. Justice Ramesam and Mr. Justice Jackson.

AVARARALA VENKATA SESHAMMA—
DEFENDANT—APPELLANT
versus
AVARARALA APPA RAO AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Hindu Law—Inheritance—Mitakshara Law—Property inherited from maternal grandfather—Nature of—Adopted son, whether has right of survivorship.

According to the Mitakshara law, property which descends on a daughter's son from his maternal grandfather is ancestral property in his hands liable to the incidents of survivorship as between him and his son, whether natural or adopted.

Venkayyamma Garu v. *Venkatramayyamma Bahadur Garu*, 25 M. 678 ; 4 B. L. R. 657 ; 7 C. W. N. 1 ; 12 M. L. J. 299 ; 29 I. A. 156 (P. C.) ; *Vythinatha Aiyar* v. *Yeggianarayana Aiyar*, 27 M. 382, *Kari Ramayya* v. *Velloori Jagannadhan*, 30 Ind. Cas. 889 ; 89 M 930 ; 4 L. W. 874 ; 18 M. L. T. 369 ; (1915) M. W. N. 838, followed.

Jamna Prasad v. *Ram Portap*, 29 A. 667;4 A. L. J. 582 ; A. W. N. (1907) 211 ; *Bishwanath Prasad Sahu* v. *Gangadhar Prasad*, 43 Ind. Cas. 370 ; 3 P. L. J. 168 ; 3 P. L. W. 286 ; 1917 Pat. 356, not followed.

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721 ; 35 C. 1039 ; 42 P. R. 1910; 128 P. W. R. 1908 ; 35 I. A. 206; 12 C. W. N. 1049 ; 8 C. L J. 359 ; 10 B. L. R. 790 ; 18 M. L. J. 379 ; 4 M. L. T. 207 (P. C.) ; *Jogeshwar Narain Deo* v. *Ram Chandra Dutt*, 23 C. 670 ; 23 I. A. 37 ; 7 Sar. P. C. J. 13; 6 M. L. J. 75 : 12 Ind. Dec. (N. S.) 445 ; *Sudarsanam Maistri* v. *Narasimulu Maistri*, 25 M. 149 ; 11 M. L. J. 353, *Karuppai Nachiar* v. *Sankaranarayanan Chetty*, 27 M. 300 ; 13 M. L. J. 398; referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge, Cocanada, in O. S. No. 9 of 1920.

Messrs. *G. Lakshmanna* and *A. Satyanarayana*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—In this case the 1st defendant is the appellant before us. The suit was brought by the plaintiff for a declaration that the property which was the subject of the suit did not belong to the 1st defendant, but belonged to the 2nd defendant and was, therefore, liable to be attached by the plaintiff in execution of a decree obtained by him against the 2nd defendant. The 1st defendant is the wife of the 2nd defendant. She claims the property under a will of her mother-in-law to whom it was conveyed by a sale-deed Ex. VII, dated 23rd February 1914 by the second defendant's father Venkataratnam. It is the case of all the parties that the property originally belonged to Venkataratnam's maternal grand-father and devolved on him as daughter's son, *Vide* Ex. XIX.

The first point argued by the appellant before us is that when the 2nd defendant was adopted by his father there was an agree-

ment according to which the adopted son should not share with the father in the properties the latter obtained from his maternal grandfather. This agreement was found against by the Court below. We agree with this finding. The adoption must have taken place many years ago and certainly long before the Jaggampett case was reported. And an agreement between the adoptive father and adopted son that the adopted son should not be co-parcener in the property obtained by the father from his maternal grandfather was inconceivable at the time. The only evidence adduced in support of the agreement is that of P. W. 1. He is the father of the 1st defendant and, therefore, interested. He admits there is nothing in writing about the conditions before adoption. The only other circumstance relied on by the learned Vakil for the appellant in support of the agreement is that the property was enjoyed by the father alone. But when the facts are examined, this statement really has no significance. The father and son were joint up to 1912 and during their jointness naturally it was the father that managed the property. Disputes arose between the father and the son and they became divided in status in that year and in 1914 the father conveyed the property to his wife under the sale-deed EX. VII. So all that is left to us to form a material for inferring any agreement at the date of adoption is merely one year's enjoyment. This contention of the appellant must, therefore, be disallowed.

The second point argued by the appellant is that the sale-deed, EX. VII, is binding on the 2nd defendant. We do not see how this contention can be supported. It is a sale-deed by the father after the separation in status between him and his son, and apart from any question of consideration it cannot bind the son to the extent of the son's share.

The third point argued for the appellant is that the property is not joint family property in the hands of Venkataratnam in the sense that the 2nd defendant has a right in it as a co-parcener by adoption (adoption corresponds to birth here) though it may be ancestral property and liable to the incidents of survivorship between Venkataratnam and his brother, if any, according to the decision of the Privy Council in *Venkayamma Garu* v. *Venkataramayyamma Bahadur Garu* (1). This point has been decided against the appellant in *Vythinatha Aiyar* v. *Yeggianarayana Aiyar* (2) where the effect of *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu* (1) was considered. The point was raised again and decided by another Bench of this Court in *Karri Ramayya* v. *Vellori Jagannadham* (3). The learned Vakil for the appellant in that case relied on *Jamna Prasad* v. *Ram Portap* (4) where a conclusion different from that in *Vythinatha Aiyar* v. *Yeggianarayana Aiyar* (2) was arrived at, and suggested a reference to a Full Bench. But their Lordships, Coutts Trotter and Spencer, JJ., on a consideration of the then authorities including the Privy Council decision reported in *Atar Singh* v. *Thakar Singh* (5) a case arising under the Punjab Customary Law, held that the matter was settled and did not refer the case to a Full Bench. The only additional authority that is now brought to our notice by the learned Vakil for the appellant is the decision in *Bishwanath Prasad Sahu* v. *Gangadhar Prasad* (6). Practically it adopts the same reasoning as *Jamna Prasad* v. *Ram Partab* (4) and there is no other reasoning. I think we must follow the view adopted in *Karri Ramayya* v. *Vellori Jagannadham* (3), and *Vythinatha Aiyar* v. *Aiyar Yeggianarayana Aiyar* (2) based as they are on a full consideration of the effect of the decision in *Venkayyamma Garu* v. *Venkataramayyamma Bahadur Garu* (1) with the principles laid down in *Jogeshwar Narain Deo* v. *Ramachandra Dutt* (7), and *Sudarsanam Maistri* v. *Narasimulu Maistri* (8) and the Full Bench decision in *Karuppai Nachiar* v. *Sankaran Narayanan Chetty* (9).

(1) 25 M. 678; 4 B. L. R. 657; 7 C. W. N. 1; 12 M. L. J. 299; 29 I. A. 156, (P. C.).
(2) 27 M. 382
(3) 30 Ind. Cas. 889; 39 M. 930; 2 L. W. 874; 18 M. L. T. 360; (1915) M. W. N. 838.
(4) 29 A. 667; 4 A. L. J. 582; A. W. N. (1907) 211.
(5) 6 Ind. Cas. 721; 35 C. 1039; 42 P. R. 1910; 128 P. W. R. 1908; 35 I. A. 206; 12 C. W. N. 1049; 8 C. L. J. 359; 10 Bom. L. R. 790; 18 M. L. J. 379; 4 M. L. T. 207 (P. C.).
(6) 43 Ind. Cas. 870; 3 P. L. J. 168; 3 P. L. W. 286; (1917) Pat. 356.
(7) 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S) 445.
(8) 25 M. 149; 11 M. L. J. 353.
(9) 27 M. 300; 13 M. L. J. 398.

KARIM BUX *v.* ABDUL WAHID KHAN

The appeal fails and is dismissed with costs. The Memorandum of objections is dismissed with costs.

V. N. V. *Appeal dismissed,*
Cross-objection dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 6 OF 1923.

February 25, 1924.

Present :—Mr. Wazir Hasan, J. C.

KARIM BUX AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
ABDUL WAHID KHAN—DEFENDANT—RESPONDENT.

Limitation (Act IX of 1908), Art. 97, applicability of —Consideration, failure of—Dispossession from portion of purchased property.

By virtue of a compromise decree plaintiffs were declared owners of certain property on payment of a sum of money. Having paid the money they obtained possession of the property. Subsequently on being dispossessed from a portion of the property, they sued for recovery of the entire consideration money.

***Held*, the case was not one of failure of consideration but one of mere inadequacy of consideration and Article 97 of Schedule I to the Limitation Act was not applicable.**

Appeal against the decree of the District Judge, Rae Bareli, dated the 6th October 1922 setting aside the decree of the Munsif, Rae Bareli, dated the 19th July 1922.

Mr. *M. Wasim*, for the Appellants.

Messrs. *Wasi Hasan* and *Kalbi-abbas*, for the Respondent.

JUDGMENT.—This is the plaintiffs' appeal in a suit for the recovery of Rs. 677-6-0 from the defendant. The suit succeeded in the Court of first instance but was dismissed on appeal by the learned District Judge of Rae Bareli. The ground of the claim as argued before me, is that under a compromise which was incorporated in a decree of Court the plaintiffs were to become the owners of certain parcels of property on payment of a sum of money to the defendant, that they paid this money but that on the 24th July 1919 they were dispossessed and that consequently they are entitled to recover the money they paid for the property in suit as the existing consideration failed within the meaning of Article 97 of the Indian Limitation Act. The lower Appellate Court has held that the suit is barred under the article just now mentioned, the cause of action having arisen long before three years of the institution of the suit.

The whole case was argued before me with reference to the point that the consideration failed when the plaintiffs were dispossessed and the suit was within time from that date. If the date of dispossession is the date from which the period of limitation will begin to run against the plaintiffs for the purpose of Article 97 of the Indian Limitation Act we are all agreed that the suit will be in time but, as I am going to state shortly, the decision of this point has become wholly immaterial.

During the course of the arguments of the respondent's pleader, it appeared that the plaintiffs are still in possession of two parcels of the property which were conveyed to them under the compromise mentioned above. This fact is admitted in paragraph 14 of the plaint. In paragraph 24 of the written statement it was set up as a point in defence that the plaintiffs being in possession of a portion of the property dealt with by the compromise they were not entitled to bring a suit for the entire consideration. In my opinion, the fact, that the plaintiffs are in possession of some portion of the property transferred to them by the defendant under the compromise mentioned above goes to the root of their title to recover the purchase-money on the ground of failure of the existing consideration. If a part of the consideration is in the hands of the plaintiffs as they admit it is, it is not a case of failure of consideration. It merely becomes a cast of inadequacy of consideration. On this ground the appeal fails and is dismissed with costs.

G. H. *Appeal dismissed.*

PERIASAMI MUTHIRIAN *v.* ANANDAYI AMMAL

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 783 OF 1921.

February 19, 1924.

Present :—Mr. Justice Wallace.

PERIASAMI MUTHIRIAN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

ANANDAYI AMMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession and title—Long possession—Title not established—Right to continue in possession.

A person in long anterior and peaceable possession at the time of the threat of dispossession is until the contrary is shown, entitled to maintain his possession against all but the true owner.

Narayana Row v. *Dharmachar*, 26 M. 514 ; *Ismail Ariff* v. *Mahomed Ghouse*, 20 C. 884 ; 20 I. A. 99 ; 6 Sar. P. C. J. 305 ; 17 Ind. Jur. 321 ; 10 Ind. Dec. (N. S.) 561, followed.

Somasundaram Chetti v. *Vadivelu Pillai*, 31 M. 537; 4 M. L. T. 344 ; *Maikal Servai* v. *Thambuswami Servai*, 25 Ind. Cas. 934 ; 1 L. W. 858 ; (1914) M. W. N. 784, distinguished.

In a suit for declaration of title to land and for an injunction restraining defendant from disturbing possession, it was found that neither plaintiff nor defendant has established title but that plaintiff was in possession on the date of suit and for 11 years previously and that the defendant was never in possession ;

***Held*, that the plaintiff was entitled to be maintained in possession.**

Appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 52 of 1920, preferred against the decree of the Court of the Additional District Munsif, Kulitalai, in O. S. No. 55 of 1919 (O. S. No. 412 of 1918, on the file of the Court of the District Munsif, Trichinopoly.)

Mr. *S. Subhramania Aiyar*, for the Appellants.

Mr. *N. Rajagopalachariar*, for the Respondents.

JUDGMENT.—The original suit was by plaintiff for a declaration that the plaint *nanja* land belongs to her and for permanent injunction restraining defendants from interfering with her enjoyment. It was admitted that the *melwaram* in the land belongs to plaintiff. 1st defendant claimed that he owns the *kudivaram*. The first Court decreed the suit and the lower Appellate Court concurred. Defendants appeal.

The first point taken is that there is no evidence on which the lower Court's findings that plaintiff has title to the land can be based. This, I think, must be allowed. Ex. C the *inam* register does not make a definite statement as to the particular details of the grant. Exs. A and B are only comparatively recent title-deeds and do not recite that the *kudivaram* was sold. The mere fact that they are more than 30 years old, and purport to have been attested by one Kathaperumal, paternal uncle of 1st defendant, cannot be any evidence that the *kudivaram* also was sold. There is no other evidence on the point.

On the other hand 1st defendant also has not proved title. There are concurrent findings on this point and there is no evidence to prove his title.

There are also concurrent findings that 1st defendant has never been in possession of the land; and that plaintiff was in possession on the date of suit. The lower Appellate Court holds further that plaintiff has been in possession of both *varams* for over 40 years, but, since to prove possession further back than 12 years from 16th October 1919 (the date of plaintiff's first witness's deposition) it relies solely on Exs A and B, mere recitals in which cannot prove the fact of possession, I must take it that its real finding is, relying as it does on plaintiff's 1st witness, that plaintiff has been in possession for 12 years prior to 16th October 1919. The suit was filed on 17th September 1918. So the position is this : neither party has established title, plaintiff was in possession on date of suit and for 11 years previously, and 1st defendant has never been in possession. In such circumstances is plaintiff entitled to a decree maintaining her possession by grant of the declaration and injunction she prays for.

It is argued for 1st defendant that to allow plaintiff to rely now merely on possessory title is to fundamentally to alter the nature of the suit. But this I do not agree with. The plaint sets out clearly plaintiff's possession since 1877, and denies that defendants ever had possession. The written statement

countered with a denial that plaintiff ever had possession, and assertions that 1st defendant was in possession on the date of suit, and that defendant and his predecessors-in-title were, as occupancy tenants, paying melvaram to plaintiff. On these findings issues (2) and (3) were framed, raising the question whether plaintiff was in possession and the parties went to trial with that issue clearly before them. It was incumbent on 1st defendant to produce any evidence he had that plaintiff was never in possession and that he or his predecessors-in-title were in possession.

I think this is clearly a case where if plaintiff had actually been dispossessed by 1st defendant, she could have successfully maintained a suit for possession against him under section 9 of the Specific Relief Act. It is quite plain on the findings that plaintiff was in long anterior and peaceable possession at the time of the threat of dispossession. A person in such peaceable possession is, until the contrary is shown, presumed to be the owner, and is entitled to maintain his possession against all but the true owner. See *Narayana Rao* v. *Dharmachar* (1). *Ismail Ariff* v. *Mahomed Ghouse* (2) The case reported in *Somasundaram Chetty* v. *Vadivelu Pillai* (3) is a case where the plaintiff, having failed to prove lawful title, relied on legal possesssion by prescription, *i. e.*, again attempted to prove a title, legal, though not lawful, and was non-suited because he had not put forward such a title in the plaint. The present case is not similar. The case reported in *Maikal Servai* v. *Thambuswami Servai* (4) is also hardly in point since there plaintiff was seeking for possession as against a party already in possession. In such a case a suit based on title must fail when the title is not proved. The present suit is by a party in possession to be maintained in possession against one having neither title nor possession. Such a suit by its very nature relies not on title only but on possession also and defendants, as I have held, clearly realised the importance of attacking the plaintiff's plea so far as it was founded on possession also. The ruling of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse* (2) and illustration (g) to section 42 Specific Relief Act are direct authorities for the maintainability of the suit, and for the correctness of the decree of the lower Appellate Court.

I see no reason to interfere and dismiss this second appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 26 M. 514.
(2) 20 C. 834 ; 20 I. A. 99 ; 6 Sar. P. C. J. 305 17 Ind. Jur. 321 ; 10 Ind. Dec. (N. S.) 561.
(3) 31 M. 581 ; 4 M. L. T. 344.
(4) 25 Ind. Cas. 934; 1 L. W. 858; (1914) M. W. N. 784.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 43 OF 1923.

May 12, 1924.

Present :—Mr. Kendall, A. J. C.

AJUDHIYA PRASAD—PLAINTIFF—APPELLANT
versus
RAM AUTAR—DEFENDANT—RESPONDENT.

Pre-emption—Sale of share in law suit—Oudh Laws Act (XVIII of 1876), s. 9.

By an agreement entered into between a vendor and the vendee, the latter undertook to meet the costs of the litigation in consideration of receiving half the property in the event of success. The vendee paid no money in cash to the vendor:

***Held*, that the agreement being the sale of a share in a law suit no right of pre-emption arose.**

Abdul Wahid Khan v. *Shaluka Bibi*, 21 C. 496 ; 21 I. A. 26; 6 Sar. P. C. J. 399 ; Rafique and Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 P. C. ; *Mirza Muhammad Abbas Ali Khan* v. *A Quieros*, 9 O C. 86 ; *Khurshaid Ali* v. *Rashid Husain*, 9 O C 351; *Balwant Singh* v. *Lalla Ram*, 49 Ind. Cas. 462 ; 6 O. L. J. 29 ; *Munitazim Husain* v. *Ahmad Raza*, 55 Ind. Cas. 549; 7 O. L. J. 64; 2 U. P. L R. (O.) 44; 23 O. C. 13 *Gajadhas Prasad* v *Manrakhan*, 66 Ind Cas. 684 ; 8 O. L. J. 403; 4 U. P. L. R. (O.) 41 ; (1922) A. I. R. (O.) 156, distinguished.

Appeal against the decree of the Additional Subordinate Judge, Gonda, dated the 18th October 1922, confirming the decree of the Munsif, Utraula, dated the 28th October 1921,

AJUDHIYA PRASAD *v.* RAM AUTAR

Dr. *J. N. Misra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This appeal arises from a suit for possession by pre-emption of 3 p. 4 kts. share in *mauza* Nagra Buzurg, pargana Utraula on payment of Rs. 550. It has been admitted that the defendant is the purchaser of the above share and that the plaintiff has a right of pre-emption. The only question for the decision of the Courts has been whether the so-called sale-deed gave rise to a right of pre-emption, as the pre-emptor's claim has been challenged on the ground that the sale was only a sale of a share in a law-suit and not a sale of a share of a proprietary tenancy as contemplated by section 9 of the Oudh Laws Act 1876. Both the Courts below have decided that the sale in question was only a sale of a share in a law-suit, and they have, therefore, dismissed the pre-emptor's claim.

The sale-deed or agreement in question is to the following effect :—

One Ram Awadh was owner of a 6 p. 8 kts. share in the village, and on his death his son Ram Partap became the owner. After Ram Partap, his mother *Mt.* Lakhpati, widow of Ram Awadh, came into possession. On her death, the recital proceeds, Bhaggan the vendor, who was the nephew of Ram Awadh, became entitled to the property by inheritance, but as a matter of fact it came into the possession of *Mt.* Surajkali, sister of Ram Partap. Bhaggan not having funds to meet the expenses of the litigation necessary to recover possession, agreed by this deed to transfer a half share in the property (namely, 3 p. 4 kts.) to the vendee Ram Autar, in order that the vendee might fight out the case in regard to the whole share and meet all the expenses out of this sum. A clause is added that if Ram Autar spends less than Rs. 550 in the litigation, Bhaggan will not be entitled to a return of the balance, while on the other hand if Ram Autar had to spend more than Rs. 550, he will not be entitled to recover anything from the vendor. In case of success, the vendor and vendee are to take half a share each in the property.

The lower Courts, after noticing the leading decision in *Abdul Wahid Khan* v. *Shaluka Bibi* (1), in which their Lordships of the Privy Council have held that a share in a law suit does not give rise to a claim for pre-emption, have pointed out that in two cases of this Court (reported in *Mirza Muhammad Abbas Ali Khan* v. *A. Quieros* (2), and *Khurshaid Ali* v. *Rashid Husain* (3) it has been held that where the property in suit was not in the possession of the vendor, the sale of a right which has to be established by litigation does not give rise to a right of pre-emption. These decisions are of 1905, and it has been argued in appeal that there are more recent decisions of this Court which modify them. In *Balwant Singh* v. *Lallu Ram* (4), a decision of 1918, it was decided that the question whether a sale is a genuine sale or a mere sale of a share in a law-suit, is to be determined on the facts of each case, and that the mere fact that legal proceedings are necessary to obtain possession of the property sold, is no ground for holding that the sale does not give rise to a right of pre-emption. Mr. Justice Daniels, however, remarked in that case " The sale price was, however, paid in cash, and was not, as in the case of *Mirza Muhammad Abbas Ali Khan Bahadur* v. *A. Quieros* (2)-dependant on the result of the subsequent law-suit." The next decision quoted on behalf of the appellants is *Muntazim Husain* v. *Ahmad Raza* (5), which reiterates the general proposition that each suit of this nature is to be determined according to its own facts and that the mere fact that legal proceedings are necessary to obtain possession of the property sold, is no ground for holding that the sale does not give rise to a right of pre-emption. The facts of that case are somewhat complicated, but it is to be noted that Mr. Justice Stuart remarked. " The deed is a sale out and out of the share of one anna and four pies which had formerly belonged to Ali Husain, and which had descended to the vendor. There is no question of selling a part of the share. The whole is sold. There

(1) 21 C. 496 ; 21 I. A. 26 ; 6 Sar. P. C. J. 399 ; Rafique and Jackson's P. C. No. 134 ; 10 Ind. Dec. (N. S.) 961 ; (P. C.).
(2) 9 O. C. 86.
(3) 9 O. C. 331.
(4) 49 Ind. Cas 462 ; 6 O. L. J. 29.
(5) 55 Ind. Cas. 529 ; 7 O. L. J. 64 ; 2 U. P. L. R. (O.) 44 ; 28 O. C. 13.

is no question of enlisting the assistance of an outside party for contribution towards the expenses of legal proceedings on the consideration that that he is to be rewarded by a portion of the subject-matter of the suit in the event of the litigation being successful. The whole property is sold." Another somewhat similar case in which the right of pre-emption was held to have arisen is reported in *Gajadhar Prasad* v. *Manrakhan* (6). Here again, however, although it has been argued for the appellants that the vendor's title was more doubtful than in the present case, there was clearly an out and out sale of a share for a definite sum of Rs. 3.0. Each of these individual cases, therefore, is capable of being distinguished from the present one. It has not been shown here that any sum of money was paid down at all. In fact, it appears from the deed that nothing was paid by the vendee, but that he undertook to meet the expenses of the litigation, the amount of which was uncertain, in consideration of receiving half the property in the event of success. The nominal price stated in the deed appears to be an estimate of the cost of the litigation rather than of the value of the property. For these reasons I consider that the lower Courts were justified in coming to the conclusion that what was transferred to the vendee was a share in a lawsuit and not a share in a propreitary tenancy The appeal is, therefore, dismissed with costs.

G. H. *Appeal dismissed.*

(6) 66 Ind. Cas. 684 ; 8 O. L. J. 403; 4 U. P. L. R. (O.) 41 ; (1922) A. I. R. (O.) 156.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL AGAINST ORDER NO. 61 OF 1923.

February 12, 1924.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

KALYANI PILLAI AND OTHERS—APPELLANTS

versus

THIRUVENKATASWAMI IYENGAR AND ANOTHER—RESPONDENTS.

Judicial Committee's Act (William IV, ch 41), *s.* 28 *Privy Council appeal—Death of party—Decree after death, whether nullity—Limitation Act* (IX *of* 1908), *Sch. I, art.* 181—*Right to implead parties to decree when arises—Application to bring legal representatives on record—Limitation.*

A decree of the Privy Council has full force and effect not with standing the death of any of the parties interested therein during the pendency of the appeal.

Rajunder Narain Rae v. *Bijai Govind Singh*, 2 M. I. A. 181 at p. 221 ; 1 Moor. P. C. 117; 1 Sar. P. C. J. 175 ; 18 E R. 269 ; 12 E. R. 757, followed.

The right to implead parties to a decree does not arise till the decree is passed. Therefore, an application to bring the legal representative of a deceased judgment-debtor on the record is within time if made within 3 years of the date of the decree, even though the judgment-debtor died before the decree was passed.

Appeal against order, dated the 10th November 1922, of the Court of the Subordinate Judge, Tanjore, in E. P. No. 279 of 1905, in O. S. No. 4 of 1814 (Sub-Court, Kumbakonam).

Mr. *T. R. Ramachandra Aiyar* (with Mr. *S. Srinivasa Aiyar*), for the Appellants :—In this case pending an appeal before the Privy Council, several respondents died. Their legal representatives were not brought on record. The appeal was heard *exparte* and allowed. In execution, the legal representatives were sought to be added as parties more than 3 years after the death of the respondents. The lower Court has added them as parties and directed execution to proceed holding that the order of the Privy Council was

valid and binding. My contention is that the order of the Privy Council which was passed without the legal representatives of the deceased respondents on record is a nullity and does not bind them.

Section 23 of the Judicial Commitee's Act has no application to the present case. That Act can refer only to cases of death between the hearing of a case and delivery of judgment and is analogous to O XXII, r. 6, of the Civil Procedure Code. To hold otherwise would be against ordinary and elementary principles of Justice that a man must be afforded an opportunity of being heard before an adverse order is passed against him.

Section 23 does not help and the appeal before the Privy Council against these respondents had abated.

The provisions relating to abatement of appeals on account of death of parties are contained in the most recent rules by the Judicial Committee. These enable the dismissal of an appeal for failure to bring his legal representative on record, for abatement, for setting it aside (See orders in Council recently passed especially Rules in September 1921).

9 Halsbury 48, Para. 988: Privy Council Practice, p. 310.

[PHILLIPS, J.—Those provisions cannot apply where an order has *been* passed by the Privy Council without the legal representative being brought on record].

Mr. *T. R. Ramachandra Aiyar*:—The language of Cl. 13 and 14 of the Rules is very wide.

On the merits I have two points. The application to bring legal representatives on record was brought more than 3 years after their death. The application is time barred. Article 181 applies.

[PHILLIPS, J.—The right to add legal representatives in execution cannot arise till the decree is passed by the Privy Council. The present appeal which is within three years of that date appears to be in time].

Further, the order of the Privy Council has dealt only with the question of the validity of the vakalat.

The question of limitation which was raised has still to be disposed of. The lower Court was wrong in refusing to go into that question.

[PHILLIPS, J.—The order of the Privy Council is quite clear. It directs execution to proceed. How can any further objections to it be entertained ?]

Mr. *C. S. Venkatachariar* (with Mr. *V. N. Venkatavaradachariar*), for the Respondents, was called on to reply only on the 1st point. The language of section 23 is very wide. It was enacted in 1838 apparenty having reference to the then difficulties in communication. The present case is clearly contemplated by the section. The Privy Council are not bound by the rules of procedure in India. *Rajundar Narain Rae* v. *Bijai Govindu Singh* (1).

There are two decisions of the Patna High Court in which following decisions of the Privy Council in a New South Wales Case, the death of a respondent has been held not to vitiate the judgment: See *Baij Nath Goenker* v. *Ravaneshwar Prasad Singh* (2), *Deonandan Prasad Singh* v. *Janki Singh* (3).

In any case even if the decree is nullity, it is well settled that objection to the validity of a decree cannot be taken in execution and the order is good and binding on the legal representatives, *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (4), *Swami Mudaliar* v. *Muthiah Chetty* (5).

JUDGMENT.—Objection is taken by appellants to execution of a decree of the Privy Council. It is first contended that, as three of the respondents were dead when the appeal was heard and judgment was pronounced, the decree against them is a nullity,

(1) 2 M. I. A. 181 at p. 221; 1 Moor. P. C. 117; 1 Sar. P. C. J. 175; 18 E. R. 269; 12 E. R. 757.

(2) 58 Ind Cas. 212; 1 P. L. T. 426.

(3) 56 Ind. Cas. 322; 5 P. L. J. 314; at p. 319; 1 P. L. T. 325; 2 U. P. L. R. (Pat) 108; (1920) Pat 266.

(4) 58 Ind. Cas. 871; 43 M. 675; 39 M. L. J. 203; (1920) M. W. N. 460; 28 M. L. T. 75; 12 L W. 217.

(5) 69 Ind. Cas. 465; 43 M. L. J. 293; 16 L. W. 184; (1922) M. W. N. 597; (1923) A. I. R. (M.) 212.

Section 23 of William IV. Ch. 41, however, cures the defect in the judgment, for it enacts that the order shall have full force and effect notwithstanding the death of any of the parties interested therein vide *Deonandan Prasad Singh* v. *Janki Singh* (3). The deceased respondents must, therefore, be considered as parties to the decree notwithstanding their death before it was passed.

It is next urged that the application to bring on record their legal representatives is barred by limitation, being made more than 3 years after their death; but Article 181 of the Limitation Act gives 3 years from the date when the right to apply accrued. The right to implead parties to a decree cannot arise until the decree is passed. This objection must, therefore, fail.

The further argument that the Privy Council failed to consider another objection to the execution petition on the score of limitation, ignores the fact that the Privy Council decree orders execution to proceed and the executing Court cannot go behind the decree.

The appeal is accordingly dismissed with costs.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 26 OF 1922.

December 22, 1922.

Present :—Sir Lancelot Sanderson, Kt. Chief Justice, and Justice Sir Thomas William Richardson, Kt.

PANNALAL SAGORE MULL—APPELLANT

versus

MUKHRAM RADHAKISSEN—RESPONDENT.

Vendor and purchaser—Sale of goods—Failure to give delivery—Breach of contract, date of—Damages—Civil Procedure Code (Act V of 1908) s. 34—Interest from suit to decree—Discretion of Court—Reasons, record of.

Defendants as importers sold to plaintiffs certain goods coming out from England. The shipments were specified as from April to June of the year. Defendants failed to deliver goods of May shipment. The correspondence in regard to the shipment went on till 31st October, when the defendants withdrew their offer to deliver the goods. Plaintiff sued for damages :—

Held, that under the circumstances it was not unreasonable to take the market-rate of 1st November in assessing damages for the non-delivery of the goods.

A Court has discretion under section 34 of the Civil Procedure Code to allow interest from the date of the suit to the date of the decree, but as such a course is out of the ordinary, the Court should record its reasons for awarding such interest.

Appeal against the following judgment of Mr. Justice Rankin, dated the 13th January 1922 :

RANKIN, J.—In this case three questions have to be decided. The first relates to 8 bales of May shipment, the second to 27 bales of June shipment and the third to 25 bales of May shipment. The contract is of a type well known in Calcutta. It is the defendants' form by which they as importers sell to purchasers in Calcutta goods which are coming out from England. The most material words are the operative words of the 3rd line "the undermentioned goods or such portion thereof as may arrive or be deliverable under the conditions of the contract," which state the subject-matter of the purchase. In para. 2 of their plaint, the plaintiffs set forth a usage prevailing in the market, in accordance with which they understood this contract. At the hearing the plaintiffs were desirous of dropping the allegation of that usage. The defendants who in their written statement had denied the usage, are desirous of now affirming it.

Now I have come to the conclusion that when this contract is looked at carefully, it in effect comes to the same result as the usage alleged in sub-clause 2 of the 2nd paragraph of the plaint, taking that usage as the plaintiffs at the time understood it. Mr. Sircar has contended that the words "such portion thereof as may arrive or be deliverable" can only be applied to goods which have been at the time appropriated to the plaintiffs :—That is

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to say, that if goods appropriated to the plaintiffs, were lost or became undeliverable, then the sellers were excused: but that otherwise there is nothing in any event in these words to excuse the sellers from making full delivery. In like manner, commenting upon the custom alleged in his own plaint Mr. Sircar contends that the custom, as set forth there, is only applicable to goods appropriated to the plaintiffs: but that in the event of any loss prior to any such appropriation, that custom does not apply at all. Now in my opinion neither the custom intended when this plaint was drawn, nor the contract in question, has this meaning. The intention which I attribute to this contract is this that you are to take by themselves the bales of each quality in question and each shipment in question; after ascertaining how many have been intended for, you are to apply the number of bales that have been sunk at sea rateably throughout the importer's contract, with the result that, as stated in the plaint, the sellers would be entitled to cancel with each purchaser such proportionate number of bales as the entire loss would bear to the entire number indented for from England.

That this is how the plaintiffs understood the matter is I think made clear both by their conduct and their pleading. The defendant's conduct as to the May shipment shows the same understanding, but as to the June shipment they have, as I shall explain, gone astray. Such contracts as the present have come very often before this Court from the piece goods market in Calcutta, and I have never known the principle disputed. In many cases it has been acted on without dispute. The difficulty in the present case is, first, that proper evidence of custom is not put forward owing to the plaintiff's change of front. Secondly, the language of the contract, though undoubtedly one for the sale of unascertained goods, is, as, so very often happens, expressed, as to some of the stipulations without attention to the fact that the goods are not ascertained. "Such portion there of as may arrive" is clear enough if you are dealing with a specific subject-matter. But if the contract is being fulfilled out of a large consignment, part of which is sunk before any appropriation of specific bales, some principle is necessary before the effect of such words can be ascertained. The contract in later clauses, speaking of a time when no appropriation can possibly have been made, uses the same sort of language "should the goods or any portion of same not have been shipped." "If the goods or any portion of same are shipped prior to the time stipulated," and so forth. It seems to me that on the face of the contract itself it is not possible to suppose that the sellers intended to assume the risk of sinkage in the sense of paying damages for non-delivery. *Prima facie* one would suppose, as the notorious fact is, that there was in this market some custom as to the matters; but if one is forced to resort to the implication from the contract itself, I can see no more simple or direct implication than the *pro-rata* principle.

On this view what are the consequences? If, with the assent of the purchaser, the seller has appropriated any particular bales, and thereafter, the goods are lost at a time when the property has passed to the buyer, then the seller would not be liable for damages for non-delivery. But if the buyer has not become the owner of any specific goods, he is entitled to call for the whole number contracted for less the proportionate number after equal distribution of the loss among the entire goods indented for. In that case it is risky for the seller to make full delivery to a particular buyer while it is possible that there may be sinkage at sea yet to be ascertained. One sensible course, if people must make these contracts, in this form, is to distribute rateably each cargo as it arrives. If, in any particular case, goods have passed to one buyer with the result that the appropriation cannot be recalled, that fact would be no answer to another buyer under whose contract the property in no specified bales has passed, he would be entitled to his whole number of bales less his proportionate share of the loss in sinkage.

Now the question which I have to deal with is, first, whether the 8 bales which have been cancelled in respect of May shipment are too many. Now the fact is that Ex: 'Baroda' the total number of bales sunk was 56. In all 700 bales were indented for, of which 100 was sold to the plaintiff firm, so that the plaintiff is justly liable to bear 1/7th of the 56 bales sunk in this cargo. That amounts to 8 bales which is the exact amount for which the defendants did purport to

cancel. That calculation is subject, however, to one objection which the plaintiffs take. It is said that some of the 700 bales bought by the defendants were not sold by them. So far as that goes, it appears that at some stage such bales together with goods bought in the bazar were sold by them, and on that question I accept the evidence of the defendants' witnesses. But assuming that they were not, assuming that some 80 bales out of the 700 bales were retained by the defendants for themselves, in my judgment that does not entitle the plaintiffs to the addition of a single bale beyond what they are entitled to as the proportionate part of the whole. If these sellers chose to keep 80 bales for themselves in the hope of selling afterwards, that, in my judgment, can have no effect at all as regards the buyers. Just as to take an analogy—I may add it is nothing more than an analogy—just as a person who insures his furniture for an insufficient sum is taken in the event of a fire to be his own insurer for the amount of the deficit, so in a case like this, a seller who makes up his mind to keep the goods for himself, is simply his own purchaser at his own risk. It makes no difference whatever to the amount of sinkage to be charged upon any particular buyer. That being so, I am of opinion that the defendants must succeed upon the issue of the 8 bales of May shipment; but in any case I think the plaintiffs, as appears by their conduct and their plaint, understood the contract as I have construed it, and accepted the defendants' cancellation. At no stage do I find that the defendants made difficulties over granting inspection of the relevant documents in the usual course.

I come next to the issue with regard to the 27 bales of June shipment. It will be apparent from what I have said already, that it is in my judgment quite impossible for the defendants to justify what they have done with regard to these 27 bales. 27 bales were the total amount of June shipment coming out in the "Civilian." It appears, according to the defendants' case, that when the invoice of the "Civilian" came out, they for some reason made up their mind to allot them to the plaintiff. They in no way seem to have made proper appropriation with the assent of the buyer. Nobody says that the property in these goods passed to the buyer; but the defendants say they meant to give the plaintiffs these goods apparently because the plaintiffs are people who do not as a rule take delivery before due date. The result was that the earlier bales of June shipment were allotted to other buyers of that particular quantity and particular shipment. If that is the way in which these defendants made appropriations at a time when ships were sinking frequently, they have acted most unwisely. Having regard to the contract and having regard to the custom (which they themselves now want to plead) they had no right to do any thing of the sort. It is not necessary for me to find whether or not there are any circumstances of suspicion attaching to the fact that plaintiffs were given the whole of these bales coming out in the "Civilian." It is suggested that the fact of sinkage might have been known at the time when this was done. I do not think that is proved, but I do think that it is proved that the defendants were minded to treat the plaintiffs badly. They plainly had a grudge against the plaintiffs either for the alleged reason that they were slow in taking delivery, or for some other reason which I have not been told. Whichever way this matter is regarded, the defendants' case on the 27 bales is very nearly impossible, they are only entitled to take the proper proportion of the sinkage and attribute that to the plaintiffs. This can be worked out and mentioned to me.

I come now to the most difficult question, the question of the 25 bales of May shipment ex. "Defender." Upon this the correspondence between the parties, and between the plaintiffs and their buyers Pannalal Hazarimull, has been gone into at length, but the only question is whether or not arrival notices in respect of these bales were given. It is fair to remember that the facts are now 4 years old, and that, as Mr. Sircar says, the facts spoken to upon the one hand and the other were not very remarkable even at the time that they happened, and, therefore, very likely they may have been forgotten. At the same time it is only open to me to decide this case according to the evidence, and this is a case in which the plaintiffs have one distinct advantage upon any point of this sort. I refer to the admitted fact that the market had gone strongly in their favour. That does not mean that I am to start with a prejudice in favour of the plaintiffs. What it means is that I am to

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bear that fact in mind in trying to interpret the meaning of the correspondence and the probablities of the case. The correspondence with regard to the 25 bales begins really on the 16th October and it goes on till the 31st October. On the 16th Messrs. Khaitan say that they understand that the remaining bales of May and June shipment, have arrived and "my clients have received no arrival notice" and they say that the defendants have been wrongfully withholding all information. The defendants upon that say with regard to the 25 bales that they have repeatedly asked the plaintiffs to take delivery and pay for the goods: that the due date for delivery fell due long ago; that the plaintiffs did not care to notice their repeated requests; and they give a final period of 24 hours under threat to cancel. Upon that, on the 19th the plaintiffs' attorney replied that they have had no information up to that point, that they have not yet been told when the goods were shipped, and by what steamer, and when they arrived. In answer to that, there is the letter of the 20th simply saying that the plaintiffs might come and inspect at the defendants' office. The defendants' correspondence becomes acrimonious and the defendants say that the plaintiffs are always short of money and always make false pretexts. After that, there are two letters of the 31st in which the required information is again asked for by the plaintiffs, and the defendants withdraw their offer to give the 25 bales. From the start there has been a controversy as to whether any arrival notice was given, and it is noticeable that the 16th October happens to be exactly the due date of these goods. The due date is calculated from the arrival of the boat and not from the giving of the arrival notice. I have to find whether there is something in the conduct of the parties that enables me to say that the defendant's evidence, of the giving of verbal notice, is corroborated so as to be sufficient. I put it in this way because it is an absolutely fair observation to say that after the defendants' answer to the letter of the 16th October, good evidence must be exacted from them to the effect that they gave arrival notice. It is untrue and plainly untrue that these goods fell due long before the 16th October. It is grossly improbable and quite untrue that repeated requests to take delivery were made during the 90 days, and that throws an additional burden upon them, when I come to scrutinise the hazy verbal evidence of arrival notice given on their behalf. Now the balance of evidence leads me to a conclusion against the defendants. To begin with, I do not think that they were minded to treat the plaintiffs very fairly. Their conduct in other matters shows that, and the extreme acrimoniousness of their letters is in the same direction. It is not a very forcible argument that they were giving arrival notices to other people and therefore, they would treat the plaintiffs in the same way. It is quite true, however, that it is very usual to give arrival notices. It is quite true that with regard to some goods arrival notices were given. It is quite true that one can hardly expect Mohimbux or any one to be precise in his recollection of this ordinary incident I have borne all these things in mind; but, in my judgment, people who make contracts requiring verbal notice and with a plain and enphatic alllegation before them that no such notices had been given, conduct themselves as the defendants have done, would be well advised to make sure that their evidence of the giving of such arrival notices is sufficient.

I have considered the suggestion that the reason why these goods were not taken and paid for by the plaintiffs may have been that Pannalal Hazarimull was delaying the matter or unwilling to take the goods until the question of cancellation of other goods was examined into and disposed of. I do not think however, that that theory squares with the facts, or accounts for the position. The plaintiffs must have judgment for damages as regards the 25 bales, and they must have judgment for damages as regards everything save their proper proportion of the 27 bales. The defendants succeed as to the 8 bales. This matter can be mentioned to me at any time next week and the consequences of my judgment agreed upon if possible.

Against this decree, the defendant appealed.

The *Advocate General*, for the Appellant.

Mr. *K. P. Khaitan*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendants from the judgment of my learned brother Mr. Justice Rankin.

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The suit was brought to recover damages in respect of the alleged non-delivery of certain goods, bales of Grey shirtings, which, it was alleged, had been sold by the defendants to the plaintiffs by a contract dated the 23rd of November, 1916 or thereabouts. The shipments by the contract were specified as January to June: but it was stated by the learned Advocate-General in opening the appeal that the period provided for shipments had been altered from January to June, to April to June.

The learned Judge delivered two judgments: In the first he dealt with the question of liability; and, in the second one he dealt with the measure of damages: and, having regard to the course which was taken by the learned Advocate-General appearing on behalf of the appellants, the appeal has been confined to two points. The first related to the damages which were awarded in respect of 25 bales representing the May shipment, and the second related to the order of the learned Judge by which he allowed what was called "interim interest" which, I understand, means interest on the amount adjudged in respect of damages from the date of the suit to the date of the decree. Interest at the rate of 6 per cent. on the amount of the decree and running from the date of the decree was allowed, and no complaint was made by the appellants with regard to that matter, and it was with respect to the learned Judge's order by which he allowed interest at 6 per cent. on the amount of damages from the date of the suit to the date of the decree that the appeal was argued.

With regard to the first point, namely, damages awarded in respect of the May shipment, the learned Judge in his judgment said, "In the present case the correspondence in October satifies me that it would be wrong to give damages as regards any of May shipment on any higher rate than the October rate": and, the learned Judge further said, "I see no reason to give a highter rate of damages with regard to 25 bales than the October rate. That rate I fix at Rs. 12-12." The point which the learned Advocate-General urged in respect of this matter was that there was no evidence which entitled the learned Judge to come to the conclusion that the October rate, that is, the October market rate was Rs. 12-12 as. and, he, therefore, asked for a remand in order that the matter might be further enquired into, and, if necessary, evidence given with regard to the October rate. In my judgment, this application should not be acceded to.

As I read the learned Judge's judgment, he came to the conclusion that the period during which the defendants might have delivered the May shipment extended to 31st of October: and, when one looks at the correspondence of this period, it is not difficult to see how it was that the learned Judge arrived at that conclusion. The material date, viz. that on which the defendants finally decided that they would not deliver the May shipments, being the 31st of October it was not unreasonable in my judgment, for the learned Judge to take the market rate of the 1st November. The evidence was that on that date the market rate was Rs. 12-12 as. Consequently, in my judgment, there is no reason for remanding this matter for further enquiry, nor is there any reason for interfering with the learned judge's decision on this point.

With regard to the second point, namely, the order of the learned judge as regards interest from the date of the suit to the date of the decree, it is not disputed that the learned Judge had jurisdiction to make the order, having regard to the provisions of section 34 of the Code of Civil Procedure. The matter, therefore, was one for the discretion of the learned Judge. Having regard to the judgment of the learned Judge, when he was dealing with the question of the liability of the defendants, I find no difficulty in concluding what must have been in the learned Judge's mind when he came to the decision that it would be right to allow the plaintiffs interest from the date of the suit to the date of the decree: and, having regard, therefore, to that judgment, I am not prepared to interfere with the discretion of the learned Judge in this respect. I desire merely to add that when an order, such as this, for the payment of interest on the sum awarded as damages from the date of the suit to the date of the decree is made, in my judgment, it is desirable that the learned Judge who tries the case should state the reasons for that order. From enquiries which my learned brother and I have made and from what was stated by the learned counsel for the respondents in Court, and having regard

to certain judgments delivered on the Original Side to which reference was made it appears that in several cases recently orders somewhat similar to the one now under consideration have been made. At the same time it seems to me that it cannot be denied that an order of this kind is out of the ordinary: and, for that reason, in my judgment it is desirable that the learned Judge should state the reasons for such an order. In this case as I have already said, having regard to the fact that the learned Judge who tried the case, had all the circumstances connected with it, present to his mind at the time he made the order and having regard to what he said in his judgment, by which he decided the question of liability, it seems to me that there were materials upon which the learned Judge was justified in exercising his discretion in the way he did.

For these reasons in my judgment this appeal should be dismissed with costs.

Richardson, J.—I agree.

N. H. *Appeal dismissed.*

Attorney for the Appellant—Mr. *H. C. Banerjee.*

Attorneys for the Respondent.—Messrs. *Khaitan & Co.*

MADRAS HIGH COURT.

FULL BENCH

APPEAL AGAINST APPELLATE ORDER

NO. 45 OF 1922.

November 6, 1923.

Present:—Sir Walter Salis Schwabe, Kt., Chief Justice, Mr. Justice Ramesam and Mr. Justice Waller.

RAJAGOPALA AIYAR MINOR BY GUARDIAN RAMACHANDRA AIYAR—PETITIONER—DEFENDANT—APPELLANT

versus

RAMANUJACHARIAR AND ANOTHER—COUNTER-PETITIONERS—PURCHASERS AND DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. [illegible], O. XXI, rr. 22, 90 Limitation Act (IX of 1908), Sch. I, Arts. 166, 181—Execution of decree—Notice of attachment, absence of—Effect of—Sale, whether void—Application to set aside sale, nature of—Limitation—Appeal, whether lies—Sale set aside—Terms.

In a case where notice under O. XXI, r. 22 of the Civil Procedure Code has not been issued and the omission is due not to the fact that sub-Rule (2) of the rule has been applied, but to the fact that notice was not asked for a sale held in execution is void and not merely voidable as against the person to whom notice should have been but was not issued.

Gopal Chunder Chatterjee v. *Gunamoni Dasi*, 22 C. 370 at p. 372, (10 Ind Dec. N. S.) 251; *Raghunath Das* v. *Sundar Das Khetri*, 24 Ind. Cas. 304; 42 C. 72; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 41 I. A. 251 (P. C.). *Syam Mandal* v. *Sati Nath Banerjee*, 38 Ind. Cas. 482; 44 C. 954; 24 C. L. J. 523; 21 C. W. N. 776, **followed.**

Kasiviswanathan Chetty v. *Somasundaram Chetty*, 70 Ind. Cas. 611; 45 M. 875; 42 M. L. J. 422; (1922) M. W. N. 173; (1922) A. I. R. (M.) 93; *Doraisami* v *Chidambaram Pillai*, 75 Ind. Cas. 46; 45 M. L. J. 413; 18 L. W. 577; 35 M. L. T. 25; (1923) M. W. N. 817; (1924) A. I. R. (M.) 130; 47 M. 63, **overruled.**

Malkurjun v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739; (P. C.); *Rewa Mahton* v. *Ram Kishen Singh*, 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N S.) 13 (P. C.); **distinguished.**

Where a sale in execution of a decree is void as against a party and he applies for relief under section 47 of the Civil Procedure Code or otherwise, the case is governed by article 181 and not by article 166 of schedule I to the Limitation Act.

Seshagiri Rao v. *Srinivasa Rao*, 56 Ind. Cas. 260; 38 M. L. J. 62; (1920) M. W. N. 127; 43 M. 313; **followed.**

Chief Justice and Waller, JJ:—**An application to set aside a Court sale on the ground that no notice was given of the application for attachment and order for sale of the property is not covered by O. XXI, r. 90 of the Civil Procedure Code but comes under section 47 of the Code and an order passed on the application is, therefore, appealable as a decree.**

Neelu Nethiar v. *Subramania Moothan*, 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59, **followed.**

Where an application is made to set aside a Court sale on the ground of want of notice in accordance with the provisions of O. XXI, r. 22 of the Civil Procedure Code and the sale is set aside and it appears that the defendant judgment-debtor was properly before the Court and his interest is liable to be sold in satisfaction of the decree, the petitioner can only be permitted to recover possession of the property on payment to the purchaser of what he has paid together with interest less any amount he may have received for mesne profits.

RAJAGOPALA AIYAR *v.* RAMANUJACHARIAR

Appeal against the order of the District Court, East Tanjore at Negapatam, dated 23rd January 1922, in C. M. A. No. 81 of 1921, preferred against that of the Subordinate Judge, East Tanjore at Negapatam, in Miscellaneous Application No. 278 of 1621, in O. S. No. 13 of 1916, on the file of the Court of the Temporary Subordinate Judge, Tanjore.

This appeal coming on for hearing on the 21st day of Septemeber 1923 and the 10th October 1923 and Messrs. *T. Narasimha Ayyangar* and *N. S. Rangaswami Ayyangar*, for the 1st Respondent having raised a preliminary objection and upon hearing Mr. *V. Ramaswami Ayyar*, for the Appellant, the Court made the following

ORDER.

Schwabe, C. J.—A perliminary point is taken that no second appeal lies because it is said that this is an appeal on a petition based on, there being a material irregularity in publising or conducting the sale within the meaning of O. XXI, R. 90, that the order made under rule 92 setting aside the sale, was an order made by reason of that material irregularity or fraud, and that as no second appeal lies from orders made under rule 92, there can be no second appeal here. The answer is that it may be prefectly true as regards part of the appeal, but one of the grounds on which the appellant relies is that no notice was given of the application for attachment and order for the sale of the property and that, that comes under section 47 of the Civil Procedure Code and is, therefore, appealable as a decree.

The only direct atthority on the point is the Judgment of Oldfield and Seshagiri Ayyar, JJ., in The *Khedath Neelu Neithiar* v. *Subramania Moothan*(1), where, under somewhat similar circumstances which were not really so strong as this, because the failure to give notice was at a later stage, they held that, where an application is made which is partly covered by r. 90 of O. XXI and partly not so covered, although the order purports to have been made under r. 92 of O. XXI, a second Appeal will lie.

There are *dicta* in other cases to the effect that, where there is absence of notice, there is a remedy under O. XXI. Rule 90 or section 311 of the Old Civil Procedure Code which corresponds with it, particularly in the decision of the Privy Council in *Malkarjun* v *Narhari* (2) but, on looking carefully into that case, we note that this point was in no way before the Privy Council; but apart, I think that the decision in 11 L. W. is an authority, and I should myself come to the same conclusion as was come to, in that case, because looking at the words of O. XXI, r. 90, they appear to me perfectly plain. What is being dealt with there is a material irregularity or fraud in publishing or conducting a sale; and I cannot bring my mind to the view that the failure to give notice of the application for leave to attach and sell is an irregularity in publishing or conducting the sale. It seems to me that it is really a contradiction in terms. There is no sale to publish or conduct until after leave of the Court has been obtained (a) to attach the property and (b) to sell.

Whether or not that failure to give notice is an illegality, is a matter which is entirely irrelevant for the present purpose because it is only certain kinds of irregularities that are covered by O. XXI, r. 90. If the omission in this case was the other kind of irregularity or whether it renders the whole sale a nullity, it is not brought within the wording of that rule. The preliminary point fails and this appeal must proceed.

Waller, J.—I agree that a second appeal will lie.

This Appeal against Appellate Order No. 45 of 1922 came on for hearing again on the 24th and 25th September 1923, and upon hearing the arguments of Mr. *V. Ramaswami Ayyar*, for the Appellant, and Messrs. *T. Narasimha Ayyangar* and *N. S. Rangaswami Ayyangar*, for the 1st Respondent the Court made the following :—

ORDER OF REFE ENCE TO A FULL BENCH.

The question in this case is as to the validity of a sale held in execution of a decree for main-

(1) 58 Ind. Cas 809; 11 L.W. 59; (1919) M.WN. 897.

(2) 25 B. 337 ; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 268; 7 Sar. P. C. J. 739 (P. C.).

tenance. Appellant was the 3rd defendant in the suit. The contesting respondent is the purchaser in execution. The Sub-Judge found that the sale was invalid as notice of execution under O. XXI, Rule 22 had not been issued to 3rd defendant and that the application was in time under Article 181 of the Limitation Act. Finding, further that the property had been sold for considerably less than its proper value, he proceeded to set aside the sale under O. XXI, R. 90. The District Judge, on the other hand, was of opinion that notice to 3rd defendant was unnecessary, that the sale was not invalid and that the application was barred by limitation presumably under Article 166 of the Limitation Act. He added that there was no allegation of fraud or collusion against 1st defendant. Had he said that no fraud or collusion had been proved, he would have been more accurate. There were certainly allegations—no doubt, of a vague description of fraud and collusion against 1st defendant and the plaintiff in the suit. Nothing, however, was alleged against the auction-purchaser, though it is now suggested that he was a party to the fraud, as a result of which the property was sold for less than its proper value. There is no evidence of any collusion between these persons.

The auction-purchaser is not connected with 1st defendant's family. It is not at all probable that the plaintiff and 1st defendant, who were on opposite sides in the suit, would have colluded together. Plaintiff had no interest whatever in getting the land sold for a low price. Her interest, if she had any, lay in the opposite direction. Nor is it apparent why 1st defendant should have conspired to bring to sale only that part of the property in which she had a life estate.

The evidence as to the alleged inadequacy of price is not very satisfactory but we accept the finding of the Subordinate Judge that the sale was in fact at an undervalue.

II. The finding that there was no fraud or collusion does not end the matter. The next question is whether the sale, as against 3rd defendant's interest, is invalid or not. 3rd defendant had undoubtedly a vested interest in the property sold and a notice should have gone to him under O. XXI, r. 22. It has been held in *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (3) that the omission to give such a notice renders the sale void. This decision has been approved by the Privy Council in *Raghunath Das* v. *Sunder Das Khetri* (4) and followed in *Syam Mandal* v. *Satinath Banerjee* (5). The last case has been dissented from in *Kasi Visvanathan Chetty* v. *Somasundaram Chetty*,(6) where it has been decided that the non-issue of notice under O. XXI, r. 22, is a mere irregularity and not an illegality affecting the jurisdiction of the Court to execute the decree. The Judges refused to follow the Privy Council ruling on the ground that it was passed under the old Civil Procedure Code which had in it no provision corresponding with the present sub-rule (2) of r. 22. The ruling in *Syam Mandal* v. *Satinath Banerjee* (5) they dismissed with the remark that it had not considered the effect of sub-rule (2). In *Doraisami* v. *Chidambaram Pillai*'(7),SPENCER, J., arrived at the same conclusion "so long" he said "as r. 22, clause (2) permits an executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity." We think that the decision in *Syam Mandal* v. *Satinath Banerjee* (5) is correct and that the ruling in *Kasi Visvanathan Chetty* v. *Somasundaram Chetty* (6) has been too widely expressed. It may well be that, where an application has been made under sub rule (2) and the conditions contemplated by that sub-rule exist, the non-issue of notice without the recording of reasons would be amere irregularity. But we are of opinion that when, as here, it is not even suggested that the conditions required by sub-rule (2) existed or were under the consideration of the Court, the Privy Council ruling in *Raghunath Das* v. *Sundar Das*

(3) 20 C. 870 at p. 872; 10 Ind. Dec. (N. S.) 251.
(4) 24 Ind. Cas 304; 42 C. 72; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W N. 747; 16 Bom. L R. 814; 20 C. L. J. 555; 18 A. L. J. 154; 41 I. A. 25 (P. C.)
(5) 38 Ind. Cas. 493; 44 C. 954; 24 C. L. J. 523; 21 C. W. N. 776.
(6) 70 Ind. Cas. 611; 45 M. 875; 42 M. L. J. 422; (1922) M. W. N. 473; (1922) A. I R. (M.) 93.
(7) 75 Ind. Cas. 46; 45 M. L. J. 413; 18 L. W. 577; 33 M. L. T. 25; (1923) M. W. N. 817; (1924) A. I. R. (M) 130; 47 M. 63.

Khetri (4) should be followed. The ruling reported in *Malkirjun* v. *Nirhari* (2) is not an authority to the contrary; for in that case, notice was issued on a particular person under the direction of the Court but it was subsequently held that that direction was wrong and this, the Privy Council considered to be no more than an irregularity, which rendered the sale not void, but voidable. In another case *Ram Kinkar Tewari* v. *Sthiti Ram Panja* (8) the Privy Council decision was followed. The Code applicable to it was no doubt, that of 1882, but the opinion was clearly expressed that the law had not been altered by O. XXI, r. 22 of the present Code. The ruling referred to above *Doraisawmi* v. *Chidambaram Pillai* (7) expressly dissents from *Raghunathasami Iyengar* v. *Gopaul Rao* (9). In view of the conflicting opinion on the point, we think that the best course is to refer for the decision of a Full Bench the following question.

Whether, in a case where notice under O. XXI, r. 22 has not been issued and the omission is due not to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, a sale held in execution is void or merely voidable as against the person to whom notice should have been, but was not issued.

If the answer to the question above propounded is that the sale is void as against 3rd defendant, a further question arises—that of limitation, *i. e.*, whether the article of the Limitation Act applicable is 166 or 181 or some other and if so which article. On this point again there is a considerable divergence of opinion. In the decision reported in *Seshagiri Rao* v. *Srinivasa Rao* (10) it has been held that, when a sale is absolutely void for want of jurisdiction, the article applicable is article 181. The same conclusion was arrived at in *Ram Kinkar Tewari* v. *Sthiti Ram Panga* (8). Both of these decisions have been dissented from by OLDFIELD and VENKATASUBBA RAO, JJ., in *Ganapathi Mudaliar* v. *Krishnamachari* (11) (where also a sale was impugned as void), the first on the ground that the decision was supported by reference to an unreported case and not by any independent reasoning and the second on the ground that the relevant part of the judgment was *obiter*. As to the Madras case, the ratio *decidendi*—which the Judges possibly considered too obvious to require statement—doubtless was that a void sale need not be set aside. In the Calcutta Law Journal Case the decision it is true, ultimately rested on section 18 of the Limitation Act, but the question of the Article of Limitation applicable did arise directly in the suit and we think that the decision on it can scarcely be dismissed as *obiter*.

Another case *Babu Das Narayan Singh* v. *Muhamad Yesuf*, is reported in (12) but there it was held that what had occurred was a mere irregularity and that the Court had jurisdiction to sell. In other words, the decision was that the sale was voidable and not void. It was, no doubt, that article 166 governed all applications "on whatever grounds" to have an execution sale set aside, but that is not to say that the same article applies to cases where the sale is void and need not be set aside at all.

In a Madras case *Konidena Ramayya* v. *Konidena Ramamma* (13) it is was held that article 166 governed all applications, under section 47, Civil Procedure Code, to set aside sales on the ground either of illegality or irregularity. In another Madras Case *Thekkedath Neela Neithiar* v. *Subramania Moothan* (1), it was a notice under O. XXI, r. 66 that was in question. The decision was that article 181 did not apply. There is, however, in the course of the judgment a reference to the issue of the notice required by O. XXI, r. 22 as being a condition precedent to the validity of any execution proceedings. One of the Judges was a party to the decision in *Kasi Visvanathan Chetty* v. *Somasundaram Chetty* (6).

In *Raghunathaswami Iyenger* v. *Gopaul Rao* (9), the judgment in which OLDFIELD, J. concurred was delivered by RAMESAM, J., who laid down that where an execution sale is void, it need not be set aside. The question of limi-

(8) 46 Ind. Cas. 221; 27 C. L. J. 528.
(9) 68 Ind. Cas. 667; 41 M. L. J. 547: (1921) M W. N. 782; 15 L. W. 123; (1922) A. I. R. (M) 307.
(10) 56 Ind. Cas. 260; 43 M. 813; 38 M. L. J. 62; (1920) M. W. N. 127.
(11) 70 Ind. Cas. 748; 43 M. L. J. 184; 16 L. W. 178; 31 M. L. T. 185; (1922) M. W. N. 514; (1922) A. I. R. (M) 417.
(12) 61 Ind. Cas. 823; (1921) Pat. 181; 3 U. P. L. R. (Pat) 33; 6 P L. J. 319; 2 P. L. T. 401.
(13) 74 Ind. Cas. 459; (1922) M. W. N. 176; (1922) A. I. R. (M) 95; 16 L. W. 934.

tation did not arise, but, if it had, presumably the decision would have been that article 166 did not apply. This decision was dissented from in *Doraisami* v. *Chidmabaram Pillai* (7) by SPENCER and KRISHNAN, JJ. In *Parama Siva Thever* v. *Pu'ukuppa Thever* (14) In A. A. O. No. 74 of 1922, SPENCER and DEVADOSS, JJ., dissented from *Seshagiri Rao* v. *Srinivasa Rao* (10) and followed, *Ganapathi Mudaliar* v *Krishnamachari* (11). In A.A.O. No. 77 of 1921, SPENCER, J , did not decide the question of limitation.

Venkatasubba Rao, J., held that the sale in question is void. He held further that the application then under consideration was, in substance, one to declare that the sale was in-operative and that, therefore, article 166 could not govern it.

I need refer to only two more Madras cases. In one of them *Muthiah Chettiar* v *Bawa Sahib* (15), OLDFIELD and TYABJI, JJ., disagreed as to the applicability of article 166. OLDFIELD, J., was of opinion that the application, though it may have been made under section 47, Civil Procedure Code, was essentially one to set aside a sale and was therefore, barred under article 166. In the other *Pakyidanna* v. *Gunti Lashmi Narasamma* (16) the question we are now considering did not arise. SADASIVA AYYAR, J., however, did refer to it. His opinion was that, if the application he was dealing with was one to set aside the sale as distinguished from one for a declaration of the invalidity of the sale as against the applicant's rights it was barred by limitation under article 166.

Only one other decision need be mentioned —that in *Mani Singh Mau'hata* v. *Nawab Bahadur of Murshadabad* (17) which is in favour of the view that article 166 governs all applications under section 47, Civil Procedure Code. As the correctness of the decision *Seshagiri Rao* v. *Srinivasa Rao* (10) has been doubted, we think that the question should be referred to a Full Bench for final decision. Essentially the question is this—where a sale in execution is void against a particular person, is it a necessary part of his remedy that he should ask to have the sale set aside? If the answer is in the affirmative then probably article 166 applies. If on the other hand, he need not get the sale set aside, but his application can be treated as one for a declaration that the sale is void as against him, article 181 would seem to govern the case. The question we would refer to the Full Bench is this:

Where a sale in execution is void as against a party and he applies for relief under section 47, Civil Procedure Code or otherwise, what is the period of limitation that governs his application?

This appeal came on for hearing on 26th October 1923 in pursuance of the order of reference to a Full Bench, dated 10th October 1923 and upon perusing the grounds of appeal and the order of the lower Court and the record in the case and the said order of reference to a Full Bench and upon hearing the arguments of Mr. *V. Ramaswami Ayyar*, for the Appellant and Mr. *K. S. Krishnaswami Ayyangar* for Mr. *T. Narasimha Ayyangar* and Mr. *N. S. Rangaswami Ayyangar*, for the Rspondent, the court delivered the following

JUDGMENT.

Schwabe, C. J.—If this matter were free from authority I should incline to the view that non compliance with the provisions of O. XXI, r. 22 was a material irregularity, and not an illegality which would make the subsequent sale a nullity. In England there was a rule of Common Law that judgments after the lapse of a year and a day could not be executed unless an order for what was known as a *scire facias* was first obtained. There are authorities to the effect that the disregard of that rule rendered a subsequent sale in execution voidable and not viod *Blanchenay* v. *Burt* (18), and *Good Title* v. *Bad Title* (19), and the same rule applies in America—see Freeman on Void Judicial Sales, page 97. But in my judgment

(14) 77 Ind. Cas. 631 ; 18 L. W. 780 ; 33 M. L. J. 137 ; 45 M L. J. 829 ; (1924) M. W. N. 27 ; (1924) A. I. R (M) 137.

(15) 26 Ind. Cas. 46 ; 27 M. L. J. 605 ; 1 L. W. 969

(16) 29 Ind. Cas. 314 ; 38 M. 1076 ; 28 M. L. J. 525.

(17) 50 Ind. Cas. 202 ; 46 C. 694 at p. 695 ; 36 M. L. J. 210 ; 17 A. L. J. 202 ; 28 C. W. N. 531 ; 29 C. L. J. 355 : 1 U. P. L. R. 16 (P. C.); 25 M. L. T. 341; 21 Bom. L.R. 611; (1923) M.W.N. 318; 46 I. A, 60 (P.C.).

(18) (1893) 4 Q. B. 707 ; 3 G & D. 613 ; 13 L. J. Q. B. 291 ; 7 Jur. 575 ; 114 E. R. 1064.

(19) (1837) 9 Dowl. P. C. 1000 at p. 1009 ; 5 Jur. 990.

there are authorities here to the contrary which preclude such a view being taken here. In *Gopal Chunder Chatterjee* v. *Gunamani Dasi* (3), their Lordships of the Calcutta High Court laid down that a notice under section 248 of the Code of Civil Procedure of 1882 was necessary in order that the Court should obtain jurisdiction to sell a property by way of execution as against the legal personal representative of the deceased judgment-debtor. In *Ragunath Das* v. *Sundar Das Khetri* (4), the judgment-debtor had become an insolvent and a sale in execution took place without proper notice under the same section and their Lordships of the Privy Council held that the sale was a nullity. In the case before us no notice has been given of execution 'proceedings to the infant petitioners although a year had elapsed since the decree, but I can see no difference in principle between the position of legal representatives of a deceased judgment-debtor, or the Official Assignee of the judgment-debtor's estate, and that of a party to the suit who has not himself been served with notice of an application for execution more than a year after the decree, and is ignorant thereof. The provision for notice in the two cases of legal representatives and of parties when more than one year has elapsed are contained in the same rule, O. XXI, r. 22, which is in the same terms as section 248 of the Civil Procedure Code of 1882, and I do not think that it is possible to hold that in one case failure to give notice is a mere irregularity while in the other it results in the Court having no jurisdiction to sell at all. In *Shyam Mandal v.* v. *Sitinath Bannerjee* (5), MOOKERJEE and CUMING, JJ., held that a proper notice under O. XXI, r. 22 after the lapse of one year from the decree was the very foundation of the jurisdiction itself, and that failure to give it rendered a sale inoperative even as against a stranger. It is right to point out that in that case an application was made to prevent the confirmation of the sale before it was completed and no question of limitation arose, but the grounds of the decision are quite clear and unless we disagree with them they are conclusive of this point. In *Visvanatham Chetty* v. *Somasundaram Chetty* (6), a Bench of this Court held that the non-issue of notice under O. XXI, r. 22 was a mere irregularity, and not an illegality affecting the jurisdiction of the Court to execute the decree, and in *Duraswami* v. *Chidambaram Pillai* (7) SPENCER, J., took the same view; and KRISHNAN, J., stated that he would have been in favour of referring the matter to a Full Bench but for the decision of the Privy Council in *Mallikarjan* v. *Narahari* (2) which he considered rendered it unnecessary to do so The ground on which the Privy Council cases referred to above were sought to be distinguished from this case, was that O. XXI, r. 22 differed from section 248 of the Civil Procedure Code of 1882 in that, O. XXI, r. 22 provides that the Court can issue process in execution without issuing the prescribed notice, if for reasons to be recorded. it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice, while there was no such provision in the Code of 1882; and that as there is now a discretion in the Court to excuse the notice it follows that the failure to give such notice must be a mere irregularity. I am not able to follow this reasoning. I do not appreciate how the failure to give such notice can have any different effect under the new Code to what it had under the old Code, merely because the new Code provides that in certain cases the Court can dispense with the notice. In my judgment the only effect of this sub-section is to give the court jurisdiction in certain cases in which without it the Court would have none. *Mallikarjan* v. *Narahari* (2), is not an authority to the contrary, for in that case notice was served on a person whom the Court had ordered to be treated as the legal representative of a deceased party and who, it was subsequently held, was not the proper legal representative, and the Privy Council held that this was a mere irregularity as the Court was acting within its jurisdiction though wrongly. *Rewa Mahton* v. *Ram Kishen Singh* (20) was relied upon as an authority against this view. In that case there were cross-decrees in separates suit and execution was ordered on one of them without taking into account the other, although it was provided by section 246 of the Code of 1877, now O. XXI, r. 18, that execution can only

(20) 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.)

issue for the balance if any between the two decrees, and it was held by the Privy Council that this was an irregularity and did not render the sale void. Their Lordships held that the Court had jurisdiction to sell, and that the purchaser was no more bound to enquire into the correctness of the order for execution than into the correctness of the judgment upon which the execution was issued. This is an illustration of a case where the Court was acting within its jurisdiction on the proper interpretation of the section of the Code applicable, and does not assist in arriving at the proper interpretation of another section. It follows that the answer to the first question referred is that the sale is void.

The other question referred is what is the period of limitation that governs an application for relief where the property has been sold in execution and that sale is void. If the application is an application under the Code of Civil Procedure to set aside a sale in execution of a decree, the Article of the Limitation Act of 1908 applicable is 166 and the period of limitation is 30 days from the date of the sale. If not, the application is one for which no period of limitation is provided elsewhere and it will be governed by Article 181, the period of limitation being 3 years from the date when the right to apply accrued. Lord DAVEY delivering the judgment of their Lordships of the Privy Council in *Khiarajama* v. *Daim* (21), a case where the Court had sold without jurisdiction the property of persons who were not parties to the proceeding or properly represented on the record—said "as against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may found in the judgment of Sir BARNES PEACOCK in *Kishen Chundar Ghose* v. *Ashoorun* (22)." That is direct authority for the proposition that in such a case it is not necessary to apply to the Court to set aside the sale. If it is possible for the petitioner in this case to proceed without applying to set aside the sale he could avoid the harsh limitation imposed by Article 166. In my judgment he can do so. He could, but for the provisions of section 47 of the Civil Procedure Code of 1908 bring a suit for the possession of the property sold, and the purchaser would not be able to rely upon the Court sale as a defence, because that sale is a nullity and the Privy Council has held that it is not necessary to take any steps to set it aside. By reason of section 47 all questions arising between parties to the suit relating to execution ought to be determined by the Court executing the decree, and not by a separate suit, and it has been held that the fact that a Court purchaser is a necessary party would not prevent the application of this rule. But this is only a question of procedure and the Court may treat the proceeding under this section as a suit subject to any objection as to limitation. It is unnecessary to consider whether the effect of this is that the period of limitation to be applied is the period provided by the Limitation Act in respect of applications or that provided in respect of suits. If the former, the period of limitation will be 3 years under Article 181 and if the latter, the 12 years provided in the case of suits to recover possession of immoveable property. I cannot agree with the view that all applications under Section 47 are governed by Article 166 nor do I think that the statements in cases to that effect are more than *obiter dicta*; the intention being to express the view, with which I agree, that if an application is an application to set aside a sale in execution of a decree it matters not whether the application is made under section 47 or under O. XXI, r. 90. *Seshagiri Rao* v. *Srinivasa Rao* (10) is a direct authority for the proposition that when a sale is absolutely void for want of jurisdiction the Article applicable is article 181, and in my judgment in view of the decisions of the Privy Council referred to above that case was rightly decided.

The petitioner is the guardian of infants who were properly before the Court as Defendants in the original suit, and their interest in the property was liable to be sold in execution in satisfaction of the decree, and they can only be permitted to recover possession of the property on payment to the purchaser of what he has paid together with interest thereon at 6 per cent. less any amount the may

(21) 32 C. 296 ; 1 C. L. J. 584 ; 32 I. A. 23 ; 8 Sar P. C. J. 734 ; 9 C. W. N. 201 ; 2A . L. J. 71 ; 7 Bom. L. R. 1 (P.C.)

(22) (1863) 1 Marsh 647.

have received for mesne profits, and in the absence of agreements, this petition must go back to the Court of first instance to ascertain the amount and fix the date of payment and make the necessary order for carrying out this direction. In view of the fact that the petitioner chose to frame his application under O. XXI, r. 90, and to make unfounded charges of fraud against the respondent, there will be no costs here or below.

Ramesam, J.—The facts of the case and questions referred to the Full Bench are stated in the Order of Reference.

The first question is—whether the sale is void, no notice having been issued under O. XXI, r. 22. Three possible views may be taken on the effect of want of notice under O. XXI, r. 22 of the new Code.

(1) The want of notice is only an irregularity—This is the view taken by Oldfield, J., in *Viswanathan Chetty* v. *Somasundaran Chetty* (6), and I agreed with his judgment.

(2) The sale is void—This is the decision of the Privy Council under the old Code in *Ragunath Das* v. *Sundar Das Khetri* (4) and it may be said that the addition of clause (2) in the new Code does note make any difference when the mind of the Court was not applied to the need for notice.

(3) An intermediate view may be taken viz., if the case is one to which clause (*a*) of subsection (1) of rule 22 applies then the want of notice is merely an irregularity; and if clause (*b*) applies the sale is void for want of notice. In this way *Ragunath Das* v. *Sundar Das Khetri* (4), may be distinguished.

Now I confess there is something to be said in favour of each of these views. All that can be said in favour of (1) has been said by Oldfield, J., in *Viswanathan Chetty* v. *Somasundaram Chetty* (6). (with which I agreed) and by Spencer, J., in *Doraisamy* v. *Chidambaram Pillai* (7).

Incidentally I may point out that the point doese not strictly arise in *Doraisamy* v. *Chidambaram Pillai* (7). There, the sale took place on 17th January 1916. The judgment-debtor died on 16th December 1915. The application for attachment, for sale must have been ordered and the proclamation of sale must have been settled before his death. It does not appear that an application for execution, had to be made or was made after his death, and if there was none, it cannot be said that O. XXI, r. 22, was violated. If the sale in that case was viod it must be only on the ground that the judicial proceeding after the death of the judgment-debtor and without bringing any legal representative on the record was void as held by Oldfield, J. and me in *Ragunathaswami Iyengar* v. *Gopaul Rao* (9), but Spencer and Krishnan, JJ., dissented from this view. In the judgment of my Lord, my Lord has given reasons against adopting the reasons of the decision in *Viswanathan Chetty* v. *Somasundaram Chetty* (6), and of Spencer, J., in *Doraisamy* v. *Chidambaram Pillai* (7).

(2) The second view was adopted in *Shyam Mandal* v. *Satinath Banerji* (5), dissented from by Spencer, J., in *Doraisamy* v. *Chidambaram Pillai* (7), is supported by the Judgment of the Privy Council in *Ragunath Das* v. *Sundar Das Khetri* (4), and now by my Lord the Chief Justice. I understand that my brother Waller, J., also agrees with this view.

(3) The third view was urged before Oldfield, J., and myself and was rejected by us in *Viswanathan Chetty* v. *Somasundaram Chetty* (6). As my Lord now points out there is something to be said in its favour, but the language of the Judicial Committee which does not make any distinction between clause (*a*) and clause (*b*) of section 248 of the old Code (corresponding to O. XLI, r. 22 of the present Code) prevents us from accepting it.

With no strong inclination in favour of any one of the three views stated above, and in order that our judgment may be unanimous, I would formally drop the conclusion I adopted in *Viswanathan Chetty* v. *Somasundaram Chetty* (6), and agree with my Lord and Waller, J., on the first question referred to the Full Bench.

The second question referred to the Full Bench presents no difficulty. Once we are agreed that *Ragunath Das* v. *Sundar Das Khetri* (4), applies, that case is conclusive that the sale has not got to be set aside. Only if it has to be set aside, Article 166 applies

If not, Article 181, when the matter arises, under section 47 or Article 144 when the question arises in a suit (as in *Ragunath Das* v. *Sundar Das Khetri*) (4), would apply. I agree with my Lord's proposed answer to the second question and with the further order as to mesne profits and costs.

Waller, J.—I agree entirely with the Judgment of the learned Chief Justice and have nothing to add to it.

V. N. V. *Answered accordingly.*

CALCUTTA HIGH COURT,

APPEAL FROM APPELLATE DECREE
No. 423 OF 1922.

March 20, 1924.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Graham.

RAMESH CHANDRA DAS—APPELLANT

versus

MAHARAJA BIRENDRA KISHAN MANIKYA BAHADUR—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 85, *O. XXXII —Ruling Prince—Majority—Personal law—Guardian* **Item**, *whether necessary—Manager, suit by, maintainability of.*

It is not necessary to appoint a guardian *ad litem* of a ruling prince not living within the limits of British India and not domiciled in British territory who has attained majority under his personal law, although he is a minor under the Indian Majority Act. Such prince is not a minor within the meaning of O. XXXII, Civil Procedure Code. He is moreover entitled to act through his manager appointed under section 85 of the Code of Civil Procedure.

Mathura Mohan Roy v. *Surendra Narain Deb*, 1 C. 108 ; 24 W. R. 464 ; 1 Ind. Dec. (N. S.) 71, followed.

Rule in the matter of an application for substitution of the heir of the deceased respondent and appointment of a guardian-*ad-litem*.

Babu *Mahandra Nath Roy* (with Babus *Ramesh Chandra Sen* and *Santemoy Majumdar*), for the Petitioner :—My Lords, the Respondent in the appeal in connection with which this application arises, *viz.* Maharaja Birendra Kishore Manikya Bahadur of Tipperah died on the 13th August 1923. On his death the appellant made an application for the substitution of the name of Maharaja Bir Bikram Kishore Manikya, the son and heir of the deceased Maharaja alleging that he was a minor and proposing, Maharani *Srimati* Arundhati Mahadevi his mother as his guardian *ad litem*. The present application is by the said Maharani *Srimati* Arundhati Mahadevi for a decision as to whether Maharaja Bir Bikram Kishore Manikya Bahadur is a minor for the purposes of the present appeal which is one of many of his cases pending in British Indian Courts. The Maharaja is above 15 but has not yet completed his 16th year. The Governor in Council has appointed with the approval of the Government of India a Council of Administration for the Tripura State with Rai Jyotish Cnandra Sen Bahadur as the Vice-President, and the Manager and agent of the Maharaja with respect to his estates in British territories. The notices for the substitution in the present appeal have been served upon the mother of the Maharaja, the Government pleader and the Vice-President of the Council of Administration. The Vice-President, however, referred to the Government as to what should be done regarding substitution of the name of the Maharaja in all the pending cases of the State in British Courts. The reply of the Government embodied in a letter dated 27th January 1924 is to the effect that " the name of His Highness the Maharaja should be substituted in those suits acting through his manager in whose favour a power of attorney should be executed by the Maharaja himself for that purpose. Therefore, the decision of the Government is that the Maharaja has attained majority. But a decision of the Court is necessary for the purposes of the suits pending there. Under

O. XXXII, r. 3 of the Civil Procedure Code the Court has to satisfy itself as to whether the defendant who is alleged to be a minor is really a minor, before a guardian is appointed to act on his behalf.

Now according to r. 16 of O. XXXII, the rules regarding the appointment of a guardian are not applicable to a Ruling Chief like the present Maharaja. Besides, the Maharaja is not a minor as contemplated by O. XXXII of the Civil Procedure Code. For, according to it a minor is a person who under the Indian Majority Act (IX of 1875) has not completed the age of 18 years or a person of whose person and property a guardian has been appointed by a Court of justice or whose property is in the hands of the Court of Wards and he has not completed the age of 21 years. Again, the preamble of the Indian Majority Act states that the same is applicable only to persons domiciled in British India. The Maharaja, however, does not live within British India and is not domiciled in it.

What, then, is the law by which 'the question as to whether the Maharaja is a minor or not is to be determined.' Before the Indian Majority Act, there was no enactment governing the people of the town of Calcutta regarding the age of majority. The Act XI of 1858 which laid down 18 years as the age of majority governed the people in the *Mufassil* outside Calcutta. Under such circumstances the Full Bench decision in the case of *Mathura Mohan Roy* v. *Surendra Narain Deb* (1) concluded that the age of majority of a Hindu living within the town of Calcutta was to be determined by his personal law. If, therefore, the Majority Act is not applicable to the Maharaja, his personal law must be resorted to. The personal Law applicable to the Maharaja is the *Dayabhaga* branch of the Hindu Law according to which a person who has completed 15th year is to be considered as to have attained majority though under the *Mitakshara* branch one hasto complete the16th year for that purpose (passages cited from Mayne's Hindu Law, 9th edition, page 282, and Trevelyan on Law relating to Minors 5th edition, page 200). Therefore, my submission is that the present Maharaja having completed his 15th year he can no longer be treated as a minor for legal purposes in British Indian Courts.

Babu *Sasadhar Roy*, (for the Opposite-Party :—My application for the appointment of a guardian was meant only to safe-guard my client's interest. I have no objection to the Maharaja's being considered as having attained majority if that does not prejudice my client's interest in any way. [Babu *Govinda Chandra Deo Roy* (with Babu *Birendra Chandra Das*), for the Manager]. I have no objection.

JUDGMENT.

Suhrawardy, J.—This is an application by Maharani *Srimati* Arundhati Mahadevi of Tipperah asking for a decision of this Court as to whether Maharaja Bir Bikram Kishore Manikya Bahadur, the present Maharaja of Tipperah is a minor for the purposes of the present appeal which is one of many cases pending in British Indian Courts in connection with his extensive *Zemindary* within British territories and for such order as to this Court may seem fit and proper. During the pendency of this appeal the respondent Maharaja Birendra Kishore Manikya Bahadur of Tipperah died on the 13th August 1923 leaving as his son and heir the said Maharaja Bir Bikram Kishore Manikya Bahadur who has succeeded to the Tipperah State, a Fendatory State in alliance with the British Government, as its Ruling Chief with the approval of the British Government. The appellant thereupon applied for the substitution of the name of Maharaja Bir Bikram Kishore Manikya in place of the deceased Maharaja Birendra Kishore Manikya Bahadur as respondent and, alleging that he was a minor, proposed the applicant *Srimati* Arundhanti Mahadevi, his mother, as his guardian *ad litem*. Notices were served upon the applicant, the Government pleader as also upon Rai Jyotish Chandra Sen Bahadur who is the Vice-President of the Council of Administration of the Tipperah Estate. The petitioner Maharani *Srimati* Arundhati Mahadevi states that Maharaja Bir Bikram Kishore Manikya Bahadur has not yet completed his 16th year and is

(1) 1 C. 108; 24 W. R 464; 1 Ind. Dec. (N. S.) 71.

governed by the Dayabhaga School of Hindu Law. She, therefore, submits that according to the personal law of the Maharaja he has attained the age of majority. Sometime in November 1893 with the approval of the Government of India in the Political Department, a Council of Administration was constituted for the administration of the Tripura State and by a proclamation, dated the 9th December 1923 the Council of Administration assumed charge of the administration and Rai Jyotish Chandra Sen Bahadur the Vice-President of the Council was appointed the manager of the Chakla Roshnabad Estates which are estates appertaining to the Tipperah Raj in British territory. It further appears that by a notification published in the Calcutta Gazette, dated the 5th December 1923, Part I, page 1826, the Governor in Council appointed the said Rai Jyotish Chandra Sen Bahadur manager of his Highness Roshnabad Estates to be the agent of the Maharaja under section 85 of the Code of Civil Procedure. The question as to what course should be adopted in the matter of substituting the Maharaja's name in the pending suits, appeals and proceedings was referred to the Government by the Vice-President by a letter, dated the 27th January 1924 and the answer given by the Government by its letter, dated the 25th February 1924 from the Political Agent of the Tipperah Estate to the Vice-President of the Council of Administration of the Tipperah Estate is to the following effect: "The name of His Highness the Maharaja should be substituted in suits in British Courts acting through his manager holding his power." It is further suggested in that letter that "the Maharaja should himself execute a power of attorney in favour of the Manager for the purpose of British Indian Courts only for the administration of properties of His Highness in British territory."

We are now invited to decide whether the Maharaja is a minor and should be represented by a guardian in this appeal or whether he is competent to act without the intervention of a guardian *ad litem*. O. XXXII, r. 3 of the Code provides that where the defendant (respondent in appeal) is a minor, the Court on being satisfied of the fact of his minority shall appoint a proper person to be the guardian for the suit (or appeal) for such minor. We have, therefore, to satisfy ourselves of the fact of the minority of the Maharaja. Reference may also be made in this connection to r. 16 of that Order which applies to Ruling Princes, as the present Maharaja, is, which makes this Order inapplicable to a Ruling Chief where he is sued in the name of his State or any other name. With reference to the provisions of O. XXXII, Civil Procedure Code a minor is a person who under the Indian Majority Act (IX of 1875) has not completed the age of 18 years or a person of whose person and property a guardian has been appointed by a Court of Justice or whose property is in the hands of the Court of Wards and he has not completed the age of 21 years. The Indian Majority Act, as the preamble shows, applies only to persons domiciled in British India. Admittedly the Maharaja is not living within the limits of British India and is not domiciled in British territory. The Indian Majority Act has, therefore, no application.

The next question that we have to consider is whether the Maharaja is a minor according to the law by which he is governed. It is maintained and there is no contradiction on this point, that the Maharaja is governed by the *Dayabhagha* School of Hindu Law. According to the tenets of that school majority is attained after the completion of the 15th year. There is a slight difference in regard to the age of majority between the two important schools of Hindu Law. Under the *Dayabhagha* School a person who has completed his 15th year is to be considered a major, whereas under the Benares School he must have completed his 16th year. (See Mayne's Hindu Law, 9th edition, page 282, and Trevelyan on Law relating to minors, 5th edition, p. 200). The Act in force before the Indian Majority Act was Act XL of 1858 which laid down the age of majority as 18 years: but that Act was in force only in the *Mufassil*. It was not applicable to the town of Calcutta within the jurisdiction of the Supreme Court of Judicature and the question arose in several cases as to the age of majority of Hindus living within the town of Calcutta. There have been several decisions on this point; but it will suffice if we refer to the Full Bench decision in the case of *Mathura Mohan Roy* v. *Surendra Narain Deb* (1). In that case the age of the defendant when he executed the bond was 16 years and a few months. His plea of mino-

rity at the time of the contract was overruled on the ground that he was bound by his personal law according to which he was a major. In this state of the authorities we are of opinion that Maharaja Bir Bikram Kishore Manikya Bahadur is not a minor within the meaning of O. XXXII, Code of Civil Procedure and that it is not necessary, therefore, to appoint a guardian *ad litem*. He is, however, entitled to act through his manager the Vice-President of the Council of Administration appointed by order of Government under section 85, Civil Procedure Code.

The result is that the application made by the appellant on the 12th November 1923 asking for the appointment of Maharani *Srimati* Arundhati Mahadevi as guardian *ad litem* of the respondent Maharaja Bir Bikram Kishore Manikya Bahadur is dismissed. The appellant will serve notice of this appeal of the Maharaja through the Vice-President who has appeared in these proceedings through Babu Gobinda Chandra Dey Roy who is willing to receive service on his behalf.

Graham, J.—I entirely agree with the order which my learned brother proposes to make. Having regard to the authorities which have been placed before us by the learned vakil for the petitioner, *viz.*, Mayne's Hindu Law, 9th edition, p. 282, Trevelyan on Law relating to minors, 5th edition, p. 200, *Cally Churn Mullick* v. *Bhuggubutty Churn Mullick* (2) and *Mathura Mohan Roy* v. *Surendra Narain Deb* (1). We must, I think, hold that the present Maharaja Bir Bikram Kishore Manikya Bahadur has attained his majority. This view also finds support in the action which has already been taken by Government in this connection. The proper course in the circumstances of the case will, I think, be to treat the Maharaja as a major and for action to be taken on the lines indicated in section 85, Code of Civil Procedure.

M. B. *Appeal dismissed.*

(2) 19 W. R. 110 ; 10 B. L. R. 231 (F. B.).

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 60 OF 1923.

February 22, 1924.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

KALLEPALLI RAJILAGIRIPATHY—APPELLANT

versus

KALLEPALLI BHAVANI SANKARAN AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), S. 11, Expl. IV —Madras Civil Rules of Practice, 161 (3)—Transfer of decree application for—Notice to Judgment-debtor—Failure to plead bar of limitation—Res-judicata—*Limitation Act (IX of 1908), S. 15, Sch. I, Art. 182 (5) —Attachment before judgment—Injunction—Exclusion of time—Application by transferee for recognition of transfer—Step-in-aid of execution.*

On an application for transfer of a decree, it is not only competent to the judgment-debtors but it is incumbent on them, if they propose to rely upon it, to appear and plead that the execution of the decree is barred by limitation.

Where notice of an application for transfer of the decree was issued under Rule 161 (3) of the Madras Civil Rules of Practice to the judgment-debtor and he had opportunity to appear and plead limitation but he raised no objection and execution was ordered to proceed :

Held that it was not open to him on a subsequent application for execution to plead that the former application was barred by limitation.

An application by a transferee decree-holder to recognise the transfer and execute the decree is a step-in-aid of execution within the meaning of Art. 182-(5) of the Limitation Act so as to save the bar of limitation of a later execution petition by the decree-holder, notwithstanding the fact that in certain subsequent proceedings the title of the transferee decree-holder on that date is negatived.

Until an assignment of a decree is held to be invalid the transferees are the proper persons who have title to execute the decree.

An attachment before judgment of a decree absolutely prohibiting the execution of the decree by anybody operates as an injunction within the meaning of section 15 of the Limitation Act. A decree-holder is, therefore, entitled to deduct for the purposes of an execution application, the period during which such attachment is in force,

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Sreepati Charan Chowdhury v. *Shamaldhore Dutt*, 8 Ind. Cas. 22; 15 C. L. J. 123; 15 C. W. N. 661. *Chutterpat Singh* v. *Sumarimal*, 36 Ind. Cas. 602, 20 C. W. N. 889; 23 C. L. J. 645; 43 C 903, not followed.

Mungul Pershad Dichit, v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; Ind. Dec. (N. S.) 32 (P.C.); *Raja of Ramnad* v. *Velusami Tevar*, 59 Ind. Cas. 880; 40 M. L J. 197; 19 A. L. J. 168; 18 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom L. R. 701, relied on.

Rangaswamy Chetty v. *Thangavelu Chetty*, 50 Ind. Cas. 380; 42 M. 637; (1919) M. W. N. 448; 26 M. L J. 147; 10 L. W. 383, distinguished.

Appeal against the order of the District Court, Kistna at Masulipatam in E. P. No. 60 of 1922 (O. S. No. 66 of 1913, on the file of the Court of the Temporary Subordinate Judge, Masulipatam).

Messrs. *T. Ramachandra Rao* and *N. Mangapathi Nayudu*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—This appeal relates to the execution of a decree, dated 27th April 1918. On 26th April 1919 the transferee decree-holders applied for recognition of their transfer and for execution. However, in consequence of an attachment of the decree this petition was dismissed. The next petition was put in on 4-4-1922 asking for the transmission of the decree to the District Court for execution, and on 26-4-1922 the present execution petition was filed. It was contended that the present petition was barred by limitation, but four grounds were urged by the decree-holder for allowing execution. The District Judge has held that two of these grounds were valid and has ordered execution to proceed. Now, this appeal is filed by the 1st defendant, the judgment-debtor.

The first ground taken is that the plea of limitation is *res judicata* by reason of the order on the application of 4-4-1922 directing the transmission of the decree to the District Court. It has been held in the Calcutta Court in *Sreepati Charan Chowdhury* v. *Shamaldhone Dutt* (1) and in *Chutterpat Singh* v. *Saita Sumarimal* (2) that, when an Order for transmission of the decree is made, no question of limitation is decided and therefore, such an order does not amount to *res judicata* on the question of limitation. In fact, in the former case, Mukerjee, J. held that the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation but, apparently no notice was issued to the judgment-debtor under section 248 of Code of Civil Procedure : the Court held further that, even though notice under section 248 is issued, it is not competent for a judgment-debtor at that stage to contend that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous as being barred by limitation. In the judgment no authority is given for this proposition of law and possibly it is based upon the rules of the Calcutta High Court, which do not require the issue of a notice to the judgment-debtor in an application for transmission of the decree. On the other hand, in Madras, under Rule 161 (3) of the Civil Rules of Practice, a notice should be issued, and a notice was accordingly issued in this case. It is now urged for the respondent that the judgment-debtor had an opportunity of appearing and pleading that the application was barred by limitation, and it would seem that, when there was that opportunity section 11, explanation (IV) would be applicable and that the question would be *res judicata* because it was one which might and ought to have been put forward to show that the decree was not one that could be executed. In fact in *Mungal Pershad Dichit V Grija Kant Lahiri* (3) it was held that, where an execution petition was barred by limitation but execution had been ordered to proceed it was not open to the judgment-debtor in a subsequent application to plead that the former application was barred by limitation. Similarly in *Rajah of Ramnad* v. *Velusami Tevar* (4), the Privy Council held that, when an assignee of a decree applied to be brought on the record and to have the decree executed, execution was allowed although the judgment-debtor had raised the plea that execution was barred by limitation. In the order allowing execution, the plea of limitation was not dealt with specifically but it was held that in a

(1) 8 Ind. Cas. 22; 15 C.L J. 123; 15 C. W. N. 661.
(2) 36 Ind. Cas. 602; 20 C. W. N. 889; 23 C. L. J. 645; 43 C. 903.

(3) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).
(4) 59 Ind. Cas. 880; 40 M. L. J. 197; 19 A. L. J. 168; 18 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom. L. R. 701.

subsequent application the plea of limitation could not be urged, for it must be deemed to have been decided in the order on the former application. In that case the plea was raised in the first proceedings but their Lordships remark in the judgment (at p. 200).

"It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it. No appeal was brought from the order then made and therefore it was not competent for the Subordinate Judge to admit the plea on the subsequent proceedings."

It would appear from this that, even in an application for transfer of a decree, it is open to a judgment-debtor to plead limitation and in fact he ought to do so. If the decree is barred by limitation, the transfer of it to another Court is a mere infructuous proceeding which ought not to be taken and therefore if a valid plea of limitation is available, it should be urged in order to prevent multiplicity of proceedings. In this view we think that the District Judge's order in the present case was correct.

The second ground on which the District Judge allowed execution is that the petition put in on 26-7-1919 was a step in aid of execution, and, being less than three years before the present application the latter is not barred. The application on 26-7-1919 was one put in by the transferee decree-holders to recognise the transfer and to execute the decree in certain methods specified in the petition. The petition was dismissed because execution of the decree had been stayed and it appears that in subsequent proceedings the right of those transferee decree-holders has been negatived. At the time the application was made they were transferee decree-holders by assignment from the original decree-holders and as such the proper persons to execute the decree; it was held in *Sreenada Brahmayya Pantulu* v. *Pavasuram Ayya* (5) that such an application as this would have the effect of saving the bar of limitation. The transfer in that case was effected by a decree of Court, whereas in the present case the transfer is effected by an assignment by the parties, but this cannot affect the question whether the application was one made in accordance with law. Until the assignment had been held to be invalid, the transferees were the persons who had title to execute the decree. On this ground also we think the District Judge was right.

The District Judge has rejected the third ground, namely, that limitation is saved under Section 15, of the Limitation Act, and he has based his decision on *Rangaswamy Chettti* v. *Thangavelu Chetti* (6). In that case, however the attachment was of a book-debt and it is clear that an attachment of a book-debt does not operate as an injunction within the meaning of Sect. 15 of the Limitation Act. When a decree is attached, the form of attachment is given in Appendix E, forms Nos. 22 and 23 and, in accordance with those forms, there would not really be any injunction against execution, for the attaching decree-holder cannot execute the decree himself: but in the present case, the attachment was not by a decree-holder, but it was an attachment before judgment, and consequently the order issued by the Court attaching the decree absolutely prohibited the execution of the decree by anybody, as will be seen by a reference to the attachment order. This order clearly amounts to an injunction and it is not denied that, if the period during which that injunction was in force be deducted, the present application would be within time.

For all these reasons we think the present petition is not barred by limitation and therefore dismiss this appeal with costs.

V. N. V.
N. H. *Appeal dismissed.*

(5) 12 M. L. J. 348.

(6) 50 Ind. Cas. 380 ; 42 M. 697 ; (1919) M. W. N. 448 ; 26 M. L. T. 147 ; 10 L. W. 383.

BHOREY AKHEY RAM *v.* BASANT LAL

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1386 OF 1922.

June 11, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

BHOREY AKHEY RAM—PLAINTIFF—APPELLANT

versus

BASANT LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57, O. XXXVIII, rr. 1, 7. 9—Attachment before judgment—Dismissal of execution application—Attachment, whether terminates—Transfer after dismissal of execution application, validity of.

An attachment made before judgment does not come to an end on the dismissal of an execution application. The attachment enures for the benefit of the plaintiff decree-holder till his remedy becomes absolutely barred; and a transfer of the attached property even though made after the dismissal of an execution application, is void as against him.

O. XXI, r. 57 of the Civil Procedure Code does not apply to attachments before judgment and is confined to attachments in execution of decree.

Ganesh Chandra Adak v. *Banwari Lal Roy*, 14 Ind. Cas. 345 ; 16 C. L. J. 86 ; 16 C. W. N. 1097 ; *Kosuri Suraparaju* v. *Mandapaka Narasimham*, 26 Ind. Cas. 31 ; 1 L. W. 932; *Banuddin Sahib* v. *Arunachalla Mudali*, 22 Ind. Cas. 351 ; 26 M. L. J. 215 ; *Venkatasubbiah* v. *Venkataseshaiya*, 48 Ind. Cas. 232; 42 M. 1; 24 M. L. T. 346; (1918) M. W. N. 606; 35 M. L. J. 387; 8 L. W. 369, relied on.

Sewdutt Roy v. *Sreecanto Maity*, 33 C. 639 at p. 643; 10 C. W. N. 634, distinguished.

Ganpati v. *Mukunda*, 63 Ind. Cas. 712 ; 17 N. L. R. 121, not followed.

Appeal from the decree of the District Judge, Agra, dated the 14th September 1922.

Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage deed dated the 8th of January 1909.

It appears that Basant Lal, respondent brought a suit for recovery of a money debt against Khwaju and others, and while that suit was pending he applied for attachment of the defendants' house before judgment. It is not disputed that the house was so attached. While the suit was pending and this attachment was in force, the defendants mortgaged it on the 8th of January 1909 in favour of Bhore Akhey Ram the present appellant. On the 5th March 1909 Basant Lal's suit was ultimately decreed. He put in an application for execution on the 14th of April 1909 which, however was dismissed on the 22nd July 1909 on the ground that the decree-holder had not deposited the process fee necessary for the issue of the proclamation of sale. A second application for execution was made on the 19th July 1909 which also was dismissed on the 23rd December 1909 on apparently not very clear grounds. In pursuance of a third application for execution a share of the house was put up for sale and purchased at auction by Basant Lal, the decree-holder, on the 1st June 1910.

The Courts below have dismissed the plaintiff's claim on the ground that his mortgage deed was executed while the attachment of Basant Lal was subsisting and that, therefore it is absolutely void as against the latter.

On behalf of the plaintiff it is contended that as soon as the first application for execution was dismissed for the default of the decree-holder on the 12th July 1909, the previous attachment ceased to exist. In support of this contention it is urged that O. XXI, r. 57 Civil Procedure Cdoe applies not only to attachment in execution of the decree but also to attachment before judgment, and that under that rule, upon the dismissal of an application for execution, the attachment ceased *ipso facto*.

It is to be noted that prior to the coming in force of the new Act there used to be some doubt as to the continuance of an attachment when the execution cases were struck off or removed from the file. In order to put an end to such doubts r. 57 has been added in O. XXI. As the rule stands it professedly applies to a case where a property has been attached *in execution of a decree*. Unless, therefore, there is some other provision in the Code which makes this rule applicable to attachments

before judgment this new rule would not be applicable to such attachments. It is, therefore, contended on behalf of the plaintiff that by virtue of the provisions contained in r. 7 of O. XXXVIII the above-mentioned rule is applicable to attachments before judgment also. This contention we are not prepared to accept. Under O. XXXVIII, r. 7 the attachment before judgment is to be made in the manner provided for the attachment of property in execution of a decree. That rule clearly refers to the mode of the attachment and not to the way in which that attachment ceases. It is O. XXXVIII which provides as to how and when the attachment before judgment is to cease. Under that rule if a suit is dismissed or if the defendant furnishes the required security the court is to withdraw the attachment. We are, therefore, of opinion that it is not possible to extend the provisions of O. XXI r. 57 to cases of attachment before judgment.

The attachment before judgment would have been subsisting, even though no application for execution had been made up to the date when the mortgage was effected. The attachment was clearly to enure for the benefit of the plaintiff decree-holder till his remedy became absolutely barred. Under the circumstances we see no good ground for holding that the attachment which had been subsisting prior to the application necessarily came to an end when that application was dismissed.

There are several cases in support of the view which we have taken. We may refer to the cases of *Ganesh Chandra Adak* v. *Banwari Lal Roy* (1), *Kosuri Suraparaju* v. *Mandapaka Narasimham* (2), *Banuddin Sahib* v. *Arunachala Mudali* (3), and lastly the Madras Full Bench case of *Venkatasubbiah* v. *Venkata Seshaiya* (4).

In all these cases it has been laid down that O. XXI r. 57 does not apply to attachments before judgment but its operation is confined to attachments in exution of a decree. With that view we fully agree.

The learned Advocate for the plaintiff appellant has relied on the case of *Sewdutt Roy* v. *Sreecanto Maity* (5). That case however is clearly distinguishable because in the first instance it was a case under the old Act which contained no express provision like the one contained in O. XXI r. 57. The remark of Woodroffe J. has to be understood with reference to the facts of the case as were then before him, and cannot be said to have decided the point which arises in the present case. The second case on which reliance is placed is the case of *Ganpati* v. *Mukunda* (6) in. This case is certainly a direct authority favour of the plaintiff. The learned Judicial Commissioner came to the conclusion that there was no good reason for not applying O. *XXI* r. 57 to attachments before judgment. The main ground relied upon by him was that as rules like 55 and 56 of O XXI did apply, there was no jurisdiction for not applying r. 57. We have, however, already pointed out that under O. 38 r. 7 the mode of attachment before judgment has to be the same as that for the attachment in execution of a decree, but that rule does not refer to the way in which attachments come to an end. There is no doubt that there is a clear preponderance of authority in favour of the view we have taken. We accordingly uphold the decree of the Court below and dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 14 Ind. Cas. 345 ; 16 C. L. J. 86 ; 16 C W. N. 1097.
(2) 26 Ind. Cas. 81 ; 1 L. W. 932.
(3) 22 Ind. Cas. 351 ; 26 M L. J. 215.
(4) 48 Ind. Cas, 282 ; 42 M. 1 ; 24 M. L. T. 316 ; (1918) M. W. N. 606 ; 35 M. L. J. 387 ; 8 L. W. 369.
(5) 33 C. 639 at p. 643 ; 10 C. W. N. 634.
(6) 63 Ind. Cas. 712 ; 17 N. L. R. 121.

BALUSWAMY AYYAR, *In re*

MADRAS HIGH COURT.

INSOLVENCY PETITIONS NOS. 201 OF 1919 AND 179 OF 1921.

October 8, 1923.

Present :—Sir Walter Salis Schwabe, Kt., Chief Justice, and Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

In the matter of A. N. B. BALUSAWMY AYYAR AND A. N. B. NARASIMHA 'IYER AND *In the matter of* SELLAMUTHU SERVAI AND RATHNASWAMY SERVAI OF VELLASAMY SERVAI AND BROTHERS—INSOLVENTS.

- *Hindu Law—Joint Family—Debt incurred by father—Son's share, liability of—Insolvency of father—Official Assignee, whether can proceed against son's share—Immorality or illegality.*

The share of a son in joint family property governed by the Mitakshara Law can be made liable even during the father's life-time for the father's debts not tainted with illegality or immorality.

On the insolvency of the father, the Official Assignee who stands in his shoes, can claim to have recourse to the joint family property including the son's undivided shares therein.

The two decisions of the Privy Council, *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280 ; 39 A. 437 ; 44 I. A. 126; 6 L. W. 213; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M .L. T. 22 (P. C.); and *Chet Ram* v. *Ram Singh*, 67 Ind. Cas. 569; 44 A. 368; 49 I. A. 228; 3 P. L. T. 363; 31 M. L T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. (P. C.) 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 21 A. L. J. 114; 37 C. L. J. 79 (P.C.), were not intended to and do not alter the law in this respect as laid down in a long series of cases in India.

Nanomi Babuasin v. *Madhun Mohun*, 18 C. 21 at p. 35; 18 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N.R.) 510 (P.C.) ; *Giraharee Lall* v. *Kanto Lall*, 1 I. A. 321 ; 14 B. L. R. 187 ; 22 W. R. 56 ; 3 Sar. P. C. J. 380 (P.C.) ; *Suraj Bansi Koer* v. *Sheo Persad Singh*, 6 I. A. 88 ; 5 C. 148 ; 4 Sar. P. C. J. 1 ; 3 Suth. P. C. J. 589 ; 4 C. L. R. 226 ; 2 Shome. L. R. 282 ; 2 Ind. Dec. (N.S.) 705 (P.C.); *Jogicus* v. *Ganga Ram*, 42 Ind. Cas. 791 ; 21 C. W. N. 957 ; (1917) M. W. N. 739 (P.C.); *Srijut Singh Lugar* v. *Fredyot Kumar Tagore*, 89 Ind. Cas. 252 ; 44 C. 524 ; 44 I. A. 1 ; 32 M. L. J. 133 ; 15 A. L. J. 147 ; (1917) M. W. N. 193; 21 C. W. N. 442 ; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom L. R. 290 (P C); *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280 ; 39 A. 437 ; 44 I. A. 126 ; 6 L. W. 213 ; 21 C. W. N. 698 ; 1 P. L. W. 557 ; 15 A. L. J. 437 ; 19 Bom. L. R. 498 ; 26 C. L. J. 1 ; 33 M. L. J. 14 ; (1917) M. W. N. 439 ; 22 M. L. T. 22 (P.C.); *Chet Ram* v. *Ram Singh*, 67 Ind. Cas. 569; 44 A. 308; 49 I. A. 228; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98 ; 16 L. W. 89 ; (1922) M. W. N. 455 ; 4 U. P. L. R. (P.C.) 64 ; (1922) A. I. R. (P.C.) 247 ; 3 P. L. R. (P.C.) 1922 ; 24 Bom. L. R. 1231 ; 27 C. W. N. 150; 21 A. L. J. 114 ; 37 C. L J. 79; (P.C) *Peda Venkanna* v. *Vadlamannati Sreenivasa Dukshatulu*, 43 Ind. Cas. 225 ; 41 M. 136 ; 6 L . W. 649 ; 22 M. L. T. 334 ; 33 M. L. J. 519 ; (1918) M. W. N. 55 ; *Subramanya Aiyar* v. *Shaw Wallace & Co.* 58 Ind. Cas. 648 ; 12 L. W. 117 ; 38 M. L J. 402 ; 28 M. L. T. 107 ; *Kandaswami Gounden* v. *Kuppu Moopan*, 55 Ind. Cas. 320 ; 43 M. 421 ; 11 L. W. 221 ; 38 M. L. T. 203 ; (1920) M. W. N. 181 ; 27 M. L. J. 96 ; *Official Assignee of Madras* v. *Rama Chandra Aiyar*, 68 Ind. Cas. 898 ; 46 M. 54 ; 16 L. W. 569 ; (1922) M. W. N. 653 ; 43 M. L. J. 569 ; (1923) A. I. R. (M) 55 ; *Soma Rao* v. *Firm of Marwadi Vamaji Vajinji* 71 Ind. Cas. 153; 46 M. 64 ; (1922) M W. N. 708 ; 43 M. L. J. 745; (1923) A. I. R. (M.) 56 ; 32 M. L. T. 9; 17 L. W. 661 ; *Fakirchand Motichand* v. *Motichand Hurruck Chand* 7 B. 438; 5 Ind. Jur. 93 ; 4 Ind. Dec. (N.S.) 294 *Hanmanth Kashinath* v. *Ganesh Annaji* 51 Ind. Cas. 612 ; 43 B. 612 ; 21 Bom. L. R. 435. *Madhusudan Das Mohant* v. *Iswari Dayi Debi*, 61 Ind. Cas. 25 ; 48 C. 341 ; 24 C. W. N. 949. *Kishen Singh* v. *Chhajja Singh* 79 Ind. Cas. 238; 45 A. 490 ; (1923) A. I. R. (A.) 206; *Chandradeo Singh* v. *Mata Prasad* 1 Ind. Cas. 479; 31 A. 176 : 6 A. L. J. 263, considered.

Mr. *M. A. Thirunarayanachari*, for the Petitioners.

Mr. *C. Madhavan Nair*, Advocate General, for the Respondents.

JUDGMENT.

Schwabe, C.J.—The petitioners are the infant sons of two brothers who traded in partnership and became insolvents. They were in possession of joint family property, to shares in which the sons had on birth become entitled.

The question raised in this insolvency petition is whether the sons' shares in the joint family property of a Hindu governed by the *Mitakshara* Law can be made liable, during their fathers' life-time to the father's debts other than *Avyavaharika*, that is, those tainted with illegality or immorality ; for the fathers having become insolvent, the Official Assignee claims to have recourse to the joint family property including, if necessary, the

sons' undivided shares therein. He alleges that the fathers could themselves alienate the property and pay such debts and that he can exercise that right in the interests of the fathers' creditors.

There can be no doubt that this has been supposed to be in accordance with the Hindu Law for a very long time past and that Indian Courts have acted upon this view, so regularly and continuously, that it has been accepted as a well-known principle of law, and that a very large number of titles to property, where there had been sales of joint property by a father's creditors, or by the Official Assignee on his Insolvency has been accepted as good and not in any way open to question.

We are now asked to say that all this is wrong and that the son's obligation to pay his father's debts comes into operation only on his death and that the son's share in the joint family property is immune until such time, except when the debt was incurred by the father for the benefit of the family, that is to say, as agent acting within the scope of his authority. It is said that the principle on which the law has proceeded is that a son is under a pious obligation to pay his father's debts and to save his father's soul, from the penalties which the Hindu religion recognises as falling to the lot of those who leave this world with debts unpaid and that it having been pointed out in two recent decisions of the Privy Council that, as it cannot at any time be predicated with certainty that any one will die, without himself having discharged his debts, that pious obligation cannot come into operation during the life-time of the father, and it must follow that the son's share in the joint family property cannot during the father's life-time in any way be made liable for the father's separate debts. Logical though this may be, it is by no means a convincing argument. Once a proposition of law has been established and acted upon over a period of time, it is too late to uproot it, by a re-examination of the *rationes decidendi* of the cases, by which the proposition was first established and a conclusion that those *rationes* were erroneous at the time, and no longer bring conviction to the existing judicial mind. Further, the principles enunciated by Halsbury, in *Quinn* v. *Leathem* (1) are particularly apposite, when trying to apply the rule of logic on a re-examination of the principles of the reported decisions on Hindu Law and their application to a particular set of circumstances. He stated them thus :

"There are two observations of a general character, which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decided. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

If this matter were coming before us, as a case of first impression, and without the large mass of authority with which it is surrounded, I should enquire by an examination of the original texts of the Smritis and Mitakshara and the commentaries thereon, whether it appeared that a son's property was or was not liable for his father's debts, during the father's lifetime. If I found that the answer to this question depended on pious obligation, I should wish to be satisfied, whether that pious obligation was such that it only comes into operation, on the father's death. On general principles, a son's property cannot be taken to pay his father's debts and it would be necessary to show, first that the Mitakshara makes some exception, on account of which that general principle does not apply to Hindus, and then to discover how far that exception extends. I should on that enquiry soon come to a passage in Yajnavalkya, which has been rendered.

"If a father has gone abroad, or is dead, or is subdued by calamity, his debts shall be paid by his sons and grandsons."

Based on that passage, the author of the Mitakshara lays down :

(1) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289 ; 50 W. R. 139 ; 65 J. P. 708.

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"If a father, without paying the debt which is due, dies, or goes to a distant country, or is afflicted with an incurable disease and the like, then his debt must be paid by his sons and grandsons, by reason of their sonship and grandsonship, even if no assets of the father or the grandfather have been left;" and later, to a statement in Jagannatha, which explains passages, in Vishnu and Yajnavalkya which include the case of a father, being wholly immersed in vice, as referring to a state of "combined insolvency and insolence." The matter for consideration would be whether such expressions must not be taken to include a case of declared insolvency which view, if accepted, would be sufficient to determine the present case. But I think we are relieved from the burden of this enquiry, because certain principles have been too long established for this Court, at any rate, to question them. In 1886 in *Nanomi Babuasin* v. *Modhun Mohan* (2), Lord Hobhouse who delivered the opinion of the Board said:

"Destructive as it may be of the principle of independent co-parcenery rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority."

In 1916, in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3) Lord Buckmaster, said:

"In every other event" that is, except where the debt was incurred for illegal or immoral purposes—"It is open tothe execution creditor to sellthe whole of the estate in satisfaction of the judgment obtained against the fathers alone."

Between those dates, the principle has been acted upon, by the Privy Council and all the Courts of India. It is true that in all the cases of the Privy Council, the question arose as between ths alienees of the family property and the sons, or their representatives; but I can find no indication that those cases were decided, as has been suggested here, on the consideration of the rights of the alienees, as *bona fide* purchasers for value, without notice. Indian Courts have not understood those cases as being limited in that way; for, they have applied the principle to cases of execution against the son's share in the family property and to the rights of the Official Assignee, on the father's insolvency and even to determining the forms of decree in suits against the father, when it is desired to make the son's share answerable for the decree.

In 1914, came the decision in *Sahu Ram Chandra* v. *Bhup Singh* (4). This case actually decided that the rule already established, that an alienation by the father of family property can only bind the son's interest in that property, when the alienation was for the purpose of discharging an antecedent debt, must be limited in its application to cases, where the antecedent debt was incurred, wholly apart from the security of the joint family property. But their Lordships did state their view that the pious duty of a son to discharge his father's debts, only arose on his father's death. It is to be observed that in that case, the claim against the father for repayment of the money due was long since barred by limitation, and that the Board was, therefore, not considering the question, whether, if a decree had been obtained in respect of that debt or the father had become insolvent, it was a debt, for which the son's share in the family property could have been made liable. Further in recognising the principle that the father can alienate joint family property, to secure payment of an antecedent debt, it would seem that the Board must have recognised that the son's share can be made, in the father's life-time, liable to pay his father's debts, altheugh such debts were not incurred, for the benefit of the family. Indeed, in my view, this case is really an authority in favour

(2) 13 I. A. 1; 13 C. 21 at p. 35; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.).

(3) 39 Ind Cas. 252; 44 I. A. 1; 44 C. 524; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290 (P. C.).

(4) 39 Ind. Cas. 280; 44 I. A. 126; 39 A. 437; 6 L. W. 213; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22 (P. C.)

of the Official Assignee, who is dealing with antecedent debts ; for, if the father can alienate the family property, to pay those debts, it seems to follow that the Official Assignee standing in his shoes, can do the same. Based, however, on the statement in this case that the pious obligation only arises on the death of the father, attempts were made all over India to raise once more the question, which it was thought had been set at rest by *Nanomi Babuasin* v. *Modhun Mohun* (2), and to get a finding that in no case, where the debt was not incurred on behalf of the family, could the son's share be reached, during the father's life-time. These attempts failed: see, for instance, *Peda Venkanna* v. *Vedlamannuti Srinivasa Deekshatulu* (5) *Kandaswamy Gounden* v. *Kuppu Moopan* (6), *Subramania Aiyar* v. *Shaw Wallace & Co.* (7) and *Hanumat Kashinath* v. *Ganesh Annaji* (8). *Sahu Ram Chanára* v. *Bhup Singh* (4) was followed by the Privy Council in *Jogi Das* v. *Ganga Ram* (9) where Lord Haldane quoted it, as authorty for the proposition, that the mere circumstance of a pious obligation did not validate the mortgage, otherwise invalid. In 1923 in *Chet Ram* v. *Ram Singh* (10), it was held, following *Sahu Ram Chandra* v. *Bhup Singh* (4) the mortgage of the family property, not being for an antecedent debt, the mortgage and the subsequent sale of the equity of redemption did not bind the sons' or grandsons' shares in the family property and it was further held that the grandsons were not under a pious obligation to repay, to the vendees of the equity, as a condition of recovering the property, the money received by their grandfather. Lord Shaw, in delivering the opinion of the Board, quoted, with approval, Lord Haldane's interpretation of his, Lord Shaw's judgment in *Sahu Ram Chandra* v. *Bhup Singh* (4), but he added.

" In the present case, the doctrine " (that is, of pious obligation) " is invoked against grandsons and in the lifetime of sons. Nothing more need be said. The invocation of the doctrine entirely fails."

Based on this observation, attempts, once more, have been made, in all the Indian Courts, to throw doubt on the principle established in *Nanomi Babussin* v. *Modhun Mohun* (2) and I think opportunely re-stated in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3), by Lord Buckmaster. In Calcutta and Madras this has failed ; see *Madhusudhan Das Mohant* v. *Iswari Dayi Debi* (11) the *Official Assignee of Madras* v. *Ramachandra Aiyar* (12) and *Sama Rao* v. *Firm of Marwadi Vajinji* (13).

By reason of the numerous cases pending in insolvency and otherwise, this petition has been referred to a Bench, and I have directed it to be heard by this Court as at present constituted. In my judgment, the case of *Sahu Chandra* v. *Bhup Singh* (4) and *Chet Ram* v. *Ram Singh* (10), were not intended to and did not alter the law, as laid down in a long series of cases referred to above, and the Official Assignee is entitled to succeed on this petition. On this point, until the Privy Council has definitely otherwise decreed, the law in this Presidency must be considered to remain unaltered in this respect.

Since the argument in this case, a judgment of the Allahabad High Court in *Kishen Singh* v. *Chhajju Singh* (14), has been published. In that case, in a suit against a father, and sons in respect of rent due, under a lease to the father, it was held that the lease was not taken for the benefit of the family and was a speculative and risky transaction not bin ing on the family and the sons were accordingly dismissed from the suit and a decree was given against the father alone and in execution of that decree certain

(5) 43 Ind. Cas. 225; 41 M. 136 ; 6 L. W. 649 ; 22 M. L. T. 334 ; 33 M. L. J 519 ; (1918) M. W. N. 55.

(6) 55 Ind. Cas. 320 ; 43 M. 421 ; 11 L.W. 221 ; 38 M. L. J. 208 ; (1920) M. W. N. 181 ; 27 M. L. T. 96.

(7) 58 Ind. Cas. 648; 12 L.W. 117; 38 M. L. J. 402; 28 M. L. T. 107.

(8) 51 Ind. Cas. 612 ; 43 B. 612 ; 21 Bom. L. R. 435.

(9) 42 Ind. Cas. 791; 21 C. W. N. 957; (1917) M. W. N. 789 (P. C.).

(10) 67 Ind. Cas. 569 ; 49 I. A. 228 ; 44 A. 368 ; 3 P. L. T. 363 ; 31 M. L. T. 50 ; 43 M. L. J. 98 ; 16 L. W. 89 ; (1922) M. W. N. 455 ; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C) 247 ; 3 P. L. R. (P. C.) 1922 ; 24 Bom. L. R. 1231 ; 27 C. W. N. 150 ; 21 A. L. J. 114 ; 37 C. L. J. 79 (P. C.).

(11) 61 Ind. Cas. 25 ; 48 C. 341 ; 24 C. W. N 949.

(12) 68 Ind. Cas. 898 ; 46 M. 54 ; 16 L. W. 559 ; (1922) M. W. N. 653 ; 43 M. L. J. 569 ; (1923) A. I. R. (M.) 55.

(13) 71 Ind. Cas. 153 ; 46 M. 64 ; (1922) M. W. N. 708 ; 43 M. L. J. 745 ; (1923) A. I. R. (M.) 36 ; 32 M. L. T. 9 ; 17 L. W. 661.

(14) 79 Ind. Cas. 238 ; 45 A. 490 ; (1923) A.I.R. (A) 206.

family property, which had been hypothecated by the father, as security for payment of the rent due under the lease, was attached and the sons' interest therein was sought to be brought to sale in satisfaction of the decree. It was held that this could not be allowed and in my judgment this decision is right, in that the debt having been held as *avyavaharika*, execution could not be allowed against the sons in any form, it being a debt for which they had expressly been found to be not liable and for which their property could not be made liable. But as I read the judgment, it goes much further and indeed seems to accept as correct practically all the arguments which had been so clearly and ably addressed to us in this case by Mr. Tirunarayanachari. It seems to lay down definitely that the pious obligation of a Hindu son to pay his father's debt does not arise, until after the death of the father and it treats the case of *Sahu Ram Chandra* v. *Bhup Singh* (4) and *Chet Ram* v. *Ram Singh* (10), as being authorities for this proposition and speaks of cases such as *Girdharee Lall* v. *Kantoo Lall* (15) and cases following *Nanomi Babuasin* v. *Modhun Mohan* (2), as having their authority shaken by these later Privy Council decisions, and with those parts of the judgment, for the reasons given above, I do not agree. Where a suit having been brought on a mortgage, by the father, of family property, in which his sons are joined as parties, it is held that the sons' shares are not liable, on the ground that the debt was not an antecedent debt properly so called, and a further suit being brought in time against the father and a decree obtained on the personal covenant in the mortgage, or for the money lent, whether the sons' shares in the family property could nevertheless be taken in execution of the decree against the father, is a point on which it is not necessary to express an opinion and I should not desire to do so, without having the matter fully argued. It would no doubt be a curious and anomalous position, if the sons' shares were not bound by the mortgage, but were liable to be taken in execution for the mortgage-debt. But that is not a question which we are called upon to decide.

I. P. No. 179 of 19[illegible] The petition will be referred back to the Insolvency Judge with these directions. He will deal with the costs.

I. P. No. 201 of 1919 is referred back to the Insolvency Judge for disposal, as we have not sufficient facts before us to deal with it.

Couts Trotter, J.—In the year 1917, the case of *Sahu Ram Chandra* v. *Bhup Singh* (4) was decided by the Privy Council. I set out the head-note, as it appears in *Sahu Ram Chandra* v. *Bhup Singh* (4) as clearly showing the propositions, which the learned reporter conceived that case to establish. The father of a joint Hindu family governed by the Mitakshara can only sell or mortgage the joint family property, so as to bind his sons in two cases namely, (1) where the alienation is for family necessity, and (2) where the alienation is made to discharge a debt, which (*a*) was antecedent to the alienation, (*b*) was incurred wholly apart from the security of the joint family property, and (*c*) is not proved to have been incurred for immoral purposes. Further, during the father's life, an alienation by him is effective, only in the first case, since its validity in the second case rests upon the pious duty of the sons, to discharge their father's debt and that duty arises only 'upon his death.' As to the first main proposition, there has never been any question, nor as to the proposition 2 (*c*). As regards the proposition 2 (*a*), their Lordships refer to the conflict of authority, which existed in India, as to whether money paid in consideration of a mortgage of ancestral property, effected by the father, could be treated as being antecedent within the meaning of the rules and they hold that it could not and that the debt must not only be antecedent, in time, but must be a dissociated and distinct transaction. The proposition 2 (*b*) may or may not have been new law, when it was promulgated. But it is safe to say that it embodied a principle, which was not present to the mind of the Indian Courts and had not been applied by them. A Full Bench of five Judges of this Court in *Arumugam Chetty* v. *Muthu Koundan* (16) was so much impressed with the possible effect of the application of this principle, upon existing titles, that they treated that proposition as an *obiter dictum* and upheld a mortgage where the antecedent debt relied upon was a prior

(15) 1 I. A. 321 ; 14 B. L. R. 187 ; 12 W. R. 56 ; 3 Sar P. C. J. 880 (P. C.).

(16) 52 Ind. Cas. 525 ; 42 M. 711 ; 9 L. W. 565 ; (1919) M. W. N. 409 ; 37 M. L. J. 166 ; 26 M. L. T. 96.

mortgage of the joint family estate, independent in fact and prior in time, to the mortgage sued upon. The decision of the Board in *Chet Ram* v. *Ram Singh* (10) affirmed the proposition and although they do not expressly overrule the decision of the Madras Full Bench, it was cited to them by Mr. De Gruyther in argument, and I cannot doubt that they must be taken to have disapproved it. But we are really concerned in this case, with the last proposition, namely, that the pious obligation, as it is commonly called, of the sons to discharge their fathers' debts, which the Hindu Law undoubtedly imposes upon them and grandsons does not arise, till the death of the father.

The difficulty which we are called upon to solve arises in this way. The Official Assignee seeks to alienate the joint family property of the family, of which the insolvents were the managers, including the assets of the minor sons, in satisfaction of the debts of the insolvent, so far as they are neither immoral nor illegal, within the meaning of the rule. The minor sons seek by this motion to restrain him from doing so. It was decided by a Bench of this Court, consisting of two members of the present Bench in *The Official Assignee of Madras* v. *Ramachandra Aiyar* (12) that the Official Assignee, though it cannot be said that the shares of the minors actually vest in him, has nevertheless the same rights of disposition of the family property, in satisfaction of the debts of the manager, as the manager would himself have been entitled to exercise, if he had not been adjudicated an insolvent. I think that we should follow that decision, which was only a re-statement of the effect of a long series of decisions in India, beginning with the well-known judgment of Latham, J., in *Fakir chand Motichand* v. *Motichand Harruckchand* (17). Indeed I do not gather that the correctness of that decision was challenged in the lucid and able argument of Mr. Tirunarayanachari. His contention really is that, on the true view of the authorities, the father himself would not in the circumstances have the right to alienate these properties. There can be no doubt that a series of decisions of the Privy Council has established that a sale of the family property by the father to his creditor, or in execution levied by the father's creditor on the family property, cannot be set aside by the sons. That has been interpreted by the High Courts of India, to involve the further proposition that the sons are not only bound by the completed sale or execution proceedings, when the property purports to have passed to the creditor, but cannot resist the steps taken by the creditor to bring about the transfer of the ownership of the property to himself. The cases are set out in note C (1) at p.410, section 307 of the 9th Edition of Mayne on Hindu Law. Mr. Tirunarayanachari's argument falls mainly under two heads. (1) He contends that all these decisions whether of the Privy Council or of the Indian Courts are based on the supposition that the pious obligation devolves upon the sons, not only upon the death but during the life-time of the father. It is only just to observe that the leading case of *Girdharee Lall* v. *Kantoo Lall* (15) undoubtedly appears to proceed on that footing. He contends that as the pious obligation has been authoritatively denied by the latest Privy Council decisions, to exist during the father's lifetime, these cases are no longer to be regarded as binding, where the father is alive. (2) He argues that even if the older decisions of the Privy Council, which are set out at page 410 of Mayne on Hindu Law, are binding, they are all cases, where the property, by alienation or execution, had already come into the hands of the creditor and that the liability of the sons should be confied to such cases. He supports this by saying that *Sahu Ram Chandra* v. *Bhup Singh* (4) has given a new ground on which the liability of the sons can be supported, in cases of a completed transfer and excluded in cases where the transfer is not yet completed. He has been at a little difficulty to find a proper legal label for his position, speaking sometimes of an equity and sometimes of a doctrine in the nature of estoppel. However, let us turn to the passages in the judgment of the Board in *Sahu Ram Chandra* v. *Bhup Singh* (4) on which he relies. At Page 132, the Board say this:

"They desire in the first place to make it clear, that much, if not all, of the law on the subject has arisen from the necessity of protect-

(17) 7 B. 488 ; 8 Ind. Jur. 98; 4 Ind. Dec. (N. S.) 294.

ing the rights of third persons, say, the purchasers of the property, who have taken their title for onerous consideration and in good faith "; and at page 133 is the following passage :

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property and rights have thus sprung up, with regard to the joint family estate, these rights are not to be defeated by the members of the Joint family simply questioning the transaction entered into by its head."

Their Lordships then refer to the well-know summary of Sir James Colvile in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (18) which begins with the words, "where joint ancestral property has passed out of a joint family," words repeated by Sir John Stanley, C. J., in the case *Chandradeo Singh* v. *Mata Prasad* (19) So far as I can ascertain, it is the fact that all the Privy Council cases do deal with executed sales and not with mere proceedings to enforce the creditors' rights But it is difficult to see in principle, what reasons there can be, for holding that such a distinction should be drawn. If a creditor can hold what he has got, it is difficult to see, why his hand should be stayed, in attempting to get it.

The argument that because the decision in *Sahu Ram Chandra* v. *Bhup Singh* (4), has removed the basis, which underlies the earlier decisions of the Privy Council beginning with *Girdharee Lall* v. *Kantoo Lall* (15), therefore, the decisions themselves are to be disregarded, is one that I confess does not appeal to me strongly. The last thing I look for in Hindu Law is logical consistency, compounded as that law is, of ancient texts, thousands of years old, qualified and interpreted by a series of commentaries and by decisions of the Indian Courts and the Privy Council, to temper and modify their application to the conditions of modern Indian life. It seems logically unanswerable to say, that, as the pious obligation of the son is based on the duty to remove his father from hell, that obligation cannot arise until the father, by means of his death, has reached hell. But the matter is not so simple as that; for, Vishnu and Yagnavalkya, as cited by Jagannatha, both accept the father's becoming a *sanyasi*, or being wholly immersed in vice or his suffering from incurable disease, or being mad, or being extremely aged (these last three qualifications come from Katyayan and Vrihaspati) as also giving rise to the son's liability to pay his father's debts.

It is plausible enough to say that the early authorities treat these conditions as equivalent to physical death ; but, at any rate, the doctrine of actual residence in *put* is gone, and it may be that that is the solution of this difficulty, namely, that one is entitled to treat insolvency as equivalent to a kind of civil death of the father, which would thereby invoke the pious obligation of the sons. It is worth remarking that Jagannatha, in his comment on the phrase "immersed in vice," includes, under that head, a state of insolvency and insolence, in which the father has abandoned all attempt to satisfy his creditors. He does not, of course, use "insolvency" in the technical sense of a person who has been actually adjudicated by a Court of law. If this enunciation of the Hindu Law is correct, it seems to me that it will apply *a fortiori* to a case where there had been such a formal adjudication.

The next observation I have to make is that there are at least two decisions of the Privy Council, in which the son's liability was enforced, during the lifetime of the father, although it is true that it was after the property had passed to the creditor. One was *Nanomi Babuasin* v. *Modhun Mohun* (2), and the other was *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3). In each of these cases language was used, which appears to imply that their Lordships, who decided it had no intention of restricting the son's obligations to cases where property has actually passed. And in each case, the decision contains statements, which, if they are correct law, establish the liability of the sons in such a case as the present. In *Nanomi Babuasin* v. *Modhun Mohun* (2), Lord Hobhouse says this, page 35 :—

" Destructive as it may be of the principle of independent co-parcenary right in the sons, the decisions have for sometime established

(18) 5 C. 148 ; 6 I. A. 88; 4 Sar. P. C. J. 1 ; 3 Suth. P. C. J. 589; 4 C. L. R. 226 ; 2 Shome L. R. 242 ; 2 Ind. Dec. (N. S.) 705 (P. C.).

(19) 1 Ind. Cas. 479 ; 31 A. 176 ; 6 A. L. J. 263.

the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or aginst his creditors' remedies for their debts, if not tainted with immorality."

In *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3), Lord Buckmaster says this, at page 4 :

"In every other event," (that is except where the debt was incurred for illegal or immoral purposes), it is open to the execution creditor to sell the whole of the estate, in satisfaction of the judgment obtained against the father alone."

It seems to me impossible to hold that these pronouncements mean that the creditor can hold the property against the sons, if he has actually got it, but can be resisted in his attempts to take the legal steps necessary to get it. I have already said that I do not look for logic in Hindu Law, but I think that such a state of things is repugnant not merely to logic but to a sense of practical justice and convenience. I think that the matter is admirably put by Shah, J. in *Hanumanth Kashinath* v. *Ganesh Annaji* (8).

"I am, therefore, of opinion that in the absence of a definite and explicit pronouncement on the point, this Court is bound in spite of the observations in Sahuram's case *Sahu Ram Chandra* v. *Bhup Singh* (4), to follow the Indian decisions and the decisions of the Privy Council to which I have referred, and to hold that the decree-holder's right to proceed against the ancestral immoveable property in execution during the debtor's life-time is co-extensive with the debtor's power to alienate it under the *Mitakshara* for the satisfaction of his antecedent debts not tainted with illegality or immorality."

Since the argument was concluded, our attention has been drawn to the case of *Kishan Singh* v. *Chhajju Singh* (14) and it is indisputable that the reasoning on which the judgment in that case proceeds is opposed to the conclusion and reasoning of Scott, C. J., and Shah, J. in *Hanumanth Kashinath* v. *Ganesh Annaji* (8) and in effect adopts the line of argument taken by Mr. Tirunarayanachari in this case before us. The actual decision can be distinguished on a very simple ground. The decree was passed in a suit in which the sons and grand-sons had been made parties and the Court which passed the decree expressly exempted them and gave judgment against the father only. It was then sought notwithstanding the decree to bind the sons' and grand-sons' shares in execution, the decree not having been appealed from. I conceive that the decision can be upheld on the ground that even supposing the decree to be wrong, as long as it stood execution could not be sought on the footing that it was to be treated as a nullity in so far as it exonerated the sons and grandsons.

I respectfully agree with the High Court of Bombay that the only course open to a Court in this country is to follow the earlier decisions and hold that the father-manager or the creditor or the Official Assignee standing in his shoes has the power to alienate joint-family property in satisfaction of an antecedent debt of the father-manager not tainted with illegality or immorality. If the Privy Council had thought that the earlier decisions of the Board and the mass of decisions of the Indian Courts which had been built upon them were erroneous or were to be restricted in the manner suggested in *Kishen Singh* v. *Chhajju Singh* (14) they could easily have said so, as the whole subject has been before them for review in Sahuram's case and Chetram's case. They would then have pointed out that the dicta of Lord Hobhouse and Lord Buckmaster in Nanomi Babuasin's case and Sripat Singh's case respectively which entirely support the decisions in the Indian Courts down to Sahuram's case, travelled outside their legitimate scope in the decisions involved. They have not done so and until we are given further guidance, I think that our plain duty is to take it as a settled rule that the father during his life-time and any one who during his life-time stands in his shoes can validly alienate the whole of the joint family property in satisfaction of antecedent debts not tainted with illegality or immorality, and it would be travelling outside our legitimate function to consider a rule so well established as abrogated because the supposed basis on which it rests has been disturbed by the more recent pronouncements of the Privy Council.

Since I wrote this judgment and submitted it to my Lord the Chief Justice, I have had the advantage of perusing his judgment, and I desire to say that I respectfully agree with

his observation on the case of *Kishen Singh* v. *Chhajju Singh* (14).

Krishnan, J.:—In this case the question for our decision is whether the Official Assignee is entitled to sell the whole of the joint ancestral estate of an insolvent Hindu father including the shares of his sons the parties being governed by the *Mitakshara* Law, in realising the assets of the insolvent for distribution among the creditors. It is not disputed that if the father has the right to sell the whole joint estate to pay off his antecedent debts that power can be exercised by the Official Assignee. This was so decided recently by this Court in *Official Assignee of Madras* v. *Ramachandra Aiyar* (12). The question for our consideration then narrows itself into, whether a Hindu father is entitled to alienate the joint ancestral estate of himself and his sons to pay off an antecedent debt of his. As pointed out by the learned Chief Justice, it has been taken as the settled law in this country that he could do so provided that the debt was not an illegal or immoral one, ever since the decisions of the Privy Council in Girdhari Lal's case and in Nanomi Babuasin's case, the latest ruling of the Privy Council on the point being in *Sripat Singh* v. *Tagore* (3). Now it is contended before us that the recent decisions of the Privy Council in Sahuram's case, followed in Chetram's case have altered the law on the point and has abrogated the doctrine of the Hindu father's right to alienate the joint ancestral property of himself and of his sons to pay off a proper antecedent debt of his.

To decide this question we have to consider the case of Sahuram and of Chetram very carefully. Taking Sahuram's case first, that was a suit brought to enforce a mortgage given about 20 years prior to suit by one Bhup Singh to one Bhagirath for Rs. 200 paid in cash. Sahuram the plaintiff obtained the rights under that mortgage by paying off Bhagirath's mortgage and sued Bhup Singh and his sons and grandsons and others to recover Rs. 15,000 by sale of the property mortgaged which consisted of joint ancestral properties belonging to Bhup Singh and his sons and grandsons. It was found by the lower Court that no legal necessity for the mortgage had been proved. Before the Privy Council it was argued, however, that even though legal necessity was not proved as there was no proof by the sons that the debt was of an illegal or immoral character, they had no defence to the suit as the father was entitled to mortgage the ancestral estate for an antecedent debt of his, quite apart from any legal necessity. The Privy Council had to consider then the scope of the doctrine of 'antecedent debt' to see if it applied to the facts of the case and their Lordships held that a mortgage debt borrowed on the security of the ancestral property itself could not be treated in any way as an antecedent debt within the meaning of that doctrine and they accordingly repelled the argument that the case was one to which the doctrine applied. They did not, however, say that the father could not sell or charge the joint ancestral estate where the debt was not only antecedently incurred by him, but incurred wholly apart from the security of the joint property. In fact if they were holding that the father could not sell the joint estate for an antecedent debt of his because the sons' pious duty arose only after the father's death they would have said so in clear terms and there would have been no necessity to consider the scope of the rule of 'antecedent debts.' On the other hand their Lordships have in more than one place in their judgment stated that they make an exception in favour of the father's power to sell for an antecedent debt. Their Lordships on p. 444 of I. L. R. 39 All. 437 say this "although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet *an exception has been made* to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle their Lordships are of opinion that the exception should not be extended and should be very carefully guarded." Here they clearly recognise the existence of the rule of antecedent debts and do not in any way abrogate it as suggested. Again on page 447 their Lordships say "In their Lordship's opinion these expressions which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the

father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate of the security afforded or supposed to be available by such joint estate. *The exception being allowed as in the state of authorities it must be*, it appears to their Lordships to apply and to apply (only) to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him, but are joint family property."

I have quoted these passages at length to show that their Lordships expressly exempted from the purview of their decision the exceptional case of the father being able to alienate joint ancestral property of himself and his sons for a proper antecedent debt. How after such expressions of opinion by their Lordships themselves in their judgment the case could be treated as an authority for doing away with the doctrine of antecedent debt altogether, I entirely fail to see.

The main decision in Sahuram's case was that a mortgage on ancestral property could under no circumstances be treated as an antecedent debt to justify an alienation of ancestral property and that beyond the power given to the father by this doctrine to deal with the son's share in the joint estate neither the father nor his creditors could rely merely upon the general rule of the son's pious duty to pay his father's debt to have recourse to the son's share of the joint estate to pay the father's debt. These propositions were re-affirmed in Chetram's case and any attempt like the one made by the Full Bench of this Court in *Arumugam Chetty* v. *Muthu Goundan* (16), to treat the ruling of the Privy Council as an *obiter dictum* must be abandoned. I agree with Coutts Trotter, J., that that Full Bench decision must be treated as erroneous, for though it is not expressly overruled by the Privy Council it is clearly in conflict with their Lordship's view which has been re-affirmed in Chetram's case.

The passage that has given trouble in dealing with the question before us is the one on page 444 where their Lordships say that the prior obligation of the sons to pay off their father's debt cannot and does not arise till the death of the father. Now it is argued that the father's power to sell the ancestral estate including the shares of his sons for an antecedent debt and the creditor's right to have recourse to such estate for payment of his debt are founded upon the theory of the son's pious obligation and if that pious obligation is treated as not arising during the father's life-time the father cannot deal with the son's shares in the joint estate nor the creditor while the father is alive.

The doctrine of 'antecedent debt' was no doubt evolved from the 'pious obligation' theory, see Nanomi's case and that theory originally was that the son was under a duty to save his father's soul from the penalties prescribed by Hindu *Sastras* for a man who dies without paying off his debts. Such a duty would only arise after the father's death as the Privy Council justly point out. But the theory was extended at a very early stage even by the Hindu *Smrithi* writers themselves like Vishnu and Yagnavalkya to cases of persons who became *sanyasis* or suffered from incurable disease or went away to foreign country and so forth. These are all cases where the pious obligation was taken to arise before the death of the debtor-father. Other restrictions and changes were introduced into the doctrine by the case-law of the country till it has now become crystallised as the doctrine of the 'antecedent debt'. That doctrine has become a definite and independent doctrine in Hindu Law which has been acted upon for many years and any attempt to do away with it now by referring to its origin and arguing that its development was illogical can hardly be supported. In the paragraph referred to in page 444 of I. L. R. 39 All. as I read it, the Privy Council was repelling the attempt to base a claim against the sons 'merely' on account of their pious obligation to pay off their father's debt quite apart from any antecedent debt. Their Lordships use the word 'merely' in that paragraph and again lower down use the same word when they say 'accordingly the case founded merely upon pious obligation * * * * * * * fails.' I understand their Lordships to refer in that para, to the attempt to enlarge the scope of the son's liability beyond the limits of the doctrine of 'antecedent debt' by recourse to their pious duty as originally understood. Those

observations, in my opinion, do not touch the doctrine of antecedent debt as otherwise the judgment will become self-contradictory.

Chetram's case does not advance the position any further. It was a case of a sale by a father of ancestral estate being set aside. The mortgage which formed part of the consideration for the sale was according to their Lordship's view already expressed in Sahuram's case not an 'antecedent debt.' The balance of the sale price was paid in cash, that of course was not a debt at all. The sale not being for proper legal necessity or for antecedent debts necessarily failed. It was argued that where the sale failed a debt arose, at least as regards the cash paid, which the father was bound to re-pay and that constituted an antecedent debt for which the creditor could have recourse to the ancestral estate and were it not for the fact that their Lordships were abrogating the doctrine of antecedent debts they would have given a decree for that amount against the ancestral estate. This is not so. There was no debt at all in existence to apply the doctrine of antecedent debt, the application of the doctrine of the son's pious duty by itself to make the sons liable during their father's life-time their Lodships had repudiated, see also *Jogi Das* v. *Ganga Ram* (9).

The conclusions I have come to agree with the conclusions of the Calcutta and Bombay High Court see *Madhusudhan Das Mohunt* v. *Iswari Dasi Debti* (1), and *Hanumanth Keshinath* v. *Ganesh Annaji* (8) and are in accordance with the previous rulings of this Court, cited by the learned Chief Justice in his judgment. Our attention was, however, drawn to a recent case in the Allahabad Court *Kishen Singh* v. *Chahhajju Singh* (14) which is in petitioner's favour. In that case it was decided at the trial of the suit itself that the sons and grandsons who were parties to the litigation and their estate were not liable for the suit debt. The question could then hardly be re-opened in execution. I, therefore, agree with the learned Chief Justice that the decision is right, but in so far as the views of the learned Judges are against the views I have expressed above I regret with all respect I am unable to follow them.

I have come to the conclusion that the Official Assignee can sell the joint ancestral estate of the insolvent and his sons to pay such of the debts of the insolvent which are not shown by the sons to be illegal or immoral debts, and I agree to the order proposed by the learned Chief Justice.

V. N. V. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 40 OF 1916.

June 21, 1920.

Present:—Mr. Kincaid, J. C., and Mr. Raymond, A. J. C.

Musammat BHAGBHARI, WIFE OF ALLABUX, AND OTHERS—APPELLANTS

versus

Musammat KHATUN, WIDOW OF MAHOMED FAZAL, AND OTHERS—RESPONDENTS.

*Mohammadan Law—Renunciation of inheritance—Bequest as to more than one-third of property-Bequest to heir—Consent of heirs—Divorce in death-illness—Widow, rights of—Marz-ul-Mant, what is—Limitation Act (IX of 1908), Sch. I, Art. 127, application of—Undivided property of Mohammadan family—Suit to recover share—"Joint family," meaning of—Adverse possession—Possession of family property by one heir—Hostile title—Exclusion—Non-participation in profits—Wills, interpretation of—Reasonable and unreasonable wills—*Pardanashin *ladies, transactions with—Law applicable.*

A transfer or a renunciation of a right of inheritance before it has vested is prohibited under the Mohammadan Law. Rights of inheritance only arise after the death of the person whose estate is in question. A Mohammadan cannot renounce his right of inheritance before that right has become vested by the death of the person to whom he is entitled to succeed.

A bequest by a Mohammadan can only take effect to the extent of one-third of the net assets remaining after payment of his funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby, and a bequest to a person entitled to inherit is void unless the other inheritors give their consent, after the death of the testator, to its taking effect.

A divorce pronounced by a Mohammadan in death-illness or *Marz-ul-Mant* does not deprive the widow of her right of inheritance, where the husband dies during the period of her *Iddut*.

BHAGBHARI *v.* KHATUN

In order to establish *Mars-ul-Mami* there must be present at least three conditions, (*a*) proximate danger of death, so that there is a preponderance of apprehension or *Khouf* that at a given time death must be more probable than life, (*b*) some degree of subjective apprehension of death in the mind of the sick person, and (*c*) some external *indicia*, chief among which would be the inability to attend to ordinary avocations.

A too narrow a view should not be taken of the doctrine of death-illness.

Article 127 of the schedule to the Limitation Act does not apply to a suit to recover share of undivided property of a family governed by Mohammadan Law. The words "joint family" in the article qualify the word "property" and refer to a joint family as conceived by Hindu Law. They cannot apply to a Mohammadan family as such, where each member holds his share in severalty.

Where on the death of a Mohammadan, the only male member of the family assumes management of the estate, there being other females entitled to shares therein, the natural presumption is that he enters upon the estate as agent or manager for them, and on his own behalf.

Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by an open assertion of hostile title on the part of the former.

To prove title to land by adverse possession for the statutory period, it is not sufficient to show that some acts of possession have been done; the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor; in other words, the possession must be actually visible, exclusive, hostile, and continued during the time necessary to create a bar under the Statute of Limitation

What is sufficient evidence of exclusion must depend on the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time.

In the case of a will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those causes which demand a rigorous scrutiny of wills, of which the opposite can be said that they are unnatural, unreasonable or tinged with impropriety.

In the case of a deed executed by a *parda-nishin* lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon the deed and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to and really understood by the grantor. It must also be established that it was not signed under duress but by the free and independent exercise of her will

Case-law discussed.

Appeal from the decision of First Class, Sub-Judge, Larkana.

Mr. *Bhojsing Gurdinomal*, for the Appellants.

Mr. *Wadhoomal Oodharam*, for the Respondents.

JUDGMENT.

Raymond, A. J. C.—A wealthy and influential *Zamindar* of Larkana, Mahomed Fazal died on the 24th December 1890, possessed of considerable immoveable and moveable property. The bulk of his property consisted of agricultural land; there were also some dwelling houses and some cattle. He left him surviving, a widow Khatun, an only son Gulam Mahomed who assumed the management of the estate on his father's death, and a daughter Fatma. Gulam Mahomed died on the 11th September 1911 at the age of about 58. Several survey numbers of the agricultural land stood in his name already in his father's life time, and after the latter's death, he admittedly enlarged the estate though the precise extent of his contribution has not been definitely established. Gulam Mahomed left him surviving 4 widows Jamzadi, Bachi, Sabhai and Hayut Khatun, with regard to the last it is alleged that he had divorced her about a fortnight before his death. He also left several daughters, Jamal Khatun, Bhagbari, Umedan, Inayat Khatun, Rahima and Karam Khatun. After Gulam Mahomed's death dissensions arose between the widows with the result that a suit was filed for the partition of the property of Mahomed Fazal and Gulam Mahomed. Plaintiffs in the suit were Khatun the widow of Gulam Mahomed, and Jamal Khatun the daughter of Gulam Mahomed, who died after the institution of the suit, and her legal representatives, her husband Mahomed Parial and her minor son Khudabux, and daughters of Gulam Mahomed and also his sister Fatma. Plaintiffs contended that all the property moveable and

immoveable was that of Mahomad Fazul, and asked for its partition and the allotment of their share which they valued at over Rs, 60'000. The suit was principally contested by the widow Bachi, and the daughters Bhagbari, Karam Khatun and Rahim Khatun. Such of the contentions as were taken up in the lower Court and pressed in appeal may be briefly summarized as follows:--(1) The suit is time-barred so far as Khatun the widow of Mahomed Fazul is concerned, and also as regards defendant Fatma who claims a share in the property. (2) Hayat Khatun can claim no share in Gulam Mahomed's estate as she had been divorced. (3) Jamal Khatun and Umedan equally are not entitled to any share, as they are illegitimate, their mother Namul being a mistress of Gulam Mahomed and not his legally wedded wife. (4) That the property in suit is the self-acquired property of Gulam Mahomed. (5) That by his will Gulam Mahomed bequeathed the bulk of his property to Bhagbari, Karam Khatun and Rahim Khatun, to this will the other sharers in the property assented, and executed release-deeds on being assigned certain portion of the property. There were some other contentions taken up in the lower Court by the pleaders of both parties but they have been abandoned in this Court.

The lower Court in an exhaustive and elaborate judgment gave the plaintiffs a preliminary decree for partition as prayed for, and the appellants before us are, the 3 aforesaid daughters of Gulam Mahomed, and the respondents are the plaintiffs in the lower Court and the remaining defendants.

It will be convenient to discuss, in the first instance the contentions raised regarding the right to sue, of Khatun, Fatma, Hayat Khatun and Jamal Khatun, and we shall dispose of them *seriatim*. It is urged that the claim by Khatun the widow of Mahomed Fazal is time barred, as the suit was filed on the 7th February 1912 and article 144, Indian Limitation Act is applicable as Gulam Mahomed had been in adverse possession for more than 12 years. The lower Court held article 127 to apply and that the suit was within time as it is not proved that Khatun was excluded from the family property or that the exclusion ever came to her knowledge. The parties in this suit are Sunni Mahomedans and we are not prepared to hold that article 127 applies to undivided property of a family governed by Mahomedan Law, and not proved to have adopted as a custom the Hindu Law of the joint family. We are of opinion that the words "Joint Family" as used in the article qualify the word property and a joint family is a peculiar concept of the Hindu Law, and could not apply to a Mahomedan family as such, where each member holds his share in severalty. There is no reference to a joint family or joint family property in books on Mahomedan Law. The substitution in ariticle 127 of the word "person" by Act XV of 1877 for the word "Hindu" in the corresponding article of Act IX of 1871 was not intended to make the article applicable to Mahomedans but to such sects as the Kutchi Memons and Khojas who though Mahomedans have been held to have adopted so much of the custom as included the law of the joint family amongst Hindus, and as a necessary consequence, the law with regard to the joint family property under certain conditions. The Bombay High Court had held in a series of decisions commencing with *Sayed Ghulam Hussein* v. *Bibi Anvarnisa* (1), that joint family property includes property left by a deceased Mahomedan and divisible among his heirs until it is actually divided: *Bavasha* v. *Masumsha* (2), *Abdul Rahim* v. *Kriparam Daji* (3), *Fatma Boo* v. *Ghisan Boo* (4). The latest ruling, however, on the applicability of article 127, is the Full Bench decision of 7 Judges reported in *Isap Ahmad Mograria* v. *Abhramji Ahmadji Mograria* (5), where the following question was referred to a Full Bench, "Whether article 127 of Act XV of 1877 can apply to the property of a Mahomedan (or any other person, not being a Hindu) and not having been proved to have adopted as a custom the Hindu Law of the joint family and it was held (Shah, J. dissenting) "that it did not." This case was not cited in the lower Court as it was reported after its judgment was given but it brings the Bombay view which was till then

(1) (1885) P. J. 170.
(2) 14 B. 70 ; 7 Ind. Dec. (N. S.) 504.
(3) 16 B. 186 ; 8 Ind. Dec. (N. S.) 601.
(4) 4 Ind. Cas. 242 ; 11 Bom. L. R. 1083; 33 B. 719.
(5) 41 Ind. Cas. 761 ; 41 B. 598 ; 19 Bom. L. R. 579 (F. B.).

discordant in conformity with the views of the other 3 High Courts all of which have held that Article 127 is not applicable to Mahomedans as such : *Amme Raham* v. *Zia Ahmed* (6), *Abdul Kadar* v. *Aishamma* (7) *Mahomed Akram Shah* v. *Anarbi Chowdhrani* (8) As I have remarked above the parties to this suit are Sunni Mahomedans, it is not even alleged much less proved, that they were governed by any special custom under which the rules of Hindu Law as to joint family property would apply. The Mahomedan Law presumes that each share is separate and that each sharer is the separate owner of his share and, therefore, the words "Joint family property" could not apply to the property of a Mahomedan strictly governed by the principles of Mahomedan Law. We are, therefore, of opinion that the lower Court was in error in holding that Article 127 was applicable to the present suit. In arriving at this conclusion it followed a ruling of our Court reported in *Chuto Khalikdino* v. *Haji Ahmed* (9). This was a decision of Beaman, J. as Judge of the Sadar Court. His remarks at page 591 of his judgment are significant. He says "In suits by Mahomedans to recover their shares of an inheritance which has remained undivided, the Bombay High Court has in a series of decisions held that article 127 applies. I have always been strongly opposed to that view, because it has always seemed to me illogical and repugnant to theoretical perfection to talk of suits for the recovery of a share in joint family property by persons for whom the legal concept of "joint family" has absolutely no existence. The joint family is a creation of Hindu Law and no other system of jurisprudence, certainly not the Mahomedan, has anything precisely corresponding with it." In holding, however, that a suit by a Mahomedan sharer for partition of inheritance is governed by article 127 he felt that where the law of property is concerned the maxim "*Stare decisis*" must be respected, and that it has always been the practice of the Courts in Sind for reasons of uniformity and policy to follow the rulings of the Bombay High Court. The same learned Judge, however, in *Jan Md Abdullah* v. *Datu Jafer* (10) was of opinion that article 127 does not apply to Mahomedans as such, and he was one of the referring Judges and a member of the Full Bench that decided in *Isap Ahmed Magraria* v. *Ahramji Ahmedji Magrarai* (5), that article 127 is not applicable to a Mahomedan. There can be no doubt, therefore, that the judgment in *Chuto Khalikdino* v. *Haji Ahmed* (9) holding that a suit for partition of inheritance by a Mahomedan sharer is governed by article 127 is wrong, and we must dissent from it. The next question on the point of limitation that arises so far as the respondents Khatun and Fatma are concerned is whether the suit is time-barred by article 144. On the death of Mahomed Fazul in 1890, his son Gulam Mahomed as the only surviving male member of his family assumed the management of the estate. Both Khatun and Fatma being co-sharers with him in the estate, the natural presumption is that he dealt with the land as manager or agent for them, and on his own behalf : *Dhamumal Chandiram* and others v. *Musmat Kaim Khatun* (11), *Dhamumal Chandiram* v. *Musammat Kaim Khatun* (12) Now possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former, *Ujalbi Bibi* v. *Umakanta Karmakar* (13), *Gogendranath Rai* v. *Baladevdas* (14). It was held that "to prove title to land by adverse possession for the statutory period it is not sufficient to show that some acts of possession have been done ; the possession required must be adequate, in continuity in publicity and in extent to show that it is possession adverse to the competitor ; in other words, the possession must be actually visible, exclusive, hostile, and continued during the time necessary to create a bar under the Statute of Limitation. Mr. Bhoj Singh, for the appellants has contended that since the death of his father Mahomed Fazul, Gulam Mahomed has dealt with the property

(6) 13 A. 282 ; A. W. N. (1891) 88 : 7 Ind. Dec. (N. S) 177 (F. B)
(7) 16 M. 61 (F. B.) ; 2 M. L. J. 200 ; 5 Ind. Dec. (N. S.). 750.
(8) 22 C. 954; 11 Ind. Dec. (N. S.) 638.
(9) (1905) 2 S. D. 582.
(10) 22 Ind. Cas. 195; 38 B. 449; 15 Bom.L.R.1044.
(11) 1 S. L. R. 133.
(12) 2 S. L. R. 43.
(13) 31 C. 970 ; 9 C. W. N. 32.
(14) 35 C. 961 ; 12 C. W. N. 127 ; 6 C. L. J. 785.

as his own and that Khatun and Fatma were excluded from possession of the property both moveable and immoveable. Testing these assertions in the light of the evidence on the record, neither adverse possession by Gulam Mahomed nor exclusion of Khatun has been proved. Khatun states in her evidence that she lived with Gulam Mahomed till his death. She admits that after her husband's death she lived with her brothers for some time owing to some disagreement between one of her brothers and Gulam Mahomed but that she returned as soon as a reconciliation had been effected. Apparently she was in the family house during the period of Gulam Mohomed's illness and at the time of his death, as she describes in detail his condition during this time. In her cross-examination she does not seem to have been asked any question which would indicate any knowledge on her part of her exclusion from the family property; all that she was asked was whether she had demanded her share from Gulam Mahomed and she replied in the negative, but this does not prove either adverse possession on the part of Gulam Mahomed or the exclusion of Khatun, for as long as her wants were supplied she may not have thought it necessary to acquire separate possession of her share. In the written statement filed by the appellants, beyond stating that the suit is time-barred, no particulars are given when Khatun left the family house or of the nature of the adverse possession by Gulam Mahomed. The burden of proof lies on those that assert that the possession of Gulam Mahomed was adverse to Khatun. Mr. Bhojsingh has mainly relied on the following statement in the will of Gulam Mahomed in Ex. 238. "I have a step-mother *Musammat* Khatun who went away from the house about 22 years ago. Besides, my father Mahomed Fazul had also made a will that if *Musammat* Khatun left the house she will have no interest in the property." Mr. Wadhumal for the respondents has contended that this statement in the will is inadmissible under section 32, Indian Evidence Act, and, we are of opinion that Mr. Wadhumal's contention must be upheld. Statements of deceased persons under section 32, Indian Evidence Act, are admissible if certain conditions are fulfilled, and the statements in Gulam Mahomed's will as to the time when Khatun left the house or as to the restriction imposed upon her by a will of Mahomed Fazul which is not produced, do not fall within any of the clauses of section 32 Indian Evidence Act, *cf. Farhari Hari Vaidya* v. *Bal Krishna Sansarikar* (15). Mr. Bhojsing next urged that the appropriation of the profits of the property by Gulam Mahomed was one of the *indicia* of adverse possession particularly in view of the length of time during which Khatun was excluded from participation in the rents and profits. He relied upon *Gungadhar* alias *Buburav Balvant* and others v. *Parshram Bhalchandra* and others (16) where it was held that sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenants-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. But it was also held in this very case that to constitute adverse possession as between tenants-in-common there must be an exclusion or an ouster. See also on this point *Ayenrnusra Bibi* v. *Sheikh Isuf* and others (17) followed in *Govinda Chandra Bhattacharjee* v. *Dina Nath Acharjee* (18) where it was said "What is sufficient evidence of exclusion must depend on the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time." It must further be remembered that in the present appeal we are dealing with a *parda-nashin* woman, and the property in which she had a share which was being managed by her step-son, the only male member of the family. She had no children of her own whose interests she had to protect and before the Court can regard the appropriation of profits as constituting adverse possession, it must be satisfied that there was an indication of a denial of right in Khatun to receive them. Mr. Bhojsing relied very strongly on a judgment of this Court in appeal No. 10 of 1916 which turned

(15) 55 Ind. Cas. 316 ; 44 B. 192 ; 22 Bom. L. R. 57.
(16) 29 B. 300 ; 7 Bom. L. R. 252.
(17) 14 Ind. Cas. 722 ; 16 C. W. N. 849.
(18) 56 Ind. Cas. 141 ; 47 C. 274 ; 28 C. W. N. 977; 30 C. L. J. 512.

on the applicability of Article 144 of the Limitation Act and the conditions under which adverse possession may be proved. He contended that the circumstances of the case which he cited were analogous to the present case and that we should be governed by its decision. As the judgment in appeal No. 10 of 1916 was delivered by a Bench and one of the members composing it is a member of this Bench it would be useful to point out the essential difference between it and the present appeal. A careful perusal of the judgment in appeal No. 10 of 1916 discloses the existence of several circumstances which are absent in the present case. It is true the plaintiff was a *parda-nishin* woman and was a co-sharer in the estate in which she claimed her share and had been out of possession for a considerable length of time. But here the analogy ends. The surrounding circumstances which are really the main test to apply in the absence of any specific direct evidence were found to be so strong and so many in favour of adverse possession that the Court held adverse possession to be proved. It was found that the plaintiff on her marriage left the family house and resided with her husband in another house that was bought by him, it was not alleged that any maintenance was given to her out of the family estate, she admitted she earned her living by making clothes and her son added to the income by driving a hackney carriage, after her husband's death she sells her house in order to obtain the means of livelihood and lives in a rented house, it was proved that the defendants were dealing with the property for some years as exclusive owner, it was also proved that she attested a document where a part of the property was dealt with by the defendant as his own and it was held to be unlikely that she did not know the nature of the document, all these circumstances determined the Court in coming to the conclusion that there was adverse possession.

In the present case all that appellants can and do rely upon as proving the exclusion of Khatun is the non-participation in the rents and profits of the immoveable property for a period of 20 years, her residing outside the family house and the absence of any claim to maintenance out of the family estate. But in the first instance we are not at all impressed with the evidence on the record on which the appellants rely in proof of these assertions. When I pointedly asked Mr. Bhojsing to specify in detail the evidence on which he relied in proof of adverse possession, he referred to the passage in the will of Gulam Mahomed already adverted to as inadmissible and the evidence of Bachi and Ata Mahomed. Now Bachi is a witness very much interested in the result of this case as the exclusion of Khatun and some of the other co-sharers proves highly beneficial to her daughter Karam Khatun's interests in the estate, one of the beneficiaries under the will and it appears to us that she has been the moving spirit in engineering the defence in this case. She has admitted in her evidence that she and Bhagbari a daughter of Gulam Mahomed and another beneficiary under the will " are managing the litigation together in consultation." The passage in her evidence on which Mr. Bhojsing relies is the following "Khatun was not in the Kot when Gulam Mahomed died. She then lived in her father's house. She had left the Kot before I came in after my marriage," and in Ata Mahomed's evidence the following passage is relied upon. " I have been visiting the family for the past 20 or 25 years. During that period I did not find Khatun living there." This last witness is referred to as the family priest and has apparently had a good share of luck since Gulam Mahomed's death. He states that Bhagbari has given him in charity 10 *jirebs* out of the property of Gulam Mahomed, 5 of which he has disposed of for Rs. 500, he has also received a mare which he describes as worth Rs. 50 and one was given to his brother worth Rs. 80, he also got two buffaloes in charity and a full dress and bedding worth about Rs. 40. He adds that since the death of Gulam Mahomed, Bachi, Bhagbari and Khatun visit him to obtain his blessing. Even if we were to accept this evidence in its entirety all that it proves is that Khatun has not resided in the family house for a period of about 20 years, and not a single question has been asked of Bachi in cross-examination as to how Khatun was maintained during this period. On the other hand there is a fair amount of evidence which is to the effect that Khatun lived in the family house till the death of Gulam Mahomed, occasionally visiting her parents' house. Vide Allahdino Ex. 262, Nizamdin the brother of

Khatun Ex. 298, Sabhai Ex. 456 and Khatun herself Ex. 312. It appears to us that adverse possession has not been proved as against Khatun and her suit is within time.

Next with regard to the question whether Fatma's claim to share is statute-barred. Mr. Bhojsing contented that her case is on all fours with *Bibi Hafiza* v. *Lalsha* and others referred to above. Fatma was a sister of Gulam Mahomed and was married to one Allahbux who died about 20 years before the suit. Adverse possession as against her is based on her living in her husband's house and non-participation in the profits of the immoveable property belonging to her father. It is also urged that the fact of Fatma not being examined as a witness to repudiate the allegation of her being excluded from the family estate is a strong piece of evidence in favour of adverse possession. Now it appears to us that if Fatma had lost all claim to any share in the estate by the Statute of Limitation, then it is difficult to explain the clause in the will of Gulam Mahomed referring to her executing a release-deed relinquishing the larger rights to which she was presumably entitled. The testator must have recognised that she was entitled to her share in the estate according to Mahomedan Law, and even if Gulam Mahomed was not the author of the will those that were instrumental in bringing it into existence, must have felt the necessity of binding Fatma by a declaration that she waived all her rights to the property, a proceeding which was perfectly unnecessary if Fatma's claim was time-barred. Probably Fatma never urged her claim to any share in the estate during Gulam Mahomed's life-time as the consciousness of her own brother managing the estate, and her position in life as a *pardanishin* woman may well have been two important factors in influencing her conduct. There is no evidence on the record to show that her right to a share in the estate was ever denied or that she was expressly excluded from participating in the profits of the property. She was apparently on affectionate terms with her brother, admittedly she was in the family house at the time of his death and Sobhai Ex. 406 states that " Fatma lived in the Kot for 2 or 3 months during the illness of Gulam Mahomed and all the females had their meals together. " In short, the evidence as to adverse possession against Fatma is based on her living in her husband's house and not in the family house since her marriage and on the allegation that she has not obtained any maintenance from the estate We do not consider these circumstances sufficient to prove adverse possession and as we are far from being satisfied that Fatma was excluded from the family estate, we are of opinion that equally with Khatun her claim to a share is not time-barred.

The next question for consideration is the exclusion of Hayat Khatun from a share in the estate, however, on a different ground. Appellants contend that on the 27th August, Gulam Mahomed who died about a fortnight later, executed a divorce-deed which was attested by several witnesses and registered, and which recited the verbal divorce given on the 25th August, that is two days previously, to Hayat Khatun by throwing three clods of earth at her, the said divorce being irrevocable. Respondents argue that even if the verbal divorce and the written deed in confirmation thereof be proved, yet the divorce is not valid as Gulam Mahomed died on the 11th September 1919, that is, within the period of *Iddut*, and as thedivorce was pronounced on his death-bed, it has not the effect of depriving Hayat Khatun of her right to a share in her husband's estate. The question may be thus formulated:—" Was the divorce pronounced during Gulam Mahomed's death-bed illness, if so what is its legal effect on Hayat Khatun's right to inherit, in view of the fact that Gulam Mahomed died during the period of her *Iddut*? There is no dispute and there can be none that where a Mahomedan husband in health pronounces an irrevocable divorce and dies within the period of his wife's *Iddut*, she has no claim to inherit to her husband. What is then the effect of a divorce in death-illness or *Marz-ul-maut* as it is styled in Mahomedan Law ? The leading case on the subject in the Bombay High Court is that of *Sarabai* v. *Rabiabai* (19) where it was held that in order to establish *Marz-ul-maut* there must be present at least three conditions :—

(1) Proximate danger of death, so that there is a preponderance of apprehension or *Khouf* that at a given time death must be more probable than life ;

(19) 30 B. 537 ; 8 Bom. L. R. 35.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person ;

(3) There must be some external *indicia* chief among which would be the inability to attend to ordinary avocations.

The conditions here laid down are gathered from the authorities and text books on Mahomedan Law and were adopted as a correct exposition of the Law in a subsequent case *Rashid Karamali* v. *Sherbanoo* (20). There is an earlier ruling to the same effect *Fatma Bibi* v. *Ahmed* (21), confirmed on appeal to the Privy Council. There is equally a consensus of opinion in the commentaries on Mahomedan Law that if a divorce is pronounced in death-illness, and the husband dies before the completion of the wife's *Iddut*, the wife is entitled to inherit to him. Wilson's Mahomedan Law 178, Tyabji's Mahomedan Law 151 and Mulla's Mahomedan Law 144.

Adopting these principles we pass on to the consideration of the evidence on this point. Unfortunately there is no medical evidence on the record which would help us to form an opinion as to the nature of the disease that Gulam Mahomed was suffering from for a period of about 7 months prior to his death. There is evidence to show that he was treated by an Indian physician but he has not been examined as a witness. The evidence on the record describing Gulam Mahomed's ailments and his physical condition at the time he pronounced the divorce is most conflicting, undoubtedly due to the fact that practically all the witnesses in the case whether for the appellants or the respondents seem to be inspired by the one motive of doing as much damage as possible to the opponent's case. Witness Allahdino Ex. 262 states in his evidence "Gulam Mahomed was ailing for long. He suffered from diabetes. I visited him to enquire about his health." Nizamudin Ex. 298 states "Gulam Mahomed lay ill for 7 months before his death." Sher Mahomed Ex. 299 says "Gulam Mahomed lay ill for 6 or 7 months before his death. During the last month or two he did not come out of the Kots. Khatun Ex. 312 states "Gulam Mahomed lay ill for about 7 months. During the first 3 months he did not move out of the otak and during the last 3 months he could not leave his family house. He was moved by others for all his necessary purposes during that period. He was bed-ridden all the time. He was not conscious during the last 14 or 15 days of his illness. Pir Mian Sala visited Gulam Mahomed during his last illness. He was not conscious then. He could recognise a little and talk very feebly. Gulam Mahomed had fever in his illness. He could speak very feebly till his death." Rahim Khan Ex. 314 says "Gulam Mahomed was ill for about 7 months before his death. During the last 2 or 3 months he was lying unconscious. He was moved about by others. He did not take any food. He was suffering from continuous fever. Sher Mahomed Shah once visited him and declared the case hopeless about 15 or 20 days before his death. Pir Allamdin treated him." These are the witnesses that were examined on behalf of the plaintiffs-respondents in the lower Court. Now on behalf of the defendants-appellants on the same point we have first of all the Sub-Registrar Rijhumal. He says "When Gulam Mahomed admitted the execution of the will and the divorce-deed he was conscious. When I went in he sat up on his cot and greeted me. He also shook hands with me. He presented the divorcedeed himself. I enquired from him about his health and asked what he was ailing from. He replied I have fever and suffering from heavy breathing and I have been ailing for the last 8 or 10 months. He did not appear to me to have got emaciated. His body looked well nourished." Aishising Ex. 341, the writer of various documents produced in the case was with Gulam Mahomed for about 3 days taking instructions and drawing up the respective deed and he states that during this period Gulam Mahomed was in his proper senses. But he also adds that when the messenger Total came to call him he told him that Gulam Mahomed was ill and unable to move about and, therefore, needed his services in the house. Gulam Rasul Ex. 343 says "Gulam Mahomed was ailing for about 12 months before his death. He had bad digestion and vomited his food." Ramu Ex. 354 states "Gulam Mahomed lay ill for 2 or 3 months before his death and was bed-ridden." Raman Ex. 379 states "Gulam Mahomed's illness lasted for 4 or 5 months. He suffered from diabetes. He passed the whole period

(20) 31 B. 264 ; 9 Bom. L. R. 252.
(21) 31 C. 319.

of 4 or 5 months within the Kot. He had no fever but he got emaciated from day to day." Amul Ex. 381 states, " Gulam Mahomed lay ill for 2 or 4 months before his death. I attested the deeds. Gulam Mahomed was ill." Bago Ex. 383 states " Gulam Mahomed remained ill for 6 or 7 months and was all the time within the Kot." There are three more witnesses Sabhai, Jamzadi and Ali Mahomed whose interests in the case are identical with those of the plaintiffs-respondents who say that Gulam Mahomed's illness lasted for about 7 months and that during this period he never left the family house, that he was very much emaciated and was scarcely in his senses during the last 3 months of his life.

With this resume of the evidence as to the physical and mental condition of Gulam Mahomed at the time he pronounced the divorce, one circumstance appears abundantly clear and that is, his inability to attend to his ordinary avocations, and thus fulfilling one of the conditions of Marz-ul-maut. With regard to the first of the conditions whether there was a preponderance of apprehension that at a given time death was more probable than life, there is the important consideration, apart from the direct evidence, that on the 29th August 1911 Gulam Mahomed is said to have made a will. Now this will was either the result of free and independent action on the part of Gulam Mahomed or had been fabricated at a time when the prospect of Gulam Mahomed's early death was extremely probable. In either event there was an apprehension that death was more probable than life. In spite of the conflicting evidence on the record it may be taken as established that Gulam Mahomed had been ailing for a period of about 6 or 7 months immediately prior to his death and that there was no indication of any improvement in his physical condition, on the contrary there were signs of approaching dissolution. He was a man of about 58 years of age and this would be regarded as old age for some of the Sind *Zamindars* with a multiplicity of wives and accustomed to an indolent existence. Obviously he was unable to move out of his otak else he would not have sent for the Sub-Registrar to the family house. Whether we accept the evidence that he was suffering from diabetes or consumption or fever accompanied by heavy breathing, one thing is clear that he never rallied up to the day of his death and must have apprehended that his death was near. Some of the witnesses for the appellants have said that for 2 or 3 months before his death Gulam Mahomed was bed-ridden, Gulam Rasul and Rahman say he got emaciated from day to day thus confirming the evidence of Khatun on the point. The only evidence that may have appealed to us of a disinterested character is that of the Sub-Registrar, but for several reasons which will be alluded to later we hesitate to accept it. We feel in short that the circumstances of the case and the evidence on the record clearly established (1) the illness of Gulam Mahomed (2) the expectation of a fatal issue and (3) his inability to attend to his ordinary avocations. As was said in *Hasarat Bibi* and others v. *Gulam Jafer* alias *Fukhrullah* and others (22) too narrow a view must not be taken of the doctrine of death-illness, and in this case the doctrine was stated as follows " was the disease of such a nature or character as to induce in the person suffering, the belief that death would be caused thereby or to engender an apprehension of death and was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death? We agree with the view of the Lower Court that the divorce was pronounced in death-illness and as Gulam Mahomed died within the period of Hayat Khatun's *Iddut*, she is entitled to inherit to his estate.

The exclusion of plaintiff No. 3 Jamal Khatun from a share in Gulam Mahomed's estate is based on the allegation that both she and Umedan were the illegitimate daughters of Gulam Mahomed as their mother Namoi was a mistress of Gulam Mahomed and the question for determination is whether Namoi was a legally wedded wife of Gulam Mahomed or was only his mistress. Appellants have strongly relied upon two pieces of documentary evidence in the case in proof of their assertion that Namoi was a concubine of Gulam Mahomed. The first is a passage in the will of Gulam Mahomed Ex. 328 which is as follows "*Musammat* Namoi remained with me like a concubine for about 5 or 6 years. I had

(22) 3 C. W. N. 57.

no *Nikah* or temporary marriage with her but she also becoming disobedient went away from me about 24 years ago. She has 2 daughters. Leaving them with me she went away. Considering myself liable for maintaining these poor girls I duly brought them up and looking to the necessity of getting them married, I had them married among my poor caste brothers." The next piece of documentary evidence is a statement of the witness Rahim Khan made on the 28th May 1912 before the *Mukhtyarkar* of Mirokhan where it appears that he said "I do not know that Gulam Mahomed had any *Nikah* with *Musammat* Namoi but she was kept by him." Taking the latter statement first, this very witness Rahim Khan has stated in his deposition in Court "I know Namoi. She is the *Nikah* wife of Gulam Mahomed. I read the *Nikah* 34 or 35 years ago. Since the *Nikah* she lived with Gulam Mahomed as his wife." This was in examination-in-chief, and when confronted in cross-examination with his statement before the *Mukhtyarkar*, he had the impudence to reply "I made the statement which is not true because Bachi made me do it on the faith of the *Koran*." I shall discuss the unreliable character of this witness later on when commenting on the will, but his statement before the *Mukhtyarkar* may easily be brushed aside. With regard to the reference in the will to Namoi being the mistress of Gulam Mahomed it appears intrinsically improbable that after the lapse of about 30 years a respectable Mahomedan gentleman should publicly proclaim, that Namoi was his mistress and that his two daughters by her, Jamal Khatun and Umedan whom he had reared in his own house with his legitimate children and had them married respectably, were not his daughters. One fails to understand what possible advantage Gulam Mahomed was to gain by this open declaration, Namoi being dead, and the daughters recognised by the world as the legitimate children of Gulam Mahomed. Further I have no hesitation in saying that the words in the will "I had them married to my poor caste brothers" are not only untrue but it is highly improbable that Gulam Mahomed would have made a statement of this description. Jamal Khatun was married about 25 years before the suit to Mahomed Parial, and the latter's sister Khatun was given in exchange to Mahomed Fazul. Mahomed Parial must have, therefore, been fairly respectable in life and was not likely to take in marriage in exchange for his sister an illegitimate daughter of Gulam Mahomed. Umedan the other daughter of Namoi was married to Ali Mahomed who was a cousin of Gulam Mahomed's and who has stated in his evidence that he would not have married Umedan if she were the daughter of a mistress of Gulam Mahomed.

A very important piece of evidence in the case in favour of Namoi being the legally wedded wife of Gulam Mahomed is to be found in the deposition of the witness Raman Ex. 379. He was examined on behalf of the appellants in the lower Court and there can be no doubt to judge by his evidence that he is a witness deeply interested in Bachi. He has stated in his evidence that "both Jamal Khatun and Umedan were Gulam Mahomed's daughters by his wife Namoi. Namoi his wife also lived with him within the Kot. So also the daughters who continued to live with him even after their mother left the Kot." It is true that he added in his re-examination that he was not present at the *Nikah* of Namoi but his acquaintance with the family dates from a time before the death of Mahomed Fazul and he seems to know a good deal of Gulam Mahomed and his family affairs. Animated with the motive of helping Bachi in this case it is difficult to imagine this witness describing Namoi as the legally wedded wife of Gulam Mahomed if it were not the truth. According to the evidence, Namoi must have been brought to the Kot during the life-time of Fazul Mahomed and it is most unlikely that the latter would consent to his son bringing in a mistress and placing her on an equal footing with his own or his sons' *Nikah* wives. Khatun states that both Mahomed Fazul and Gulam Mahomed were too respectable to admit a mistress into the *Zenana*. It is naturally difficult to bring direct evidence of a *Nikah* that took place about 24 years back, Rahim Khan deposes to having read the *Nikah* but unfortunately it is difficult to place any reliance on his evidence in view of his interest in the case and contradictory statements that he has made in respect of other matters. There is, however, one witness Ex. 20,

Nizamuddin Ex. 298, who states that he was present at the *Nikah* of Namoi and that the *Nikah* was read by Rahim Khan. He is 70 years of age and though he is a brother of *Musammat* Khatun the widow of Mahomed Fazul, no sufficient reason appears for him to describe Namoi as the wife of Gulam Mahomed if she were only his concubine. In the absence of any satisfactory evidence to displace the presumption that does arise from the various circumstances in the case that Namoi was the *Nikah* wife of Gulam Mahomed, we cannot but hold it proved that Namoi was the legally married wife of Gulam Mahomed, and consequently her daughters Jamal Khatun and Umedan are entitled to a share in the estate of Gulam Mahomed.

We now turn to the Will, Ex. 328, purporting to be executed by Gulam Mahomed which is an important document in this case. It is dated the 29th August 1911 and was registered on the same day at the Kot of Gulam Mahomed where the Sub-Registrar Rijhumal had been taken for the purpose. It bears the attestation of the following persons Gulam Rasul, Ramun and Total of whom the first two only have been examined as witnesses, in the case. It is also signed by the writer Aishising and the Sub-Registrar Rijhumal. By this will the bulk of the property is bequeathed by the testator to Bhagbari and Rahim Khatun the daughters of Gulam Mahomed by his predeceased wife Khatun, and to his daughter Karam Khatun by his wife Bachi. Further, by the same Will, to the following undoubted sharers in the estate, *viz.* the widows of Gulam Mahomed, Jamzadi, Bachi, and Sabhai, his daughter Inayat Khatun and his sister Fatma, certain small portions of the immoveable property have been bequeathed which are admittedly far below their legitimate shares in the property according to Mahomedan Law. The daughters of Namoi have been excluded from any participation in the inheritance apparently on the ground that the testator regarded them as illegitimate, and equally Hayat Khatun who the testator alleged had been divorced by him. Now the 5 persons mentioned above in the Will to whom much less than their legitimate share has been allotted have executed release-deeds Exs. 418 to 422, which are all in the same form. These also have been attested and registered, and bear the same date as the will, 29th August 1911. The executants of these release-deeds declare thereby their assent to the terms of the Will and their satisfaction with the shares allotted to them, and the release-deeds further contain an undertaking by them not to dispute the Will or prefer any claim to any other portion of the property which is admitted to be exclusively that of Gulam Mahomed. At this stage the third document may also be referred to *viz.*, the divorce-deed Ex. 316, which is also registered and attested and is dated the 29th August 1911 and confirms the divorce of Hayat Khatun on the 25th August 1911.

All the three documents are written by the same Munshi Aishising and registered by Rijhumal at the Kot of Gulam Mahomed.

Now, holding as we do, that Khatun's share in the estate is not time-barred, that Hayat Khatun is entitled to a share in the estate for reasons set forth above, and that Jamal Khatun and Umedan are equally entitled to their portion in the estate as the legitimate daughters of Gulam Mahomed, there arises the initial objection to the Will, that so far as their shares in the estate are concerned, they remain unaffected by the Will. It is not alleged that they ever assented to the Will or consented to validate any legacy exceeding the legal third and they can certainly now come forward in spite of the Will and claim their legitimate share. Further, as regards the assent to the terms of the Will given by the various executants of the release-deeds, it is a well-known rule of Mohamedan Law that bequests by a Moslem can only take effect to the extent of one-third of the net assets remaining after payment of his funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby, and a bequest to a person entitled to inherit is void unless the other inheritors give their consent, after the death of the testator, to its taking effect. The release-deeds that have been filed in the present case and which embody an assent to the terms of the Will by the executants are executed on the 29th August 1911 whereas, Gulam Mahomed died on the 11th September 1911, and a consent by the other heirs before the death of the testator is of no avail. Now what do the release-deeds amount to? They are a transfer or renunciation of a right of inheritance before it has

vested. But this is clearly prohibited under the Mahomedan Law. Rights of inheritance only arise after the death of the person whose estate is in question. A Mahomedan cannot renounce his right of inheritance before that right had become vested by the death of the person to whom he is entitled to succeed. In the present case the release-deeds except in the case of Fatma mean in point of fact the giving up that which had no existence. As was said in *Asa Beevi and others* v. *S. K. M. Karuppan Chetty* (23), " there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Mahomedan Law." In *Sumsuddin Gulam Hussein* v. *Abdul Husein Kalimuddin* (24), it was held " that the chance of an heir apparent succeeding to an estate is under Mahomedan Law neither transferable nor releasable." At page 171 of the same case Sir Lawrence Jenkins says as follows "By the Transfer of Property Act it is provided that the chance of an heir apparent succeeding to an estate cannot be transferred [section 6 (*a*)]. It is true that in section 2 (*d*) it is enacted that nothing in the second chapter of the Act shall be deemed to affect any rule of Mahomedan Law but so far from there being any rule that conflicts with this provision, such a transfer would seem to be opposed to the principles of Mahomedan Law." See also on this point Macnaghten's principles of Mahomedan Law Case 11, Tyabji's Mahomedan Law, page 282, para. 371, and Roland Wilson's Digest of Anglo-Mahomedan Law, pages 255, 254. The release-deeds, therefore in the present case being transfers by heirs expectant are not binding on the executants.

Mr. Bhoj Singh undoubtedly recognized the futility of establishing assent to the terms of the Will by the release-deeds executed in Gulam Mahomed's life-time and was, therefore, compelled to call in aid the indications of assent given both directly and after Gulam Mahomed's death. For this purpose he relied, in the first instance, on certain statements made by the executants of the release-deeds, on the 29th September 1911, that is, after Gulam Mahomed's death and recorded by Tapedar Mahomed Maluk. These statements are exs. 362 to 365 in the case and are substantially in the same form to the effect that the deponents have been given their share in the land in the life-time of Gulam Mahomed, that they have executed release-deeds and that only the property mentioned in them should be entered in their names, and that they have no concern with the other property. The ladies concerned admit their thumb marks having been taken to these statements by the Tapedar but with the exception of Bachi, declare that they did not understand the purport of these statements as they were not read out then and that they were under the impression that their names were being entered in the Land Records as the heirs of Gulam Mahomed. However, apart from their assertion of their ignorance of the true character of the statements to which they appended their thumb marks, there is the important point to be considered as to their social status and the circumstances under which their assent was secured. It appears to us as established beyond all reasonable doubt, despite the stray bits of evidence emanating from a few interested witnesses, that the women-folk of Mahomed Fazul and Gulam Mahomed may be correctly described as *parda-nishin*, with the possible exception of Bachi who too observed *parda* as long as Gulam Mahomed lived. Now as was said by the Privy Council in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (25). " In the case of a deed executed by a *parda-nishin* lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon the deed and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to and really understood by the grantor. It must also be established that it was not signed under duress but by the free and independent exercise of her will." In another Privy Council case, *Shambati Koeri* v. *Jago Bibi* (26) it was said that "It is a well known rule of this Committee that in the case of deeds and powers executed by *parda-nishin* ladies, it is requisite that

(23) 45 Ind. Cas. 35; 41 M. 365 at p. 370 ; 7 L. W. 215 ; 34 M. L. J. 460

(24) 31 B. 165; 8 Bom. L. R. 787

(25) 21 Ind. Cas. 985; 36 A. 81 ; 18 C. W. N. 282 ; 16 O. C. 378 ; (1914) M. W. N. 112 ; 12 A. L. J. 115 ; 15 M. L. T. 130 ; 19 C. L. J. 172 ; 1 O.L.J. 67 ; 26 M. L. J. 121 ; 16 Bom. L. R. 147 ; 41 I. A. 23 (P. C.).

(26) 29 C. 749; 29 I. A. 127; 6 C. W. N. 682 ; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304 (P. C.).

those who rely upon them should satisfy the Court that they had been explained and understood by those who executed them. These observations are of particular significance in this case both in respect of the release-deeds and the statements recorded by the Tapedar. Now in the present case we have to depend practically on the evidence of this Tapedar in determining the question whether the ladies whose statements were recorded by him clearly understood what it was to which they subscribed their assent, and his evidence appears to us of a highly suspicious character. The Sub-Judge has discussed the evidence of this witness at considerable length and we entirely concur with him in his conclusions that very little reliance can be placed on the evidence of Mahomed Maluk, the Tapedar. We need only refer to two points in his evidence which appear to us to sufficiently discredit him, the first is, his remarkable answer to the very first question in cross-examination that "I recorded the statements for my personal satisfaction and in order that none of the parties concerned should subsequently change. They were ladies and I wished to bind them." It is inconceivable why this witness should display such feverish anxiety in binding these unfortunate women and for that purpose depart from the practice which has the sanction of the Law on presentation of documents for making the requisite entries. When Bhagbhari presented the documents to him it was his duty, as he himself admits, to issue a notice under r. 5 to the other side to file any objections that they may have, and this brings us to the second reason for doubting his evidence, that not only he did not issue the notice which he knew the Law required of him, but he proceeded to the Kot to record the statements of these women before the expiry of 30 days allowed for the filing of objections. Further the two attesting witnesses to these statements are Atta Mahomed and Ramun, the latter being sent for by Maluk, and Atta Mahomed was in the Kot when Maluk arrived. Atta Mahomed states in his evidence that the Tapedar did not read out the statements to the ladies other than the beneficiaries under the Will, and Ramun at first stated the same though later on he tried to improve upon his previous version. Both these witnesses have manifested keen interest in attempting to support the appellant's case by not over-scrupulous means, and in their dealings with *parda-nishin* ladies who apparently had no independent advice or guidance, we are not at all satisfied that the statements recorded by the Tapedar were understood by and explained to the ladies. The probabilities are that the ladies were under the impression that owing to the death of Gulam Mahomed their names were to be entered in the *Khata Badal* as his heirs. Despite, therefore, the admission by some of the ladies that they affixed their thumb marks to the statements recorded by the Tapedar, we are not prepared to hold it proved that the nature of the document has been explained to them, and, therefore, any assent to the terms of the Will after the death of Gulam Mahomed has not been proved. We may further remark at this stage that Fatma after the death of her father Mahomed Fazul had a vested interest in the property to the extent of her share under Mahomedan Law, and it is difficult to understand her relinquishment of rights that had accrued to her even before Gulam Mahomed's death.

It was further argued by Mr. Bhojsing that by their conduct the ladies had indirectly assented to the terms of the Will, and this conduct consisted in their taking possession of the lands awarded by the release-deeds and managing them and appropriating the produce thereof, and though no doubt assent indirectly given may be a good assent in the eye of Law : *Ghulam Kadir* v. Musammat *Sardozi* (27), *Doulatram Khushalchand* v. *Abdul Kayum Nurudin* (28), yet in the present case we are of opinion that the evidence on this point is too meagre to indicate any assent on the part of the ladies. What is relied upon is that payments of land-revenue were made by certain persons in respect of the lands allotted by the release-deeds to the respective ladies and it is contended that these payments were made on behalf of the latter. There is no satisfactory evidence on the record to establish that the payments of land revenue were authorised by the ladies whose names were entered in the Land Register and there is nothing to prevent the payments being made by persons independently of the person in whose name the land stands. The

(27) 9 Ind. Cas. 721 ; 4 S. L. R. 216.
(28) 26 B. 497 ; 4 Bom. L. R. 132.

ladies deny that they ever took possession of the land referred to in the release-deeds, and we are not prepared to hold that any assent to the terms of the will was indirectly given. The question however, still remains, is the will Ex. 328 a genuine document? Of the heirs of Ghulam Mahomed interested in upholding the will are his widow Bachi, the mother of Karam Khatun one of the beneficiaries under the will, and Ghulam Mahomed's daughters by his predeceased wife Khatun, Bhagbari and Rahim Khatun who equally benefit under the will. In bequeathing to these three daughters the substantial part of his property, the testator gives as a reason "they have served me well and I have a liking for them". Now by the will as already remarked, Hayat Khatun and the daughters of Namoi are entirely excluded from inheritence for reasons stated above, and as regards Hayat Khatun and Namoi the testator declares that they have been disobedient to him and failed to act in conformity with his wishes, but why the daughters of Namoi whom he had maintained and married respectably in life, and who we have held to be his legitimate daughters should be entirely debarred from inheritance is a matter for considerable surprise. But even assuming that the testator had grounds for excluding these, it is difficult to appreciate the reason for the marked difference in his treatment of the beneficiaries under the will and the others who apparently had been faithful to him till his death. One may well understand the allotment of a small share in the property to Bachi, as her daughter Karam Khatun acquires a very substantial share in the estate, but why allot to the two widows Jamzadi and Sabhai, what may comparatively be deemed a scanty pittance barely sufficient to enable them to live in comfort, why treat the sister Fatma similarly when she had already acquired a large share in her father's estate on his death, and why finally discriminate between his daughter Inayat Khatun and the other daughters that benefit under the will? The evidence does not disclose any reason for the inequitable treatment as revealed by the allotment of about 1,800 acres of land to the three daughters under the will, and the grant of about 20 acres to the widows Jamzadi and Sabhai, about 50 acres to Inayat Khatun and about 30 acres to Fatma. In a case of *Jagarni Kunwar* v. *Durga Prasad* (29), the Privy Council laid down that "In the case of a will reasonable, natural, and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of which the opposite can be said, namely that they are unnatural, unreasonable or tinged with impropriety." We are of opinion that it may well be predicated of this will that it is unnatural, unreasonable, and improper and hence calls for a rigorous scrutiny.

The will has been attested by Gulam Rasul, Ramu and Total. The writer is Munshi Aishising, who also wrote out the divorce deed and the 5 release-deeds. This munshi has admitted that he was convicted of forgery in respect of a bond, though he adds that it was 24 or 25 years ago. He was not acquainted with Gulam Mahomed before he went to the Kot and was introduced by Rahim Khan to him. Total had gone to call him to the Kot to write the deeds and both he and Sub-Registrar Rijhumal, had come together. Now was it a mere coincidence that of all the bond writers in Miro Khan, and admittedly there were others, the very man that had been convicted of forgery in respect of a bond that he had written should be selected by Total, and introduced by Rahim Khan who in all probability must have been well acquainted with the character of Aishising. The conduct of Rahim Khan in connection with the various documents in the case and the nature of his evidence stamp him as a clearly unrealiable witness. He was a cousin of Gulam Mahomed and in fact the only male agnate relation in Gulam Mahomed's family. In terms of the will the three daughters of Gulam Mahomed, the beneficiaries under the will, are entrusted to the guardianship of Rahim Khan and he is authorised by the will to have the land cultivated and to attend the Government calls, and there is a declaration in the will that "he as the owner like me will look after my property and my daughters." There can be no doubt that in these circumstances Rahim Khan was entrusted with the management of the whole estate of Gulam Mahomed both

(29) 22 Ind. Cas. 103 ; 36 A. 93 ; 26 M. L. J. 153 ; 18 C W. N. 521 ; 15 M. L. T 125 ; 12 A. L. J. 125 ; 19 C. L. J. 165 ; (1914) M. W. N. 137 ; 16 Bom. L. R. 141; 16 O. C. 386 ; 1 O. L. J. 57 ; 41 I. A. 76 (P.C.).

moveable and immoveable. Now Rahim Khan has stated in his evidence that "Bachi had promised on the *Koran* to marry me and allow me to have the whole property according to the terms of the will. She has not yet married me. She is not now on good terms with me." In respect of the witness Rahim Khan, Bachi has stated as follows "Rahim Khan was on good terms with us till the death of Gulam Mahomed. He quarrelled with us one or two months later. There was no actual quarrel, but he would not look after us." Though it is difficult to say what truth there is in either of these pieces of evidence, there can be no doubt that Rahim Khan and Bachi were on good terms prior to the death of Gulam Mahomed and even for some time after it. The suit was filed in February 1912 and it was in May of the same year that Rahim Khan made a statement Ex. 315 before the Mukhtyarkar that Namoi was the mistress of Gulam Mahomed, a statement which he afterwards retracted, and explained it by saying that "Bachi made him make it on the faith of the *Koran*." Now a witness who admits that he himself had read the *Nikah* of Namoi with Gulam Mahomed and has the audacity to state that Namoi was the mistress of Gulam Mahomed, to a person in the position of Mukhtyarkar is one who can expect very little credence to be attached to his statement. There is another remarkable piece of evidence in connection with Rahim Khan, which is also useful from another point of view. A codicil is said to have been executed by Gulam Mahomed about 3 or 4 days before Gulam's death, it was, however, registered after his death. One of the attesting witnesses to it is Rahim Khan and his evidence with regard to his attestation is as follows "The document shown to me bears my signature as a witness. I did not read the document at the time. It was not read out to me. Bachi and Total got my attestation after the death of Gulam Mahomed. I was induced to attest it because she promised to marry me on the faith of the *Koran* and in order that Hayat Khatun may not claim a share." The citation of these two passages in the evidence of Rahim Khan will suffice to reveal his unscrupulous character. It is this man who figures prominently in connection with the preparation of the various documents in this case and with the so-called identification of the executants thereof. Next to Gulam Mahomed, his was the influence in the surrounding country and his weight thrown on the side of Bachi, a strong-minded woman herself, enabled them to completely domineer over a batch of illiterate and helpless *pardanashin* women. Now the codicil Ex. 341 appears to us a very suspicious document, and if it is spurious which we think it to be, the authors of it would neither have much difficulty nor be below in putting forward a fictitious will. There is nothing on the record which would serve to explain the circumstances under which this codicil came to be written. It is said to have been written by Total. He is one of the attesting witnesses to the will, and according to Bachi, he and her sister's husband Bago are the two persons that have been helping her in the conduct of her case. It is very significant that though Total was present throughout the hearing of the case in the lower Court, he was not examined as a witness despite the fact that he was the only person that could explain the circumstances under which the codicil was written and what became of the original codicil in view of the Sub-Registrar's declaration that he delivered it to him after registration. Further as one of the attesting witnesses to the will which is vehemently disputed his evidence was very material. We feel that his evidence has been deliberately withheld. The original codicil has not been produced though according to Bachi it remained in the possession of Bhagbhari after execution, and as it was the latter that presented it to the Sub-Registrar Rijhumal for registration, it must have been, therefore, either with Bhagbhari or Total; its non-production has not been accounted for except by the convenient statement that it is missing and a certified copy of it was filed. Now why should this codicil be registered after Gulam Mahomed's death, if as a matter of fact it was executed three days before it. It does affect a material alteration in the will in one substantial point and that is that it cancels the power given to Rahim Khan over Karam Khatun's *Nikah* and entrusts it to Bachi. Three days before his death Gulam Mahomed must have felt that his end was drawing nigh, and if he thought it necessary to see to the registration of the will, he would have certainly felt the necessity of registering the codicil in his life-time.

We feel that the suppression of the original codicil was done with a purpose. In respect of this codicil Bachi states that she was present at the time that it was written and that it was written by the same *munshi*, that is, Aishising, who, however, denies it. She further adds that she was not consulted when it was made nor was it made at her request, a very likely statement, inasmuch as all the documents previously written including the Will are alleged to have been read out to the parties concerned, and as the codicil was effecting an important alteration in the Will in favour of Bachi it is scarcely conceivable that Bachi would not have been informed of it and that she also would not have taken the necessary steps to get the codicil registered in the life-time of Gulam Mahomed. Now, besides Rahim Khan, the two other attesting witnesses to this codicil are Atta Mahomed and Mahomed Maluk the Tapedar. We have already referred to the unreliable character of these witnesses, but besides, Atta Mahomed in his evidence states "Gulam Mahomed made no Will in my presence. I have not attested any Will of Gulam Mahomed." Mahomed Maluk says "Gulam Mahomed asked me to attest a writing on a plain-paper when I visited him in his last days. None else attested in my presence. I cannot say whether it bore any attestation before mine. I got the paper which bore his signature already." To judge from the certified copy produced, the signatures of Rahim Khan and Atta Mahomed as attesting witnesses were taken before Mahomed Maluk was asked to sign the document, and Rahimkhan states that his signature was taken after Gulam Mahomed's death. We are strongly inclined to the belief that the codicil has been manufactured after Gulam Mahomed's death, its registration does not imply much, because it was not a difficult matter for Total and the attesting witnesses to declare that the codicil bears the signatures of Gulam Mahomed. And if the codicil is a document that has been fabricated for the purposes of this case, it is not unlikely that the Will is also the output of some person determined to play a foul game. Now the attesting witnesses to the Will are Gulam Rasul and Ramu and Total the last of whom has not given any evidence. Ramu is a man who on his own admission earns about Rs. 5 to 10 a month. He has a shop on Gulam Mahomed's land and the haris on these lands have accounts with him. Bachi is well acquainted with him and sends for him when his services are required. We feel it difficult to believe that Gulam Mahomed would have thought, not of calling the Mukhi of the village to attest the signature but an impecunious Bania. A man of the position of Ramu would be easily dominated by the personality of Rahim Khan. The next witness is Gulam Rasul. He states that he is acquainted with Bachi for about 25 or 30 years and that she is on visiting terms with his family but none of the other females of Gulam Mahomed's house. Now Gulam Rasul is a witness who supports Bachi's defence in this case from start to the finish. He deposes to being present when Hayat Khatun was orally divorced, he has attested the divorce-deed and so also the release-deeds. He has only no knowledge of the codicil. A careful perusal of his evidence makes on me the impression that he is not an over-truthful witness and does not hesitate to lie when he can do so with impunity. The only evidence that remains to be considered is that of the Sub-Registrar Rijhumal. In his judgment the learned Sub-Judge refers to this witness in the following terms "In the present case I am unable to believe him. He appeared to me to give his evidence not with a free conscience. He often got nervous over questions put to him, although he was given a chair and otherwise treated with consideration throughout his evidence." Both Rijhumal and Aishising drove together to the Kot of Gulam Mahomed on the 27th August 1911 being summoned thither by Total, and on this day Rijhumal states he registered the divorce-deed which was handed to him by Gulam Mahomed. On the 29th August he registered the 5 release-deeds and the will, the former first and the latter next. He adds that there were 5 ladies in the room in which Gulam Mahomed was but as they were all *parda-nishin* he did not see their faces nor did he read out the release-deeds to them. Curiously enough, whilst he was engaged in reading the release-deeds the ladies left the room, and when he asked for them he was told to step in the adjacent room, where Rahim Khan accompanied him and identified the ladies, and the release-deeds were then registered. It is rather remarkable that Gulam Mahomed should not himself

have identified his women-folk at the time he handed the release-deeds to the Sub-Registrar and when they were still in the same room. Further, it seems strange why the Will and the divorce-deeds were not registered on the same day, for Rijhumal states that he enquired of the execution of both the deeds and Gulam Mahomed admitted it and it could not be that Rijhumal could have asked about the registration of the divorce-deed on the 29th August as it had been already registered on the 27th. It also does not clearly appear at what stage the Will was registered for according to Rijhumal his time was first taken up with the registration of the release-deeds and after he had completed their registration *in the room where the ladies were*, "I returned to the room of Gulam Mahomed took his leave and left the Kot." Rijhumal's evidence is certainly not as explicit and convincing as one may have expected from a person in his position and there appears some ground for the comment upon his evidence by the Sub-Judge.

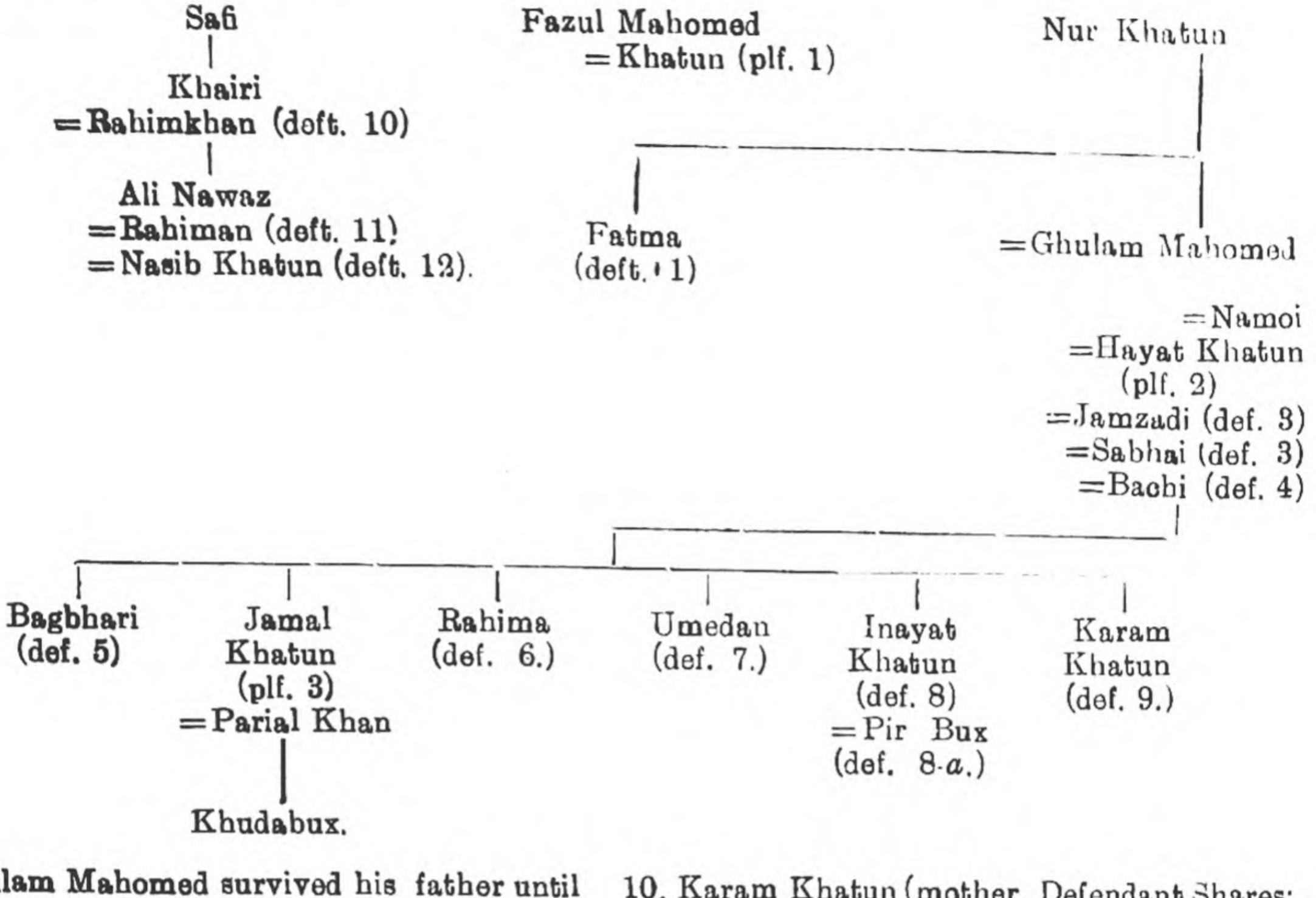
The burden of proving the Will lies on those by whom it is propounded and the question that arises in this case is whether that burden has been discharged. We have in the first instance Bachi, strongly interested in supporting the Will, ably backed up by an influential and unscrupulous scoundrel like Rahim Khan, a convict Aishising convicted on a charge of forging a document is brought in as the writer of the Will, one of the attesting witnesses an impecunious Bania, and the other an intimate friend of Bachi of 25 years standing, add to these, the assistance of Total who was a Kamdar of Gulam Mahomed, and of Bago a brother-in-law of Bachi. Tapedar Mahomed Maluk had no doubt also been rendering active assistances in this case, he was seen in the Kot on the 29th August by Rijhumal though he denies it. What have we on the other hand? A number of *parda-nishin* women who probably looked to Rahim Khan for guidance after the death of Gulam Mahomed as his nearest male relative. But Rahim Khan was not to be deterred from the object he had in view of securing a large portion of Gulam Mahomed's estate through the instrumentality of Bachi. He was an influential man and he would not experience much difficulty in securing assistance in his nefarious designs. After careful consideration we are of opinion that it has not been proved that the Will, Ex. 328, is the Will of Gulam Mahomed.

There remains lastly the question whether the property in suit is the self-acquired property of Gulam Mahomed. All the witneses are agreed that Mahomed Fazul was a rich *Zemindar* and owned large landed property. It is true that already in his life-time there was some property entered in Gulam Mahomed's name in the Revenue Register but this fact does not prove anything, for Mahomed Fazul may have well entered some of his properties in the name of his only son Gulam Mahomed, and, as is well known, entries in Land Registers are only intended for fiscal purposes. Admittedly at his death, Mahomed Fazul left considerable property both moveable and immoveable, very probably Gulam Mahomed added to it, but there should have been some definite and tangible evidence to show the precise extent of his accretions. In the absence of any such evidence we must hold that it has not been proved that the property in suit is the self-acquired property of Gulam Mahomed.

The appeal is dismissed with all costs on the appellants.

Kincaid, J. C.—The facts of this interesting appeal are shortly as follows :—A certain Fazul Mahomed died on 24th December 1890 leaving considerable property and several relatives. The family tree is as under:—

BHAGBHARI v. KHATUN



Ghulam Mahomed survived his father until 11th September 1921. He left several widows and six children. In 1912 Khatun, Fazul Mahomed's widow, Hayat Khatun, Ghulam Mahomed's widow and Jamal Khatun daughter of Ghulam Mahomed and wife of Parial Khan brought suit 15 of 1912. They claimed that they were entitled on partition to the following shares :—

	Shares.
1. Khatun (Plaintiff 1)	432
2. Fatma (Defendant 1)	1008
3. Ghulam Mahomed	2016
	3456

As Ghulam Mahomed had died 7 months before the suit they alleged that these following heirs had also shares as under :—

	Shares.
1. Hayat Khatun (widow Plaintiff 2)	63
2. Jamzadi (widow, Defendant 2)	63
3. Sabhai (widow, Defendant 3)	63
4. Bachi (widow, Defendant 4)	63
5. Jamal Khatun (daughter, Plaintiff 3)	224
6. Bagbhari (daughter, Defendant 5)	224
7. Rahiman (daughter, Defendant 6)	224
8. Umedan (daughter, Defendant 7)	224
9. Inayat Khatun (daughter, Defendant 8)	224
10. Karam Khatun (mother, Defendant 9)	224
11. Khatun (mother, Plaintiff 1)	336
12. Fatma (sister, Defendant 1)	84

The Defendants 4, 5, 6 and 9 made various pleas of which we need only consider the following. The suit was time-barred. The property was the self-acquired property of Gulam Mahomed. The Plaintiffs were entitled to nothing because Gulam Mahomed had willed his property away to Defendants 5, 6 and 9 and had obtained release from Defendants 1, 2, 3, 4 and 8. Hayat Khatum had been divorced and was, therefore, entitled to nothing. Jamal Khatum and Umedan were illegitimate. The questions which have arisen for our decision are :—

1. Is the suit time-barred as against Hayat Khatum and Fatma ?
2. Was Hayat Khatun divorced ?
3. Were Jamal Khatun and Umedan illegitimate ?
4. Was the property all Mahomed Fazul's?
5. Is the Will valid ?

I shall deal with No. 2, Hayat Khatun's divorce first. The chief evidence of this divorce is the divorce-deed Ex. 318. It is

dated 27th August 1911 and recites that Ghulam Mahomed married Hayat Khatun some two years previously, that on the 25th August 1911, he verbally divorced her by throwing three clods at her and on the 27th August 1911 he drew up the divorce-deed. This divorce has been assailed from many points. But I shall only consider one, namely, that it was invalid as made during the period of Hayat Khatun's *Iddut*, *i. e.* within three months of Ghulam Mahomed's death and at a time when he was suffering from a Marz-ul-maut a mortal sickness. The learned Sub-Judge has held that Ghulam Mahomed was ill at the time of the execution of the Will. It is also admitted that he deid of that same illness. Further he had been ailing for several months before. It is not certain what the disease was. One witness has said consumption, another diabetes. But it was certainly a mortal illness and this he must have known and he could not attend to his ordinary pursuits. I have but little doubt an incurable one. In these circumstances, as it seems to me, all the *indicia* mentioned by Batchelor, J., in *Sarabai* v. *Rabiabai*, (19) were present.

"(*a*) Proximate danger of death so that there is, as it is phrased, a preponderance (ghalba) of *khauf* or apprehension, that is, that at the given time death must be more probable than life ;

(*b*) There must be some degree of subjective apprehension of death in the mind of the sick person ;

(*c*) There must be some external *indicia*, chief among which I would place the inability to attend to ordinary avocations."

As upon the evidence furnished by these *indicia* I hold that Ghulam Mahomed was suffering from a Marz-ul-maut when he divorced Hayat Khatun.

The divorce therefore was invalid. To use the learned Judge's words "the principle appears to be that a wife's accrued rights shall not be suddenly defeated by the *caprice* of the husband while labouring under such mental infirmity as usually accompanies the approach of death."

3. Were Jamal Khatum and Umedan illegitmate ? It is contended that their mother Namoi was Ghulam Mahomed's kept mistress. The first piece of evidence is the following passage in the Will—

> "Namoi remained with me like a concubine for about 5 or 6 years. I had no *Nikah* or *Baksho* with her, but she also becoming disobedient went away from me about 24 years ago. She has had two daughters. Leaving them with me she went away. Considering myself liable for maintaining these poor girls I duly brought them up and looking to the necessity of getting them married, I had them married among my poor caste brothers. But according to law they were not my daughters."

Had the Will been reliable, this statement might, as the learned Sub-Judge has observed, have been of some weight, although a dying man who divorces one wife on his death-bed might easily charge another with being only his concubine. But, as I shall show later, the Will is a most suspicious document. There is also the inherent improbability of any man who had kept a mistress admitting it in a Will. A testator's inclination would rather be to conceal than to proclaim an illicit connection. Again had Namoi been concubine, she would surely have taken her daughters with her when she left Ghulam Mahomed's keeping. He, their father, had no right to retain them. Further she would not have been admitted, at any rate, during Mahomed Fazul's life-time to the Kot. No Mussalman gentleman would force his wives to associate with his step-son's mistress. It is also not correct that Ghulam Mahomed married his daughter by Namoi to his poor caste brothers. Jamal Khatun was married to Parial Khan a man as well born as himself and in exchange Khatun was married to Mahomed Fazul. It is unlikely that an illegitimate daughter would have been considered a fair exchange for one in wedlock. Umedan was married to Ali Mahomed who has sworn that he would not have married her, had she been the daughter of Ghulam Mahamed's mistress. Lastly Khatun, Ex. 312, has sworn that Namoi was Ghulam Mahomed's wife. It is unlikely that any lawful married woman would allege that her step-son's mistress was a wife, unless it was strongly to her interest to do so. Here Khatun has nothing to gain by falsely asserting the

marriage of Namoi or the legitimacy of her daughters.

I, therefore, hold that 'Jamal Khatun and Umedan were legitimate.

4. Was the propety all Mahomed Fazul's?

The property was originally Mahomed Fazul's. He was a large land-holder. Ghulam Mahomed has so far as I can see from the record had no private sources of income. He may have added to the estate after Mahomed Fazul's death. But the burden lies on Mr. Bhojsing's client to show what land did he add. Mr. Bhojsing has relied on pages 169, 175, 177 and 167 to show that Ghulam Mahomed did own certain numbers during Fazul Mahomed's life-time. But mere entries in Government records mean little or nothing. Mr. Bhojsing should have produced the deeds by which Ghulam Mahomed acquired these numbers. I agree with the lower Court in holding that the land in suit was Mahomed Fazul's.

5 Is the will valid? This is the most important issue of all.

The Mussalman Law as regards bequests has been laid down by Sir R. Wilson (Digest of Anglo Mahomedan Law, page 30) as follows:—

> "Bequests by a Mussalman can only take effect to the extent of ⅓rd of the net assets remaining after payment of his funeral expenses and debts, *unless the excess is rendered valid by the consent, given after the death of the testator*, of the inheritors whose rights are infringed thereby or by the fact of there being no such inheritors."

And again at page 303 "A bequest to a person entitled to inherit is void unless the other inheritors give their consent, *after the death of the testator*, to its taking effect."

Now the will, Ex. 328, clearly violates these provisions. Hayat Khatun, the testator's wife, the daughter by Namoi, his step-mother Khatun get nothing. They have not consented in any way to their exclusion. The absence of their consent is by itself enough to nullify the will so far as they are concernd. Further the testator's wives Jamzadi, Bachi, Sabhai and his daughter Inayat Khatun, his sister Fatma have been given very much less than their proper shares. It has been contended that they have consented. The *Farkaties* or release-deeds of Jamzadi, Bachi, Sabhai, Inayat Khatun and Fatma have been filed to show their consent. But these are useless. They are all dated 29th August 1911, whereas Ghulam Mahomed died on 11th September 1911. They are thus executed before his death and, therefore, are not evidence that the other inheritors gave their consent *after the death of testator*. It has however been argued that although the release-deeds do not amount to consent after the death of testator, they were a family arrangement by which the ladies resigned their rights out of affection to Ghulam Mahomed. But it has been held both by the Bombay and Madras High Courts that a Mussalman cannot transfer an expectancy. In *Sumsuddin* v. *Abdul Hussein* (1), Sir. L. Jenkins observed "By the Transfer of Property Act it is provided that the chance of an heir-apparent succeeding to an estate cannot be transferred (Section 6 (*a*)). It is true that in section 2 (*d*) it is enacted that nothing in the second chapter of the Act shall be deemed to affect any rule of Mahomedan Law, but so far from there being any rule that conflicts with this provision, such a transfer would seem to be opposed to the principles of Mahomedan Law; see the opinions of the majority of the Law Officers in *Musammat Khanum Jan* v. *Musammat Jan Bibi* (30) and *Abdul Vahid Khan* v. *Musammat Nuran Bibi* (31). And in the absence of clear proof to the contrary I certainly am not prepared to hold that there is any rule of Mahomedan Law that sanctions the transfer of an expectancy."

In *Asa Beeri* v. *Karuppan Chetty*, (23) their Lordships held:—

> "On the whole we think that there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Mahomedan Law."

This view is also supported by the high authority of Sir Roland Wilson (*see* pages 254, 255 Digest of Anglo-Mahomedan Law.)

(30) (1827) 4 S. D. A. (Beng. 210.)
(31) 12 I. A. 91; 11 C. 597; 4 Sar. P. C. J. 627; 9 Ind. Jur. 283; Rafique & Jacksons P.C. No. 89; 5 Ind. Dec. (N. S) 1157 (P. C.).

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Mr. Bhojsing, however, has relied on some statements made by these ladies on 29th September 1911. These certainly were made after the death of testator. But there is another equally grave objection to them. By assenting to the will these ladies were resigning very valuable rights. This was more especially so in the case of Fatma in whom her rights as daughter of Fazul Mahomed had already vested. Now the leading case on documents by *parda-nishin* ladies is *Shambati Koeri* v. *Jagobibi*, (26). The Judicial Committee there observed :

" It is a well-known rule of this Committee that in the case of deeds and powers executed by *parda-nishin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had explained to and understood by those who execute them. *Sudishtlal* v. *Sheobarat Koer* (32)."

What evidence then is there that the statements were fully explained to these ladies in this case ? The chief witness is the Tapedar Mahomed Maluk, Ex. 359. But it is impossible to believe his evidence. He has stated that a few days after Gulam Mahomed's death Bhagbhari one of the three main beneficiaries under the will produced it and the deeds of release in order that he might make the necessary changes in the Record of Rights register. He then went to the ladies who had executed the deeds of release and took their statements. He also issued notices to them. The Deputy Collector, moreover, had never disapproved of his action. Afterwards, however, he was forced to admit that he never issued notices as required by law and that the Deputy Collector in consequence called upon him to explain this conduct. In view of this tergiversation I entirely disbelieve his man's word. It is most unlikely that any thing was explained to the ladies when their statements were taken. These statements are virtually the same. What seems to have happened is that a number of copies were drawn up and the ladies induced by some misrepresentation, put their marks on them.

Lastly it has been urged that ladies have given their consent to the will by their conduct. Had they done so their conduct added to the release-deeds (if genuine) might have been interpreted as consent after death (*see* Wilson page 301). But there is no evidence of such consent by conduct. It has been asserted in Court that they, however, received their shares and the present suit was brought some months after the death of Gulam Mahomed.

The first question alone remains. I do not agree with the learned Sub-Judge that the case comes under Article. 127. This question was finally decided by a Full Bench in the case of *Isap Ahmed* v. *Abhramji Ahmadji* (5). There is not in my opinion in Mahomedan Law either a joint family or joint family property. In this connection I find support in the following passage of Beaman and Heaton J. J's judgment.

" The joint family as a legal entity invoving definite legal notions, incidents, and consequences is unknown to any other great system of law prevailing in the Empire. So that where property is spoken of as belonging to a joint family, it must primarily be referred to a Hindu joint family, and only secondly to such group of non-Hindus as can prove that they have by custom adopted the Hindu Law of the joint family."

In a case such as this, Article 144 applies. But as the learned Sub-Judge has observed in his admirable judgment, it is of no consequence in this suit whether Article 144 or Article 127 applies. Under Article 144 the defendant who claims adverse possession has to show when his possession became adverse to the plaintiff. The only main evidence as regards Khatun's exclusion is in the will. Therein Gulam Mahomed purports to state that Khatun left his father's house 22 years previously and that, therefore, under a will of Mahomed Fazul she was entitled to no interest in the property. Gulam Mahomed adds too that she has also no right in it as it " has been extended by his labour." But as Mr. Wadhumal has pointed out this is not admissible in evidence. It is the statement of a dead man and, therefore, can only be admitted under one or the other of the sub-clauses of section 32, Indian Evidence Act. Mr. Bhojsing has relied on sub-clause (7). It runs as follows:—

"When the statement is contained in any deed, will or other document which relates

(32) 7 C. 245; 8 I. A. 39 ; 4 Sar. P. C. J. 222. 5 Ind. Jur. 270; 3 Ind. Dec. (N. S.) 707, (P. C).

to any such transaction as is mentioned in section 13, clause (*a*).

Section 13, clause (*a*) is as under:—

"Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence."

But a statement that Khatun has left her husband's house 22 years before and that the property in suit has been extended by the labours of Gulam Mahomed, is not a transaction by which any right or custom was created, claimed, recognized, asserted or denied which was inconsistent with its existence.

Mr. Bhojsing has further relied on the evidence of Bachi, Atta Mahomed and Sher Mahomed. Bachi, however, is deeply interested in the case. Atta Mahomed has received a very handsome present of land worth about Rs. 1,000, since Gulam Mahomed died, and is quite unreliable. Lastly Sher Mohomed's version is different both from those of Bachi and Atta Mahomed and that in the will. He has merely said that she lived with her relations 15 or 20 years ago before Gulam Mahomed's death. But he has not said that they had any quarrel. Moreover Mr. Wadhumal has asserted and with justice as it would seem from Sher Mahomed's evidence that he has been tampered with. On the other hand Khatun Sabhai, Mahomed Parial and Allahdino have deposed that Khatun lived with Gulam Mahomed until his death.

There is even less evidence in proof of Fatma's exclusion. She lived no doubt in her husband's house. But that was only natural, and her rights are mentioned in the will and she was given certain lands in satisfaction of them.

I agree in holding that the appeal should be dismissed and the lower Court's finding confirmed with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 164 OF 1921.

October 12, 1923.

Present :—Mr. Justice Ramesam and Mr. Justice Wallace.

CHETTIYOTAN KANNAN KUTTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ELAYA VEETTIL VELU ALIAS ELAYA CHETTIAR URALAN AND MANAGER OF KANNANCHERI DEVASWOM—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease, invalid renewal of, effect of—Devaswom—Notice to quit by one of two uralans, validity of—Suit filed by one Uralan without consulting others, maintainability of.

An invalid renewal of an existing lease does not operate to extinguish the rights and obligations under the prior tenancy until it has been surrendered or otherwise legally put an end to.

Ramunni v. *Kerala Varma Valia Raja*, 15 M. 166; 5 Ind. Dec. (N. S.) 465; *Kuttipurath Kunhunni Panikkar* v. *Raman*, 52 Ind. Cas. 675; 10 L. W. 427; 26 M. L. T. 332; (1919) M. W. N. 742, followed.

A notice to quit by one only of two Uralans of a Malabar Devaswom is invalid.

Doe d Whayman v. *Chaplin*, (1810) 3 Taunt 120; 128 E. R. 49; 12 R. R. 615; *Alford* v. *Vickery*, (1842) Car. and Mar. 280; 66 R. R. 867; *Doe d Kindersley* v. *Hughes*, (1840) 7 M & W. 139; 10 L. J. Ex. 185; 151 E.R. 711; 56 R. R. 669, *Doe d Aslim* v. *Summersett*, (1830) 1 B & Ad. 135; 8 L. J. (O. S.) K. B 369; 109 E. R. 788; *Cassim Ahmed Malla* v. *Eusuf Haji Ajam, Popardi*, 34 Ind. Cas. 221; 23 C. L. J. 453, referred to.

Per Ramesam J.—The principle that in any transaction which creates or destroys rights in the trust estate all the Uralans must be consulted is inapplicable to suits provided that in a suit by one Uralan the other Uralans are made parties.

V. A. Istoop v. *K. Ayeppan*, 16 Ind. Cas. 435; *Matamulla Manikoth Pattan Chandu* v. *Kuttiyil Rayiru*, 66 Ind. Cas. 396; 42 M. L. J. 280; 15 L. W. 264; (1922) M. W. N. 172; (1922) A. I. R. (M.) 2, referred to.

Mariyil Raman Nair v. *Narayanan Nambudripad*, 26 M. 461; *Kumban* v. *Moorthi*, 7 Ind. Cas. 422; 34 M. 406, 20 M. L. J. 951; 8 M. L. T. 208; (1910) M. W. N. 359, relied on.

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Savitri Antarjanuam v. *Raman Nambudripad*, 24 M. 226, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Appeal Suit No. 28 of 1920 (A. S. No. 190 of 1920 on the file of the District Court) preferred against the decree of the Court of the District Munsif, Vayitri at Calicut, in O. S. No. 104 of 1919 (O. S. No. 73 of 1918, Additional District Munsif's Court, Calicut).

Mr. *K. P. M. Menon*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *K. P. Ramakrishna Aiyar*, for the Respondents.

JUDGMENT.

Ramesam, J.—The suit property belongs in jenman to Kannancheri Devaswam of which the Uralas are the plaintiff and the 3rd defendant. Plaintiff's predecessor and the 3rd defendant leased it to the 1st defendant for a period of 12 years under Ex. A on 10th August 1897. Plaintiff brought the suit to recover the property on behalf of the Devaswam. The Munsif dismissed the suit. The Subordinate Judge decreed it. The 1st and 3rd defendants appeal.

The first point argued is that the suit filed by the plaintiff (one of the Uralars) without consulting the 3rd defendant is not maintainable. It is true that, in any transaction which creates or destroys rights, all the Uralans must be consulted (*V.A. Istoop* v. *K. Ayappan* (1) a case of demise ; *Matamulla Mani Koth Pathur Chandu* v. *Kuttiyil Rayiru* (2) a case of melcharth). But this principle does not apply to suits, provided the other Uralans are also parties (*Mariyil Raman Nair* v. *Narayanan Nambudripad* (3); *Kunhan* v. *Moorthi* (4),The decision in *Savitri Antarjanam* v. *Raman Nambudri* (5) was distinguished in the former of these cases and has scarcely any authority after the latter. The remarks at p. 689, of *Angamuthu* v. *Ramalinga Pillai* (6) in (1) (in so far as they refer to suits) are obiter. This is conceded by the counsel for appellants in reply. I hold that the suit cannot be dismissed for non-consultation of 3rd defendant provided it is otherwise maintainable.

The second point argued is that the suit is bad for want of notice to quit. Though the 1st defendant's tenancy under Ex. A was only a tenancy for a term, it was converted into a tenancy from year to year by the payment and acceptance of rent after 1897 (see para 3 (2) of the plaint which shows that rent was paid after 1897). This is conceded by the respondent. The first respondent, however, contends that the 1st defendant, having accepted, by Ex. II, a renewal of the original lease by 3rd defendant only, cannot fall back on the tenancy from year to year. The Courts have found that Ex. II is invalid. That being so, the prior lease was not extinguished by Ex. II. It is true that the 1st defendant insisted on the validity of Ex. II in his written statement but the plaintiff repudiated it and as Ex. II has been proved to be invalid, the rights under the prior tenancy did not cease. Moreover, the 1st defendant's plea in para. 12 of the written statement— "This suit which is brought by the plaintiff alone to recover possession under the prior lease is not maintainable" shows that he meant to rely on his rights under the prior lease as a defence to the suit. The prior lease has not been surrendered or otherwise legally put an end to (See *Ramunni* v. *Kerala Varma Valiya Raja* (7) and *Kuthiprnath Kunhunni Panikkar* v. *Raman* (8). The respondent also contends that the clause "You must give (me) the value of the *Kuzhikoors* and *Chamayamas* ..... when, I am evicted at any time after the expiry of 12 years" in Ex. A dispenses with a notice to quit. I do not agree with this contention. A proper notice to quit is, therefore, necessary.

The next question is whether Ex. C. which was issued by the plaintiff alone is enough. It is true that, in England it has been held that one of the several joint *tenants* may issue a notice to quit and put an end to a

(1) 16 Ind. Cas. 435.
(2) 66 Ind. Cas. 396 ; 42 M. L. J. 280 ; 15 L. W. 264 ; (1922) M. W. N. 172 ; (1922) A. I. R. (M.) 2.
(3) 26 M. 461.
(4) 7 Ind. Cas. 422 ; 34 M. 406 ; 20 M. L. J. 951 ; 8 M. L. T. 208; (1910) M. W. N. 359.
(5) 24 M. 296.
(6) 60 Ind Cas. ; 766 ; 39 M. L. J. 685.
(7) 15 M. 166 ; 5 Ind. Dec. (N. S.) 465.
(8) 52 Ind. Cas. 675 ; 10 L. W. 427 ; 26 M.L. T. 332 ; (1919) M. W. N. 742.

lease created by all of them (See *Doe d Whayman* v. *Chaplin* (9), *Doe d Aslim* v. *Summersett* (10), followed in *Doe d Kindersley* v. *Hughes* (11), (*Alford* v. *Vickery* (12), 3 I. C. & Mar 28). Apart from the fact that this rule has not been followed in India by the Bombay and Calcutta High Courts, as to which I express no opinion, it cannot apply to the present case where there is no joint tenancy. The Devaswam is the only owner of the property. It is represented by the Uralans both of whom must act to determine a tenancy lawfully created. None of the English cases is a case of trustees (See *Passim Ahmed Molla* v. *Eusuf Haji Ajam Pepardi* (13), which is a case of joint receivers). I, therefore, hold that the notice Ex. C is not a valid notice. The other question argued, whether the notice is a sufficient notice (only 15 days being allowed for quitting the land) need not be considered.

The appeal is allowed and plaintiff's suit is dismissed with costs of 1st defendant throughout.

Wallace, J. :—I am in full agreement with my learned brother as to the necessity for a notice to quit and as to the invalidity of Ex. C which is the only notice given in the matter of the determination of the suit tenancy. This finding is sufficient to dispose of this second appeal. I own to some doubt on the proposition whether plaintiff was in law entitled to file his suit without consulting his colleague, since to adopt the language of *Kunhan* v. *Moorthi* (4) the remedial right in this case, *viz.*, the right to eject 1st defendant would not accrue to the trustees until they as a body after consultation had signified their will to determine the lease of 1st defendant and had communicated that will to him. As there was neither such consultation nor communication the remedial right did not accrue, and, therefore, on the principle laid down in that case, it would not be competent for plaintiff alone to sue. I prefer at present. however, not to rest my decision on this point which is not necessary for the disposal of this appeal. I agree that the suit be dismissed with costs of 1st defendant throughout.

V. N. V. *Appeal allowed.*

(9) (1818) 3 Taunt 120 ; 128 E. R. 49 ; 12 R R. 615.
(10) (1830) 1 B. and Ad. 135 ; 8 L. J. (O. S.) K. B. 369 ; 109 E. R. 738.
(11) (1840) 7 M. & W. 139 ; 10 L. J. Ex. 185 ; 151 E. R. 711 ; 56 R.R. 669.
(12) (1842) Car. & Mar. 280 ; 66 R. R. 867.
(13) 34 Ind. Cas. 221 ; 28 C. L. J. 453.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 240 OF 1921.

November 30, 1923.

Present :—Mr. Rupchand Bilaram, A. J. C.

TRUSTEES OF THE FIRM OF MOTHARAM DOWLATRAM—PLAINTIFFS
versus
PAHLAJRAI GOPALDAS—DEFENDANT.

Hindu Law—Joint family—Co-parcener engaged in business—Family business—Presumption—Transfer of Property Act (IV of 1882), s. 6 (e)—Civil Procedure Code (Act V of 1908), s. 60 (e), O. VI, r. 14—Provincial Insolvency Act (VII of 1920), ss. 37, 39—Mere right to sue, transfer of—Transfer of estate with remedy for recovery—Property, meaning of in Insolvency Law—Claim for breach of contract, whether vests in Receiver—Plaint, signing of—Co-plaintiffs—Plaint not signed by all plaintiffs, effect of—Amendment.

Although a person carrying on business may be a co-parcener in a Hindu joint family, it does not necessarily follow that all his coparceners are his partners in that business, unless it is shown that the business was set up with the help of family funds.

There is no presumption that a business carried on by one co-parcener in a Hindu joint family is a family business.

Vadilal Lallubhai v. *Shah Khushal Dalpatrai*, 27 B. 157 ; 4 Bom. L. R 968 ; *Sanwanmal, Pirianmal* v. *Pinaimal Danmal*, 2 S. L. R. 13, **relied upon.**

The word "property" under the English Insolvency Law includes claims in the nature of damages which have accrued due prior to the date of Insolvency except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation.

Brake v. *Beekhan*, 60 R. R. 691 ; *Rogers* v. *Spencer*, 67 R. R. 786, **relied upon.**

Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos* or by a testamentory instrument can be

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affected by him with a trust by an instrument *inter vivos* or by a testamentary instrument provided the objects of the trust are lawful.

Raymond v. *Fetch*, (1835) 41 R. R. 797; 2 Cr. M. and R. 588; 5 Tyr. 985; 5 L. J. (N. S.) Ex. 45; 1 Gab. 337; 150 E. R. 251, followed.

Section 6, clause (*c*) of the Transfer of Property Act does not prevent assignment of the whole estate of the assignor with an incidental remedy for its recovery but prohibits the transfer of a *bare* right to sue.

Jeewan Ram v. *Rattanchand*, 26 C.W.N. 285, relied upon.

Section 6 (*a*) of the Transfer of Property Act has no application to the case of a property vesting in a person by an order of the Court under the provisions of sections 37 and 39 of the Provincial Insolvency Act.

A claim for breach of a contract which has become due to the insolvent prior to his insolvency and has not been paid to him vests in the Official Receiver.

Kimatrai Bhojraj v. *Chandumal*, 17 S. L. R. 52 and unreported ruling in *Pinto* v. *Firm of Tulsidas Mulchand*, Suit No. 221 of 1921, followed.

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Though the authority to bring a suit is a question of principle, the proper signing of the plaint is a matter of practice only and any mistake or omission therein may be amended at any time and authority to institute a suit may be established by other means besides the signature.

Mohini Mohandas v. *Bungsi Buddan Saho Das*, 17 C. 580; 5 Sar. P. C. J. 498; 8 Ind. Dec. (N. S.) 926; *Basdeo* v. *John Smidst*, 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068; *Bishesher Nath* v. *Emperor*, 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L. J. 865, followed.

Mr. *Jiwatram*, for the Plaintiffs.

Mr. *Dharamdas Thuwardas*, for the Defendant.

ORDER.—Certain preliminary issues relating to the maintainability of suits Nos. 114, 235, 236, 240 and 600 all of 1921 and applications for leave to amend the plaint have been heard together. All the five suits are filed in the names of the Trustees of the firm of Motharam Doulatram against different defendants. Evidence has been recorded in suit No. 240 of 1921 which has been treated as a test suit.

The facts material to the present inquiry are that one Doulatram, son of Metharam who described himself as trading in the name of Metharam Doulatram was adjudicated insolvent on his own application by an order, dated 12th September, 1919 Ex. 13. He subsequently entered into a deed of arrangement, Ex. 7, with his creditors by which five persons were appointed Trustees *viz.*, (1) Hassasing Lalsing, (2) Jettaram Manghumal, (3) Seth Khiluram Dayaldas, (4) Gopaldas Parumal, and (5) Rameshardas Shivanthrai. In the deed they are described as arbitrators and as a committee of inspection, and are authorized to settle disputes between the insolvent and the creditors to take charge and possession and assume control over all the property of the insolvent including outstandings due from the debtors of the insolvent and it is expressly stated in the deed that all the estate of the insolvent was to vest in them. This deed of arrangement was accepted with slight modifications by Kennedy, J. C. by his order, dated 15th October 1920, Ex 10. The material part of which order is as under :—

> " I, therefore, sanction the composition deed as amended. I annul the order of adjudication and direct that the property vests in the Trustees appointed by the composition deed subject to payment of the Official Receiver's fees."

On the 16th January 1923 all the five trustees have purported to execute a power of attorney in favour of Doulatram Metharam, but the power has been actually signed by only four of them. Rameshardas' signature does not appear on it. This power *inter alia* recites that as the firm of Metharam Doulatram was adjudicated insolvents and as under the composition deed they had been appointed trustees or receivers, they had resolved at a meeting held by them to appoint Doulatram as their attorney and they empowered him to collect the outstandings of the insolvents and to file suits on their behalf.

Suit No. 240 of 1921 has been filed against one Pahlajrai Gopaldas for recovery of Rs. 7,500-0-0 said to be due by him to the firm of Metahram Doulatram in respect of several transactions of sale and purchase of certain

goods between the 2nd June 1917 and the 25th January 1918. The plaint was presented on the 24th January 1921 and was headed as under :—

"The trustees of the firm of Metharam Doulatram which lately carried on business at Karachi but now dissolved *viz.* :—

(1) Seth Hassasing Lalsing
(2) Seth Jettaram Manghumal
(3) Seth Khuluram Dayaldas
(4) Seth Gopaldas Perumal
(5) Seth Ramasherdas Shivnathrai, by their duly constituted attorney Seth Doulatram Metharam, Hindu adult merchant now residing in Karachi."

The plaint is signed by three of the five trustees, that is, Nos. (1), (3) and (4). It is attested by the attorney Doulatram. The *Vakalatnama* in favour of the pleaders has been signed by Nos. 1, 3 and 4 and also by the attorney Doulatram.

The defendant in this suit *inter alia* contended that the suit having been instituted through a person who was not a recognized agent, was not properly instituted, and that the claim in suit being for unliquidated damages for the breach of certain contracts, could not be validly assigned to the trustees and that the trustees had, therefore, no right to sue. On these pleadings the following two issues were raised by the Court :—

1. Is the suit properly instituted ?
2. Have the plaintiffs any right to sue ?

More or less similar issues were raised in the connected suits. At the hearing, however, the defendant in this suit and the defendants in the other connected suits amplified their defence and the following further points were raised by them in connection with all the suits :—

(*a*) That the Trustees, or at least some of them being in Karachi on the date of these suits, the attorney could not file the suits ;

(*b*) That the Trust Deed having been executed by Doulatram son of Metharam one of the partners of the firm of Metharam Doulatram is not valid ; and that the firm of Metharam Doulatram consisted of more than one partner ;

(*c*) That the vesting of the property in trustees does not give them power to sue ;

(*d*) That under any circumstances claims in the nature of damages do not vest in the trustees ;

(*e*) That the plaints are not properly signed or verified or presented.

In order to meet the different contentions raised by the parties, the plaintiffs have at the close of the case filed two applications in each suit for amendment, the first being an application to permit the trustees who have not signed the plaint and *Vakalatnama* to do so. and a second, to permit the name of Doulatram Metharam to be brought on the record as a co-plaintiff.

I shall deal with the different points in issue generally in this suit which has been treated as a test suit and record my findings on the issues in this suit so far as they relate to it and I shall formally record my findings in the connected suits by separate judgments.

Issue No. 2. It is alleged that Doulatram, his nephew Chandumal and his son Lachmandas, all three carried on business in partnership in the name of Metharam Doulatram. The only witness examined on this point is Doulatram himself. He has denied that he had any partner in the business. He has stated that Chanumal worked with him as a paid servant for ten months only and has produced entries from his books to show the salary credited to him. The entries with regard to the payment of salary are somewhat suspicious, having been made after the date of insolvency, but in the absence of any evidence to the contrary I hold that the defendant has failed to prove that Chandumal was a partner. "With regard to the part taken by Lachmandas in the business of his father, Doulatram has admitted that his son was joint with him and used to work at the shop. The drawings of Lachmandas have been debited to the profit and loss account. He admits that up to the date of insolvency Lachmandas used to live and mess with him. He states that he started this business only about four years before his failure and as Lachmandas is said to be 26 years old now, he was about 18 years of age when he joined his father's business. I cannot hold on this evidence that Lachmandas was a partner with his father. "Partnership" is defined in section 239 of the Indian Contract Act as "the relation which subsists between persons who have agreed to combine their property, labour or

skill in some business, and to share the profits thereof." There is no evidence in the present case of an express agreement. Can the Court infer an agreement to share the profits from the fact that Doulatram's son who had attained the age of 18 years when his father started the business, became a partner by working at his father's business and that it was agreed that he would get a share in the profits? The son had no property of his own to share the loss of the business. It is not urged that the business was an ancestral business or that it was started with assets in which the son was interested. In *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1), Chandavarkar, J. held that from the mere fact that certain persons are members of a joint family, it does not necessarily follow that they are partners in the firm which one of them says is his, unless such firm was set up with the help of family funds and that there is no presumption that a business carried on by one co-parcener is a family business. In *Sawanmal Pinanmal* v. *Pinanmal Danmal* (2) a Bench of this Court non-suited a son who claimed a share from his father in the property said to have been acquired by the father and the son in the course of the business carried on in the joint names of both of them and in which the son took part. The position of a Hindu son in his father's business has been admirably summed up by Crouch, A. J. C. as under :—

> "The circumstances of this case are quite common occurrence in this country. A son enters his father's business, and takes an active part in its management. It is convenient that he signs *hundis*, and receipts and contracts as if he were a partner; to do so involves no risk, for the son has no fortune apart from his father's. But no definite arrangement is made as to the son's remuneration, and nothing whatever is said between them as to a partnership. When the son needs money he draws it out of the business, without any objection by the father. The son, partly out of filial respect, and partly because he thinks that were a definite arrangement to be made, he would be no better off than he is already, forbears to press the matters. If it be necessary to give definition to the vague terms of the agreement between the parties, I should say that the son had agreed to serve in the business, at such remuneration as his father might from time to time choose to give him."

It is contended that prior to Doulatram's insolvency he had filed certain suits in the name of the firm of Metharam Doulatram showing thereby that he had partners. It is not impossible that the misdescription in those plaints was due to the same negligence and carelessness which has been shown in the filing of the present suits. Though Doulatram applied to the insolvency Court as carrying on business by himself, and though the deed of arrangement is signed by him as such, the heading of the plaint in this suit and the other connected suits describes the plaintiffs as the trustees of the firm of Metharam Doulatram now dissolved. I hold on the evidence of Doulatram uncontradicted as it is, that he alone traded in the name of Metharam Doulatram and had no other partners in the business.

It is next contended that the claim in suit being in the nature of damages does not vest in the Trustees. Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos* or by a testamentary instrument can be affected by him with a trust by an instrument *inter vivos* or by a testamentary instrument provided the objects of the Trust are lawful. (Halsbury, Vol. 28, paras 44 and 45 and section 4, Indian Trust Act). The claim in suit is part of the estate of the debtor and would ordinarily devolve at his death on his legal representatives. As said by Lord Abinger in *Raymond* v. *Fitch* (3). "The authorities are uniform that a personal representative may sue not only for all debts due to the deceased by speciality or otherwise but for all covenants and indeed all contracts with the testator broken in his lifetime and the reason appears to be that these are choses in action and are parcel of the personal estate in respect of which the executor or administrator represents the person of the testator and is in law the testator's assignee." The claim in suit is not in the nature of a

(1) 27 B. 157 ; 4 Bom. L. R. 968.
(2) 2 S. L. R. 13.

(3) (1835) 41 R. R. 797; 2 Cr M. & R. 588; 5 Tyr. 935; 5 L. J. (N. S.) Ex. 45; 1 Gale 337; 150 E. R. 251.

personal action for any tort done to the person which according to the maxim *Actio personalis moritur cum persona* would die with the death of the assignor and cannot, therefore, be assigned.

Section 6, clause (*e*) of the Transfer of Property Act does not prevent the assignment of the whole estate of the assignor being transferred to the trustees, but prohibits the transfer of a *mere* or *bare right* to sue on grounds of public policy. As said by Saunderson, C. J., in *Jeevan Ram* v. *Ratanchand* (4), the question for the Court to decide in such a case is whether the subject matter of the assignment by the assignor is in view of the Court property with an incidental remedy for its recovery or whether it is a bare right to bring an action within the meaning of the words "a mere right to sue." The deed of arrangement vests in clear terms the whole of the estate of the insolvents in the trustees for certain lawful objects and does not purport to transfer a mere right to sue in the trustees, though no doubt it confers incidentally the remedy on the trustees to sue for recovery of all funds due to the Trust estate and imposes an obligation on them to do so.

The trustees acquired their rights in the present case not only by virtue of the deed of arrangement but by the order of the Court, Ex. 10, passed in the exercise of its Insolvency Jurisdiction.

Section 37 of the Provincial Insolvency Act provides that when an order of adjudication is annulled by the Court the property of the debtor shall, subject to the reservation contained therein, vest in such person as the Court may appoint and shall revert to the debtor only in default of such appointment.

Section 39 of the Act makes the provisions of section 37 applicable to orders of annulment of adjudication on compositions and schemes of arrangement being approved by the Court.

By Ex. 10 the Court has ordered all the property of the insolvent to vest in the trustees and has made no reservation in his favour. All property which vested in the Official Receiver does, therefore, vest in the trustees. "Property" under the English Insolvency Law does include claims in the nature of damages which have accrued due prior to the date of the insolvency except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation. *Brake* v. *Beckhan* (5), *Rodgers* v. *Spencer* (6). Halsbury Vol. II, para. 236.

The learned pleaders for the defence have however, contended that clause (5) of section 28 of the Provincial Insolvency Act provides that such property as is exempted from attachment and sale under section 60, Civil Procedure Code did not vest in the Official Receiver, and that the claim in suit being in the nature of damages is exempted from attachment under clause (*e*) of section 60. Clause (*e*) of section 60, Civil Procedure Code like clause (*e*) of section 6 of the Transfer of Property Act refers to a mere or bare right, and not to *every* right, and the ruling in Jeevanram's case equally applies. Generally an important item in the assets of an insolvent trader is his claims for breaches of contracts which have become due to him prior to his insolvency and have not been paid to him, and the bulk of his liabilities are similar claims which he has failed to pay. The very object of the insolvency law would be defeated if claims in the nature of damages arising out of his dealings in trade were intended to be excluded from vesting in the Official Receiver.

In *Pinto* v. *Firm of Tulsidas Mulchand* (2), Suit No. 221 of 1921, Aston, A. J.C. has taken the same view that similar claims do vest in the Official Receiver, under the Provincial Insolvency Act. Raymond, A. J. C. has also arrived at the same conclusion in *Official Assignee of Bombay* v. *Chandulal Chimanlal* (7), though on some-what different grounds.

I hold that the claim in suit did vest in the Official Receiver and that by virtue of the order Ex. 10 as also the terms of the deed of arrangement it does vest in the Trustees. I am further of opinion that under O. XXXI, r

(4) 70 Ind. Cas. 498; 26 C. W. N. 285.

(5) (1843) 60 R. R. 691 ; 11 M. & W. 315 ; 12 L J. Ex. 486 ; 7 Jur. 204 ; 152 E. R. 823.

(6) (1844) 67 R. R. 736 ; 13 M. & W. 571 ; 15 L. J. Ex. 49 ; 153 E. R. 239.

(7) 76 Ind. Cas. 657 ; 17 S. L. R. 52.

1, Civil Procedure Code the Trustees can maintain suits in respect of property vested in them in their own name.

I hold on this issue in the affirmative.

Issue No 1. All the trustees must join together in the execution of the trust except where it is otherwise provided by the instrument of trust (section 48, Indian Trust Act). It is also open to any of the trustees to appoint an attorney on his behalf to do a ministerial Act (section 47, Indian Trust Act).

Clause 9 of the deed of arrangement reads as follows:—

> "That the decision of the majority of the arbitrators or committee of inspection shall be binding on the parties, and in case of the death or absence through any cause whatsoever of any of the arbitrators or committee of inspection the remaining arbitrators shall have power to act in these presents provided there is no disagreement between them. In case of disagreement the remaining arbitrator shall wait for the absenting arbitrators or in case of his death appoint an Umpire in these presents and whose decision shall be final and binding."

As I interpret this clause, it provides—

(a) that as between the insolvent and the creditors the decision of the majority shall in any dispute between them bind the parties, all the five persons being present and acting together.

(b) That in any matter whether it is a dispute between the insolvent and the creditors and also in any other matter whatsoever relating to the deed of arrangement, if one of the trustees dies or is absent the remaining four trustees can act jointly, the words used being "in these presents."

(c) If, however, there is a disagreement between the four trustees, they shall postpone their action till the absentee trustee returns or if the fifth trustee is dead, till a fifth trustee is appointed in place of such deceased trustee. This deed empowers any four trustees present to act in any matter provided they are unanimous. It does not, however, empower only three of the five trustees to act except in disputes between the insolvent and his creditors under certain circumstances.

It would, therefore, appear that any suit authorised by four of them and which is not objected to by the 5th trustee is competent.

The suit has been authorized by four trustees, three of them have signed the plaint. The *vakalatnama* in favour of the pleaders is signed by three trustees and the attorney acting on behalf of the fourth trustee As the fourth trustee was absent from Karachi the plaint could have been signed on his behalf by the attorney. The suit would have been competent even if it had been filed in the names of four of the trustees unless there was evidence to show that the fifth trustee objected to it. The learned pleaders for the defence were misled by the heading of the plaint and urged that the attorney could not file a suit or sign the plaint on behalf of the trustees present in Karachi. As the plaints are signed by such of the trustees who were present, they have not pressed this point but have urged that as the plaint purports to be filed on behalf of five trustees it is not properly presented having been signed by only three of them.

In *Mohini Mohun Das* v. *Bungsi Buddan Saha Das* (8), where a suit was filed by one of the three joint creditors, the other creditors being named as co-plaintiffs, their Lordships of the Privy Council held that there is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. In *Basdeo* v. *John Smidt* (9), at page 61, Strachey, C. J. pointed out that the object of the signature to the plaint is to prevent as far as possible disputes as to whether the suit was instituted with the plaintiff's knowledge and authority, and that such authority may be established by other means besides the signature. *In the matter of the petition of Bisheshar Nath* v. *Emperer* (10), it

(8) 17 C. 580; 5 Sar. P. C. J. 498; 8 Ind. Dec. (N.S.) 926.

(9) 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068.

(10) 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr L .J. 865.

was held that O. VI, r. 14 Civil Procedure Code which requires a pleading to be signed by a party is merely a matter of procedure and it is the business of the Court to see that this provision is carried out and that though the authority to bring a suit is a question of principle, the proper signing of the plaint is a matter of practice only, and any mistake or omission therin may be amended at any time. At page 152 Walsh, J. has observed: "It can not be impressed too often upon the inferior Courts what Bowen, L. J. said in *Cropper* v. *Smith* (11), The object of Courts is to decide the rights of parties, and not to punish them for mistakes which they make in the conduct of their cases, by deciding otherwise than in accordance with their rights. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy." Of course where it is sought to abuse the process of the Court, or to over-reach the other party by some fraud it is another matter."

In the view I take of this case, the signature of the fourth trustee or his attorney if he is absent, would be sufficient and the name of Rameshердas who is said to have been absent from Karachi throughout could be deleted from the plaint The plaintiffs are prepared to obtain the signature of the remaining two trustees to the plaint, I see no reason why I should not allow them to have the plaint signed by them or if any one of them is not in Karachi, by his attorney duly constituted in that behalf.

I hold that the suit has been properly instituted. There has been a considerable waste of time of the Court and delay in the disposal of this suit and the connected suits owing to the indifference and carelessness of the plaintiffs and I order that the plaintiffs do pay to the defendants as costs the sum equal to one-fourth of the pleaders' fees which are taxable under the rules.

In the view I take of this case, the application of the plaintiff to bring the name of the insolvent on the record is dismissed with no order as to costs.

(11) (1884) 26 Ch P. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

The plaintiffs should obtain signatures of the two Trustees who have not signed the plaint within fifteen days of this date, and should also deposit the costs awarded within that period. The suit may be called up again for further orders on 18th December 1923.

P. B. A. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 257 OF 1920.

September 5, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

LOORTHIA ODAYAR — PLAINTIFF— APPELLANT

versus

GOPALASAMI AND ANOTHER— PLAINTIFF AND DEFENDANT— RESPONDENTS—

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Transfer to prefer creditors and to defeat others, validity of—Consideration, passing of, effect of.

In a suit on a promissory note, the defendant filed a written statement denying its execution but allowed it to be decreed *ex parte*. A few days after the written statement was filed and before decree, the defendant executed a usufructuary mortgage of all her immoveable properties for a term of 10 years in favour of her brother's son who was not a man in well-to-do circumstances.

There was no pressure from any creditor nor was there any necessity for creating a mortgage over the entire properties for such a long period of time. No provision was made for the payment of the pro-note debt. It was, however, found that out of the consideration of Rs. 10,000 a sum of Rs. 7,000 went towards the discharge of debts due to third parties by the defendant and the recitals as to the rest of consideration were made with the object of defeating and delaying the plaintiff who had brought the suit on the pro-note.

Held, that although the effect of the transaction was to defeat and defraud the plaintiff creditor the transaction could not be regarded as wholly void and effect must be given to it to the extent of Rs. 7,000, which was applied towards the discharge of the transferor's debts.

LOORTHIA ODAYAR *v.* GOPALASAMI

Musahar Sahu v. *Lala Hakim Lal*, 32 Ind. Cas. 348; 43 C. 521; 30 M L. J. 116 ; 3 L. W. 107; 20 C. W. N. 393; 14 A. L J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203 ; 23 C. L. J. 406 ; 18 Bom. L. R. 378 ; 43 I. A. 104 (P C); *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*, 40 Ind. Cas. 242 ; 44 C 662 ; 1 P. L. W. 425; 5 L. W 711; 32 M L. J. 425 ; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L J. 508 ; 19 Bom. L R. 424 (1917) M. W. N. 473 ; 44 I. A. 72 (P. C.); *Rajani Kumar Das* v. *Gour Kishore Saha*, 35 C. 1051 at p. 1053; 7 C. L. J. 586; 12 C W. N. 761; *Palamalai Mudaliar* v. *South Indian Export Co., Limited*, 5 Ind. Cas 33; 33 M. 334 ; 7 M. L T. 167 ; 20 M L J 211 ; *Ummacha Kutti* v. *Ummar Kutti Haji*, 29 Ind. Cas 583, relied on.

Chidambaram Chettiar, v *Sami Aiyar*, 30 M. 6 ; 16 M. L. J. 427 ; 1 M. L. T. 351, distinguished.

Appeal against the decree of the Court of the 3rd Additional Subordinate Judge, Tanjore at Mayavaram, in O. S. No. 93 of 1919.

Mr. *T.M. Krishnaswami Iyer*, for the Appellant.

Messrs. *K. Bhashyam Aiyengar* and *P. J. Kuppanna Rao*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—The question to be decided in this appeal is : Is the mortgage (Ex. I) executed by the 1st defendant in favour of the 2nd defendant liable to be set aside at the instance of the plaintiff under Section 53 of the Transfer of Property Act?

The 1st defendant and her son had executed in favour of the plaintiff a promissory note and the plaintiff filed a suit for the recovery of the amount due under it. The first defendant filed a written statement in that suit denying the execution of the promissory note. This statement was filed on the 7th of February 1916. On the date of the hearing, the 1st defendant did not appear and an *ex parte* decree was obtained by the plaintiff in about June 1916.

In the mean-time, that is, a few days after the filing of the written statement but before the decree aforesaid was passed, the 1st defendant mortgaged her properties to the 2nd defendant by Ex. I, dated 26th February 1916. The 2nd defendant is the brother's son of the 1st defendant and it is admitted that the mortgage deed comprised every item of immoveable property possessed by the 1st defendant. At the time of the mortgage, the suit against the 1st defendant was pending and a false defence was presumably put in, in order to gain time. The mortgage purports to be for Rs. 10,000 but it is in evidence that the 2nd defendant was not himself possessed of much property but it is said that his father and mother were wealthy and that he was in management of his father's properties. The 2nd defendant also admits that before the date of this transaction, he had not lent any large sums of money and that the maximum amount lent by him on any single occasion was about Rs. 300 or Rs. 400. The admissions made by him clearly show that the mortgage was not taken in the usual course of business but that it was a transaction of an unusual kind from the point of view of the 2nd defendant. No explanation is forth-coming as to why he suddenly turned a money-lender and lent such a large sum of money. As a fact, he admits that he had only with him Rs. 2,000 on the date of Ex. I and that he had to borrow the major portion of the consideration from his maternal aunt's husband and it is remarkable that this man had not even been examined. It is also significant that the mortgage that was created was a usufructuary mortgage for a period of 10 years. It seems to me that the object of creating such a mortgage was to diminish the value of the equity of redemption even granting that it was worth anything at all. What necessity was there to create a mortgage over the entire property of the 1st defendant, which was to subsist for such a long period of time? It is stated in Ex. I that the object of executing the mortgage was to raise money to pay off several creditors of the 1st defendant. There is nothing in the evidence to show that there was any pressure brought to bear by the creditors except in regard to one debt ; whereas, so far as the plaintiff is concerned, he had actually filed a suit but it is curious that the mortgage deed makes no provision whatsoever for the payment of the debt due to the plaintiff. That the 1st and 2nd defendants intended to defeat the plaintiff's claim appears further from the circumstance that the mortgage deed was registered not in the Registrar's Office nor even at the residence of either the mortgagor or the mortgagee but at the house of one Dharmalinga Pillai in a place called Settiapuram. On a consideration of the probabilities of the

case and of the evidence, I have come to the conclusion that the 1st defendant executed the mortgage with the intention of defrauding the plaintiff and that the 2nd defendant was aware of that intention.

The consideration for the mortgage deed is said to consist of.

(1) Rs. 7,037-12-10 which is the aggregate amount of the debts due by the 1st defendant to third parties and which the 2nd defendant claims to have discharged. The learned Subordinate Judge thinks that these debts were really not due and that the recital in the mortgage deed regarding their existence is false. I was first inclined to agree in this view but on further consideration I am not prepared to accept this finding. The transaction, as I pointed, is no doubt extremely suspicious but documents were produced to evidence the previous debts and witnesses were examined to prove those documents, and I find that there was no cross-examination directed to attack the genuineness of the documents. If they were seriously impugned it would have been open to the 2nd defendant to produce further evidence and I cannot draw any inference adverse to him from his omission to examine more witnesses on this point. As it is, he examined Ponnusami Pillai who proves not only the promissory note executed in his own favour but also Ex. 3 *b* executed in favour of Radhakrishna Pillai. Sadasiva Pillai proves Ex. 3-*c* and Narayanaswamy Iyer proves Ex. 3-*a*. In the circumstances, I am disposed to think that the evidence adduced is sufficient to prove the existence of the debts and I, therefore, find that the consideration to this extent did really pass for the mortgage document.

(2) Rs. 1,873-8-0 said to be the amount which was due by the 1st defendant to the 2nd defendant on a promissory note of a prior date, namely, 20th May 1913. Has the 2nd defendant made out the existence of this debt to himself ? I am satisfied that he has not. He was cross-examined in regard to his capacity to advance money. He had also to admit that he did not keep any accounts. A specific question was put to him as to whether he had lent any monies before the date of Ex. I. In the plaint, it was expressly stated that the promissory notes mentioned in the deed of mortgage were not genuine. The 2nd defendant was, therefore, bound to give clear evidence of the debt alleged to be due to himself. Beyond his word, no evidence has been adduced. The promissory note in his favour Ex. II, bears the attestation of Samiah Udayar and Srinivasa Iyar. Neither of them has been examined. I may note that this Samiah Udayar has also attested Exs. 1, 3-A and 5, and this shows that he is more or less intimately connected with the defendants. It is still more strange that the 1st defendant has not been examined at all. The 2nd defendant admits that the relations between him and the 1st defendant have continued to be friendly. There is another circumstance to which I may advert though I do not propose to base my finding upon that. From a comparison of the documents filed in the suit, Ex. II appears to have been written by D. W. 4 and although he was examined, with reference to the other documents with which he was connected, not a single question was put to him bearing on Ex. II. The mortgage document having been executed in circumstances which show that the object of the transaction was to defeat the plaintiff, the onus was heavily upon the 2nd defendant to prove the existence of the debts alleged to have been discharged from and out of the consideration for the mortgage. In *Palamalai Mudaliar* v. *The South Indian Export Company* (1), Wallis J. as he then was states the law thus, "Now if the sale was effected with the object of preferring these two creditors to the plaintiffs and the other creditors it is clear and is admitted, that the sale would not be voidable under section 53 of theTransfer of Property Act, but the burden of proving this where the sale appears otherwise to be voidable is on the defendant and should be established by satisfactory evidence." This principle was also accepted by Mitra and Casperss, JJ. in *Rajani Kuwar Das* v. *Gour Kishore Saha* (2). I have come to the conclusion that there was no debt due by the 1st defendant to the 2nd defendant previous to Ex. I and that the recital in it to the contrary is false.

(3) Rs. 1,088-11-2 alleged to have been paid by the 2nd defendant to the 1st defendant at the time of the registration of the document. Aiyasami Udayar the 2nd defendant's father

(1) 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M L. J. 211.

(2) 35 C. 1051 at p. 1058; 7 C. L. J. 586; 12 C. W. N. 671.

is stated to have paid this amount before the Sub-Registrar. This man was not examined. According to the evidence adduced on behalf of the defendants the mortgage was taken for his benefit. He is not only alleged to have paid the amount at the time of the registration but he is said to be the person who was responsible for the recitals in Ex. I. Moreover, he attested Exs. 3, 3*a* and 3*b*. In the circumstances I think that the failure to examine him as a witness was deliberate. Once again I may advert to the fact that the 1st defendant was not examined and she also could have given material evidence on this point. Payment before the Sub-Registrar quite often signifies nothing, because to give the transaction an appearance of reality the parties not unusually resort to this device. I am, therefore, not satisfied that this sum was really paid to the 1st defendant. Even assuming that it was paid, I have not the least doubt that the object of the payment was to defraud the 1st defendant's creditors because as pointed out in *Palamali Mudaliar* v. *The South Indian Export* Co. (1), converting immoveable property into cash is the most obvious and effective method of defeating and delaying creditors.

Having thus found on facts, I must now consider what the law on the subject is. In *Chidambaram Chettiar* v. *Sami Aiyar* (3), it was held that where a transfer, though in part was for valuable consideration, was as regards the other part only, an arrangement to defeat creditors it was wholly void under section 53 of the Transfer of Property Act. In that case, the assignment, that was impeached, was in favour of the creditor and the money obtained by the assignor was partially utilized for the payment of his debts. Nevertheless it was held that as the arrangement was to some extent a device, intended to defeat the assignor's other creditors, the transaction was entirely invalid and no effect could be given to it. The reason for this decision, as I understand it, appears to be this. A mere preference of one creditor to another does not render the transaction voidable under section 53 of the Transfer of property Act. But if it is shown that the object of the transaction is not merely to prefer a creditor but in addition is to defeat or to delay the other creditors, it then ceases to be a transaction by which merely a creditor is preferred but becomes a transaction to which section 53 is directly applicable. The next step in the argument seems to be that the inclusion of a fictitious debt furnishes evidence of an intention to defeat the creditors and the transaction is thus wholly void against them. I may remark that this case is not an authority upon section 53, because the learned Judges expressly state in their judgment that the question before them was to be decided with reference to general principles of justice and good conscience, the property with which they were dealing not being immoveable property and section 53 not having therefore direct application. Apart altogether from this, the recent decisons of the Judicial Committee *Mushar Sahu* v. *Lala Hakim Lal* (4), and *Minakumari Bibi* v. *Bijoy Singh Dudhuria* (5), place the matter beyond doubt. In the former at page 525 an extract is given from the judgment of Palles, C. B, In Re Moroney where it is stated that although the effect of the transaction or *even the interest of the debtor in making it* may be to defeat another creditor, it is not a fraud within the statute. Their Lordships towards the close of their judgment say that a preference of one creditor to another is no ground for impeaching the deed even if the debtor was intending to defeat an anticipated execution by another creditor. In the latter case *Minakumari Bibi* v. *Bijoy Singh Dudhuria* (5), equally strong observations were made. Their Lordships say at page 671 "It may be that the judgment-debtor preferred the plaintiff..... ...and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer." On these authorities it is perfectly clear that the transaction before us cannot be regarded as wholly void as against the plaintiff.

I may add that in *Rajani Kuwar Das* v. *Gour Kishore Saha* (2), *Palamalai Mudaliar* v. *South Indian Export Company* (1),

(3) 30 M. 6 ; 16 M. L. J. 427 ; 1 M. L. T. 351.

(4) 32 Ind. Cas. 343 ;43C. 521; 80 M. L, J. 116; 3 L. W. 107; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 208; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C).

(5) 40 Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15. A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 I. A. 72 (P.C.).

and *Ummachakutti* v. *Ummerkutti Haji* (6), the transactions were not held to be wholly invalid and effect was given to the deed to the extent to which the consideration was applied for the discharge of the transferor's debts. I, therefore, hold that the mortgage in favour of the 2nd defendant is good to the extent of Rs. 7,037-12-10 and that the property is liable to be sold subject to this right of the 2nd defendant. The appeal will be allowed to that extent. The parties will pay and receive proportionate costs throughout.

Phillips, J.—I agree.

V. N. V. *Decree modified.*

(6). 29 Ind. Cas. 583.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 3042 OF 1921.

November 19, 1923.

Present :—Mr. Justice Buckland.

CHANDMUL MULCHAND—PLAINTIFF

versus

S. AND C. NORDLINGER—DEFENDANTS.

Arbitration—Award—Error of law, apparent on face of award, what amounts to—Sale of goods—Dispute as to quality—Burden of proof—Reference stipulating survey of goods—Award made without survey—Jurisdiction.

An error in law on the face of the award which is sufficient to vitiate the award means that the award or some document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, contains a legal proposition which is the basis of the award and which is erroneous.

Champsey Bhare & Co. v. *Jivraj Balloo Spinning & Weaving Co*, (1923) A. C. 480 ; 92 L. J. P. C. 163; 50 I. A. 324; 129 L. T. 166; 39 T. L. R. 253; 73 Ind. Cas. 486; 47 B. 578; 44 M. L. J. 706 ; 25 Bom. L. R. 588; (1923) A. I. R. (P. C.) 66; (1923) M. W. N. 596; 50 C. 130; 33 M. L. T. 419; 28 C. W. N. 397 (P. C.) *Hodgkinson* v. *Fernie*, (1857) 3 C. B. (N. S.) 189 ; 27 L. J. C. P. 66; 3 Jur. (N. S.) 818; 6 W. R. 181; 140 E. R. 712 ; 111 R. R. 614, relied on.

Ordinarily, where there is a dispute between a buyer and a seller with reference to tha quality of goods, it is the duty of the seller to prove that the goods are of the quality contracted for.

Disputes arose between the parties out of a contract for the sale of goods, relating to the quality of the goods and the matter was referred to arbitration, the arbitrators being required to make an award after a survey of the goods. The arbitrators made the following award :—"We have considered the papers and as the buyers are unwilling to produce the bales required for inspection, their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract;

Held (1) that the mere fact that the buyers were unwilling to produce the bales required for inspection was not by itself a sufficient reason for making an award against them, especially as it was the duty of the sellers to prove that the goods were of the quality contracted for ;

(2) that, therefore, the award was vitiated by an error of law which was apparent on the face of the award ;

(3) that the award having been made without a survey of the goods was made without jurisdiction and was invalid.

Messrs. *B. C. Mitter, N. N. Sarkar, Langford James* and *A. K. Roys*, for the Plaintiff.

Messrs. *A. N. Chaudhuri, R. C. Bonnerjee* and *J. N. Sinha*, for the Defendants.

JUDGMENT.—This is a suit for a declaration that an award dated the 3rd September 1921 made by the Bengal Chamber of Commerce is invalid and in-operative.

On the 2nd January 1918 the parties to this suit entered into an agreement containing terms under which they would conduct business with each other, and amongst other terms the second provides that "in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same shall be referred within 90 days of the arrival of the goods in Calcutta to the Bengal Chamber of Commerce unless a special agreement exists on the subject between the said parties, and no claim will be entertained if made after 90 days from date of arrival of goods. The latter part of the same clause provides that "the Chamber shall arrange for survey in accordance with its rules, that surveys shall be held on the actual goods and not on shipment samples, and that all survey reports, accompanied by samples, signed and sealed by the surveyors, showing the basis on which their award has been made must be forwarded to the sellers when-

ever the award has been given against them." On the 7th December 1920 the parties entered into a contract whereby the Plaintiffs agreed to buy from the Defendants 60 bales finished *Dhootis* of *rangin* descriptions at prices stated in para. 1 of the plaint. The goods in due course arrived and disputes arose with reference to the number of counts and lengths of the *Dhootis*. The parties accordingly went to arbitration and on the 1st March 1921 there was submitted to the Bengal Chamber of Commerce Tribunal an application signed by the Plaintiffs applying for the "appointment of two arbitrators and the issue of an award for cancellation of the contract or allowance or such other relief as the arbitrators may think fit to award upon the under-mentioned complaint and upon investigation of all facts arising out of the contract." On the same form against the printed title "Buyer's Complaints" are the words "see letter dated the 1st March," and against the printed title "Seller's Remarks" some five lines of typed matter are succeeded by a copy of a letter dated the 15th November 1920 from the Defendants to the Plaintiffs. This is succeeded by further type-written matter which is signed by the Defendants. At the conclusion appear the words: "The survey should be held on the goods and not on the shipment samples." For some reason or other which is not clear, a further document had to be, or, at all events, was filed before the Bengal Chamber of Commerce. It purports to be a brief memorandum of agreement made on the 5th April between the parties and recites that disputes have arisen between the parties as per Buyer's Statement of 1st March 1921 submitted with Application Form No. 1 and as per Seller's Statement of 1st March 1921 submitted with Application Form No. 1, and then proceeds to say: "The matters in dispute are referred to the Tribunal of Arbitration of the Bengal Chamber of Commerce to be determined in accordance with the rules for the time being of the said Tribunal as far as such rules be applicable to the submission." This document which bears an eight annas stamp is signed by the parties. In due course the arbitration was held and on the 3rd September 1921 the award was communicated to the parties over the signature of the Registrar of the Bengal Chamber of Commerce Tribunal of Arbitration and is in the following terms:—

"We have considered the papers and as buyers Messrs. Chandmul Mulchand are unwilling to produce the bales required for inspection, their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract.

Buyers to pay cost of this reference, amounting to Rs. 101."

It is now contended that the award should be set aside, firstly, for an error of law apparent on the face of it and secondly on account of the arbitrators having exceeded their jurisdiction in that they made an award without first having held a survey of the goods in question.

The first point, therefore, which I have to consider is whether or not there was an error of law apparent on the face of the award.

The most recent decision on this subject is that of the Judicial Committee of the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Bulloo Spinning & Weaving Co., Ld.* (1). There, in approval of the statement of the law of Mr. Justice Williams in *Hodgkinson* v. *Fernie* (2), which is quoted in the judgment of the Board, "an error in law on the face of the award is taken to mean that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous." The passage quoted from the judgment in *Hodgkinson* v. *Fernie* (2), also shows how very narrow is the compass which, in fact, is limitted to the award itself or matter incorporated in it, within which the error upon which the award may be impeached is to be found.

(1) (1923) A. C. 480; 92 L. J. P. C. 163; 50 I. A. 324; 129 L. T. 166; 39 T. L. R. 253; 73 Ind. Cas. 436. 47 B. 578; 44 M L. J. 706; 25 Bom. L. R. 588; (1923) A. I. R. (P.C.) 66; (1923) M. W. N. 596; 50 C. 130; 33 M. L. T. 419; 28 C. W. N. 397 (P.C.)

(2) (1857) 8, C. B. (N.S.) 189; 27 L. J. C. P.66; 3. Jur. (N. S.) 818; 6 W. R. 181; 140 E. R.712; 111 R. R. 614.

CHANDMUL MULCHAND *v.* S. & C. NORDLINGER

In this case there is no note appended by the arbitrator and I have to look at the award itself alone. It is contended that the words "as the buyers Messrs. Chandumul Mulchand are unwilling to produce the bales required for inspection, their claim cannot be upheld" state reasons for the award which are erroneous in law.

With reference to consideration of the reasons stated by arbitrators in an award as grounds for impeaching it, the passage from the judgment of the Judicial Committee itself indicates that reasons stated by an arbitrator for his award are matters to be considered and in this connection learned Counsel has also drawn my attention to *Landauer* v. *Asser* (3). In that case the umpire in his award said: "I decided that as the parties to the contract, dated 3rd November 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoices plus 5 per cent. etc." This led to the award being set aside, and the concluding passage from the judgment of Mr. Justice Kennedy indicates the ground, for he says: "My view is that as the award wrongly decides that in point of law under the contract Messrs. Asser have a title in the sum in dispute, it is bad on point of law and must be set aside."

I may therefore consider whether or not in this case the arbitrator's reasons for the award are sufficient or good in law. In my judgment they are not. The plaintiffs were the buyers: the Defendants were the sellers. The contract related to 60 bales. There was a dispute as to quality. The mere fact that the buyers were unwilling to produce the bales required for inspection is not by itself a sufficient reason for making an award against them. I do not desire to go further than I should having regard to the strict limitations laid down by the authorities as to what may be considered in a case such as this, but, ordinarily, where there is a dispute between a buyer and a seller with reference to quality, it could be the duty of the seller to prove that the goods were of the quality contracted for. No question such as this might have arisen and it might have been extremely difficult for the Plaintiffs to succeed had no reasons been stated for the award. But in view of the reasons stated for the award, in my opinion, the Plaintiffs are entitled to impeach it and I hold that the award is bad upon the face of it.

The other question that has been argued is as to the arbitrators having exceeded their jurisdiction. This is based upon the contention that it was the duty of the arbitrators before making any award to survey the goods. This contention is met by learned Counsel for the Defendants by the submission that the original agreement of the 2nd January 1918 did not contain the submission under which the arbitration was held, for which the subsequent documents to which I have already referred must alone be looked at. Incidentally I may observe that notwithstanding the cross-examination of the record-keeper of the Bengal Chamber of Commerce I have no doubt that the copy of the agreement of the 2nd January 1918 which has been produced by the Defendants was before the arbitrators. Learned Counsel's cross-examination, in the course of which he put a number of questions suggesting fraud against some individual or individuals whom he did not name, was not pressed to the extent of making a definite charge though I pointed out to him that if he were going to argue anything of the sort it would be his duty to do so. Why a subsequent document in the form of a submission had to be signed or filed before the Chamber of Commerce has not been made clear. One may possibly conjecture that it was required, among other reasons, because the copy of the agreement which had been produced before them was not stamped, though the copy in the hands of the Defendants does bear a stamp. Be that as it may, it is clear that according to the original agreement the parties intended that there should be a survey of the goods and that any award made by the arbitartors should be upon the basis of such survey. The subsequent application was not signed by both parties, and I am relegated to the agreement of 5th April which incorporates the points in dispute by reference to the parties' statements of the 1st March 1921 submitted with the application form bearing that date. In the remarks offered

(3) (1905) 2 K. B. 184 at p. 195; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 10 Com. Cas. 265; 21 T. L. R. 429.

by the Defendants it is stated that the survey shall be held on the goods shipped and not on the shipment samples. The language does not merely suggest that a survey is necessary but takes it as a matter of course that there will be such a survey, the gist of the observation relating to what should be surveyed. I do not think there can be any question but that there was a common agreement between the parties which was never rescinded or varied in that respect, that there should be a survey by the arbitrators of the goods out of which the disputes arose and that that must be taken to have been a term of the submission. That being so, unless the arbitrators held their survey they were not entitled to make an award and the award made by them must be deemed to have been made without jurisdiction.

In the result, the suit must succeed and I declare that the award, dated the 3rd September 1921, is invalid and inoperative. The Plaintiffs are entitled to the costs of the suit on Scale No. 2.

z. K. *Suit Succeeds.*

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 63 OF 1921.

January 24, 1924.

Present :—Mr. Justice Ramesam and Mr. Justice Jackson.

ESUFALI MUHAMMEDBHOY ALLIBHOY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THAHA UMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bill of Lading—Exemption clause—Damage to goods consigned—Suit to recover damages—Perils of the sea, proof of—Onus—Negligence, what constitutes.

In a suit for damages to plaintiffs' goods consigned on defendants' schooner on a Bill of Lading containing the usual exemption clause as to "dangers and accidents of the sea and navigation of whatever nature or kind," it is for the defendant to plead and prove 'perils of the sea.' If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendant's negligence.

Glendarroch, 1894 P. 226; 63 L. J. Adm. 89; 6 R. 686; 70 L. T 344; 7 Asp. M. C. 420; *Wilson* v. *Xantho*, (1887) 12 A. C. 503 at p. 509; 56 L. J. Adm. 116; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207; *Norway* v. *Ashburner*, (1865) 3 Moor. P. C. (N. S.) 245; 16 E. R. 92; Br. & Lush. 404; 11 Jur. (N. S.) 892; 18 L. T. 50; 13 W. R. 1085, relied on.

The plaintiffs consigned a number of cases of safety matches by defendant's schooner. Four days later, there was a strong wind and rough weather though not amounting to a storm or cyclone and the steamer was driven away from the place where she anchored. The wind then changed its direction with the result that the schooner swung round and sat on her anchor causing a hole on her port side. The vessel stranded and there was water in the hold. The cases of safety matches were damaged by the sea water. In a suit for damages by the plaintiff against defendant alleging negligence on the part of the master in anchoring in shallow water :—

Held, **that the facts proved amounted to a peril of the sea and the defendant had not been guilty of negligence;**

The mere fact that the accident might have been avoided by greater foresight does not make it negligence. There is no difference between ordinary and extraordinary perils.

The cause need not be extraordinary in the sense that the cause must be uncommon. Although negligence does not save defendants' liability, if reasonable care is taken, the perils of the sea while not including the effect of mere ordinary wear and tear will include the consequences of any kind of accident ending in damages by seawater.

Fletcher v. *Inglis*, (1819) 2 B. & Ald. 315; 106 E. R. 382; 20 R. R. 448; *Coceran Gurney*, (1853) 1 El. & Bl. 456; 22 L. J. Q. B. 113; 17 Jur. 1152; 118 E. R. 507; *Laurie* v. *Douglas*, (1846) 15 M. & W. 746; 71 R. R. 820; 153 E. R. 1052; *The Thrunscoe*, (1897) P. 301 at p. 304; 66 L. J. Adm. 172; 77 L. T. 407; *Catherine Chalmers*, (1875) 32 L. T. 847; *Bishop* v. *Pentland*, (1827) 7 B. & C. 219; 1 M. & Ry. 49; 6 L. J. (O. C.) K. B. 6; 31 R. R. 177; 108 E. R. 705; *Merchants Trading Co.* v. *Universal Marine Co.*, (unreported) cited in *Dudgeam* v. *Pambroke*, (1874) 9 Q. B. 581 at p. 596; 2 Asp. M. C. 431; 43 L. J. Q. B. 220; 31 L. T. 31; 22 W. R. 914, followed.

Daviss v. *Garreth*, (1830) 6 Beng. 716; 4 M. & P. 540; 8 L. J. (O. S.) C. P. 253; 31 R. R 524; 130; E. R. 1456; *Marrison & Co.* v. *Shaw & Savill and Albion Co.*, (1916) 2 K. B. 783; 115 L. T. 508; 61 S. J. 9; 32 T. L. R. 711; *Traverse & son Limited* v. *Cooper*, 1915; 1 K. B. 73; 80 L. J. K. B. 1787; 11 L. T. 1088; 20 Com Cas. 44; 30 T. L. R. 703; *Price & Co.* v. *Union Lighterage Co.*, (1903) 1 K. B. 750; 72 L. J. K. B.

374 ; 51 W. R. 477 ; 88 L T. 428 ; 19 T. L. R. 323 ; 8 Com. Cas. 155 ; 9 Asp. M. C. 398 ; on appeal (1904) 1 K. B. 412 ; 73 L. J. K. B. 222 ; 89 L. T. 731 ; 52 W. R. 325; 9 Com. Cas. 120 ; 20 T. L. R. 177 ; *Palemis* v. *Furness Withy & Co.*. (1921) 3 K. B. 560 ; 90 L. J. K. B. 1353 ; 27 Com. Cas. 25 ; 37 T. L. R. 940 ; *Steirman* v. *Augar Line*, (1891) 1 Q. B. 619 ; 60 L. J. Q. B. 425; 64 L. T. 613 ; 39 W. R. 392 ; 7 Asp. M. C. 46 ; The City of Peking, (1889) 14 A C 40 ; 58 L. J. P. C. 64 ; 61 L. T. 136 ; 6 Asp. M. C 396 ; The President Lincoln, (1911) P. 248 ; 105 L. T. 442 ; *Lewnards Carrying Co., Ltd.* v. *Asiatic Petroleum Co. Ltd.* (1915) A. C. 705 ; 84 L. J. K. B. 1281 ; 20 Com. Cas. 283 ; 113 L. T. 195 ; 59 S. J. 411 ; 31 T. L. R. 295, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in O. S. No. 6 of 1918.

Messrs. *T. R. Venkatarama Sastri* and *K. S. Sankara Iyer*, for the Appellants.

Messrs. *S. Srinivasa Iyengar*, *K. V. Sesha Iyengar* and *K. R. Rangaswamy Aiyengar*, for the Respondents.

JUDGMENT.—This is a suit for damages to plaintiffs' goods consigned on defendants' schooner Sahul Hameed. The schooner left Colombo on the 25th August 1917 and arrived at Tuticorin on 28th August with 250 cases of safety matches entrusted by plaintiff to the master. The goods were landed on the 30th in a damaged condition. On a certificate of Survey (Ex. C.) by the Secretary of the Local Chamber of Commerce, the goods were sold by auction on 30th October 1917 (Ex. G.) and realized Rs. 3,142 (Ex. D). The market value is alleged to be Rs. 31,750. The suit is for the difference.

Ex. II is the bill of lading issued by the defendants' agent. It contains the usual exemption clause—

> "The act of God, King's enemies, Fire and all and every other dangers, accidents of the seas, rivers and navigation of whatever nature or kind soever excepted."

Though there has beenconsiderable argument on the question of burden of proof and several cases have been cited before us, the matter seems to be clearly settled in the present state of authorities. It is for the defendant to plead and prove 'perils of the sea'. If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendant's negligence. See the jugment of Court of Appeal in *The Glendarroch* (1). Esher M. R. at p. 232 explains certain expressions of Lord Harschell in *Wilson* v. *Xantho* (2) ; See also *Norway* v. *Ashburner* (3); Scrutton on Charter Parties (10th Edition) Article 79 Note 1 and Article 83 note at page 293, Carver on Carriage by Sea (Section 87).

We have, therefore, to see what the facts alleged and proved are. The defendants claim that the damage to the goods was on account of a peril of sea *i.e.*, that there was a strong wind on the night of the 29th and the ship was driven away from the place where she anchored at first towards the south. The wind then changed its direction with the result that the schooner swung round and sat on her anchor causing a hole on her port side. The vessel stranded and at 6 A. M. there was 5 feet of water in the hold. The cases of safety matches were damaged by the sea water. The plaintiff denies any change in the position of the ship and alleges negligence on the part of the Master in anchoring in shallow water.

Before discussing the evidence on these allegations, I may observe that the Subordinate Judge found on the 2nd issue that the liability of the defendant as carriers continued till the 30th and on the 9th issue, he found against their allegation that the Master was ready and anxious to deliver the goods on the 29th. It is on this footing that the appeal has been argued before us.

I will now discuss the evidence as to what happened on the 28th and 29th.

(Firstly), the weather on the 29th—P. W. 1 says that no signal of high and violent wind was given on that day. But this evidence is useless as it is proved by D. W. 1, the Port Officer, that no observation was taken during

(1) (1894) P. 226 ; 63 L. J. Adm. 89 ; 6 R. 686 ; 70 L. T. 344 ; 7 Asp. M. C. 420.

(2) (1887) 12 App. Cas. 503 at p. 508 ; 56 L. J. Adm. 116 ; 57 L. T. 701 ; 36 W. R. 353; 6 Asp. M. C. 207.

(3) (1865) 3 Moor. P. C. (N S.) 245 ; 16 E. R. 92; Br. & Lush. 404 ; 11 Jur. (N. S.) 892; 13 L. T. 50; 13 W. R. 1085.

night. The extract from the log book Ex. K also shows that no entries were made for the night. D. W. 1 says that he recollects that the weather on the 29th was unsettled. We see no reason to reject this evidence. D. W. 3 the owner of another schooner M. S. Hydross which was alsc anchored in the barbour that night (See Ex. IX. This is also admitted by P.W. 2) says that there was high wind. D. W. 4 who was tandal of that Schooner says there were violent winds from 2 A. M. up to 3 or 3-30 A.M. But D. W. 5 says that there was not strong wind but only average wind. On the whole it seems to me that, there was some rough weather in the night though it is possible D.W. 4 was exaggerating. It might not have amounted to a storm or a cyclone.

The next question is—where did the schooner first anchor and did it move to another place further south on account of the wind. The coast here runs from north to south. A little to the south of the port and harbour there is an island called Hare Island on which there is a lighthouse. During night, lights were prohibited as the war was then going on. On account of the island the contours of equal depth near it recede towards the east and further from the coast.

If a ship anchoring due east of the port at a proper depth drifts towards the south, parallel to the coast, the water would be getting shallower on account of the nearness of the island.

On the 30th the ship was found in 7 feet of water (ebb). This is conceded by all the witnesses (*Vide* also Ex. E). According to P. W. 2, she was then 2 or 3 miles away from the pier and the other schooner was about half a mile to the north in 10 or 12 feet of water. He was not asked as to where the ship anchored on the 28th—a curious omission—nor was P. W. 3 questioned on this matter. P. W. 1 says that she was standing on the 28th at a point one mile from the beach. The distance given by P. W. 1 for the 28th and that by P. W. 2 for the 30th suggest that the ship changed its situation. The evidence for plaintiffs throws no further light either way. D. W. 3 says that the suit schooner was east of his own schooner (which it may be remarked was in 10 feet or 12 feet of water according to P. W. 2) by half a mile. To the same effect is D. W. 4 but his evidence is not intelligible being too briefly recorded. D. W. 3 says that she had moved on the morning of the 30th ¼ furlong off, D. W. 5 says that the ship had moved about 4 or 5 furlongs towards the shore on the southern side. D. W. 6 says that it had moved half a mile from its original place which must have been at 9 feet (ebb). He also says that it was 2 or 2½ miles away from the shore on the 28th and that he noticed its changed situation with reference to a buoy ¼ mile off. He appears to be disinterested and his evidence seems to me the most reliable. Taking all this evidence I am inclined to think that the other schooner was 1½ miles east of the port probably in 10 feet high water or 8 feet (ebb); the suit schooner was half a mile from the east *i.e.*, 2 miles from the shore and that she must have been in 9 feet (ebb). It may be that D. W. 2 slightly exaggerated when he said he anchored in 12 feet (high water) in Ex. III. The place where the schooners were anchored was the usual place for them. Here it must be remembered that the difference in the tonnage between the two schooners is only 14 tons (Ex. IX) and half a mile towards the east is a proper distance between the two. The draught of the suit schooner aft is 7 feet (Ex. IX) and it is unlikely that on the 28th it anchored in 7 feet of water (ebb). It must have moved towards the south parallel to the coast thus getting into shallow water. A slight gale causing such change or even a wreck in the native craft is not uncommon (See also D. W. 5). The only difficulty in the case is caused by the reports of D. W. 1 —Ex. X and Ex. N. where he expresses his opinion that, from the beginning, she must have been in 7 feet of water. I have already observed that this is unlikely. His first report Ex. N. (dated 4th September 1917) shows that the holding ground where the ship was said to have been first anchored was not good. He then says that the evidence is not conclusive so far as the vessel's dragging of the anchor is concerned. Probably he had not at all the evidence we have now before us and his conclusion is, therefore, not decisive. He repeated it in the second report (Ex. X dated 8th

September 1917). The learned Vakil for the appellant drew our attention to Ex. V, a protest made by the Master on the 30th August. This is in English, a language not known to the Master. That he relied on a change of situation, on the 4th September appears from Ex. N and he mentioned it expressly in his later protest Ex. III dated 7th September 1917. It may be that the Scribe of Ex. V omitted part of what was mentioned to him. Anyhow it must have been prepared in a hurry and the omission of the change in the position of the vessel in that document is not conclusive (in the face of the other evidence) to show that the explanation of the Master was an after-thought of the 4th September. I have not relied on the evidence of D. W. 2 as it may be said to be interested. I, therefore, find that the ship dragged its anchor and moved towards the south from its original position (8 feet ebb and 10 feet flow) to the later position (7 feet ebb). If it was fully loaded, 8 feet (ebb) of water could not be enough, but, with its actual load, it was sufficient (See D. W. 5).

The next question is whether the facts so proved amount to a peril of the sea. If the vessel had anchored from the beginning in 7 feet of water, one may say it was sheer carelessness but on the facts proved it cannot be described negligence. It may be that if the vessel had anchored in deeper water, further off towards the east, it would not have stranded even if it drifted towards the south on account of the wind. The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (section 512) has not been accepted by the authorities (Carver section 87). The cause need not be extraordinary in the sense that the cause must be uncommon. It is true that negligence does not save the defendants' liability (Willis, J. in *Grill* v. *General Iron Screw Collier Co.* (4). But if reasonable care is taken, the perils of the sea while not including the effects of mere ordinary wear and tear, will include the consequences of any kind of accident ending in damage by sea water (Abbot on Merchant Shipping, p. 612 citing *Fletcher* v. *Inglis* (5) Scrutton article 83, *Coyecoran* v. *Gurney* (6), *Laurie* v. *Douglas* (7). *The Thrunscoe* (8). The *Catharine Chalmers* (9) *Bishop* v. *Pentland* (10) where a rope broke, *Dudgeon* v. *Pembrkeo* (11).

In *Amies* v. *Stevens* (12). A sudden gust of wind was held to make all the difference. On the question of what is a proximate cause, the latest decision in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (13) especially the judgment of Lord Shaw of Dunferline may be referred.

The appellants pointed out that while the other schooner had 3 or 4 anchors (P. W. 3), it does not appear that the suit schooner had more than one. I do not think this matters. She had 15 fathoms of cable (Ex. N). The crew had put out more chain to prevent the dragging but without success (Ex. X). Some of the cases relied on by the learned Vakil for the appellants (*Davis* v. *Garrett* (14), and *Morrison & Co..*, v. *Shaw Savill* and *Albion Co.* (15), are cases of deviation. In *Travers & Sons. Ltd.* v. *Cooper* (16), clear negligence in leaving the barge unattended at night was proved and then it was for the defendant to show that the loss was not caused by the negligence. Negligence was

(4) (1866) 1 C. P. 600 at p. 612; 35 L. J C. P. 321; 12 Jur. (N. S.) 727; 14 W. R 898.

(5) (1819) 2 B. & Ald. 315; 106 E. R. 382; 20 R. R. 448.

(6) (1853) 1 El. & Bl. 456; 22 L. J. Q. B. 113; 17 Jur. 1152; 118 E. R. 507.

(7) (1846) 15 M. & W. 746; 71 R. R. 820 ; 153 E. R. 1052.

(8) (1897) P. 301 at p. 804 ; 6 C. L. J. Adm. 172 ; 77 L. T. 407.

(9) (1875) 32 L. T. 847.

(10) (1827) 7 B. & C. 219 ; 1 M. & Rys. 49; 6 L. J. (O.S.) K. B. 6 ; 31 R. R. 177 ; 108 E. R. 705.

(11) (1874) 9 Q. B. 581 at p. 596 ; 2 Asp. M. C. 431; 43 L. J. Q. B. 220 ; 31 L. T. 31 ; 22 W. R. 914

(12) 1 Str. 127 ; 93 E. R. 428.

(13) (1918) A.C. 350 ; 87 L. J. K. B. 395 ; 118 L. T. 120 ; 23 Com. Cas. 190 ; 14 Asp. M. C. 258 ; 62 S. J. 307 ; 34 T. L. R. 221.

(14) (1830) 6 Bing. 716 ; 4 M. & P. 540 ; 8 L. J. (O. S.) C. P. 253 ; 31 R. R. 524 ; 130 E. R. 1456.

(15) (1916) 2 K. B. 783; 115 L T. 508 ; 61 S J. 9 ; 32 T. L. R. 712.

(16) (1915) 1 K. B. 73 ; 83 L. J. K. B. 1787 ; 111 L. T. 1088 ; 20 Com. Cas. 44 ; 30 T. L. R. 703.

also proved in *Price & Co.*, v. *Union Lighterage Co.* (17) (on appeal) and in *In re Polemis and Furness Withy & Co.* (18) *Steiuman* v. *Angier Line* (19), was a case of theft by the men in the ship's service. The cases of *The City of Peking* (20) and the *President Lincoln* (21) are cases of collusion and negligence where negligence was held to be initial cause. In *Lewnards Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (22) the vessel was unseaworthy and the owners did not discharge the onus that lay on them.

We think the defendants have not been guilty of negligence and have proved a peril of the sea. In view of this finding we have not heard arguments on the question of damages.

The appeal must be dismissed with costs.

(The judgment of the Court was delivered by Ramesam, J.)

V. N. V.
K. S. D. *Appeal dismissed.*

(17) (1903) 1 K. B. 750; 72 L. J. K. B. 374 ; 51 W. R. 477; 88 L. T. 428 ; 19 T. L. R. 328 ; 8 Com. Cas. 155 ; 9 Asp. M. C. 398 on appeal (1904) 1 K. B. 412 ; 73 L. J. K. B. 222 ; 89 L. T. 731 ; 52 W. R. 325 ; 9 Com. Cas. 120 ; 20 T. L. R. 177.

(18) (1921) 3 K. B. 560 ; 90 L. J. K. B. 1353 ; 27 Com. Cas. 25 ; 37 T. L. R. 940.

(19) (1891) 1 Q. B. 619 ; 60 L. J. Q. B. 425 ; 64 L. T. 613 ; 39 W. R. 392; Asp. M. C. 46.

(20) (1889) 14 A. C. 40 ; 58 L. J. P. C. 64 ; 61 L. T. 136 ; 6 Asp. M. C. 396

(21) (1911) P. 248 ; 105 L. T. 442.

(22) (1915) A. C. 705 ; 84 L. J. K. B. 1281 ; 20 Com. Cas. 288 ; 113 L. T. 195 ; 59 S. J. 411 ; 31 T. L. R. 295.

PRIVY COUNCIL.

APPEAL FROM LAHORE HIGH COURT.

February 21, 1924.

Present :—Lords Shaw, Blanesburgh and Sir John Edge.

NABI BAKSH AND OTHERS—APPELLANTS

versus

AHMAD KHAN AND OTHERS—RESPONDENTS.

Custom (Punjab)—Partition of estate—Collateral succession—Pagwand and Chundawand—Presumption.

Where a person governed by customary law, having different wives, makes a division of the property among the members of his complex family, with the result of creating a number of single families, then the portion of property succeeded to by the children of each wife becomes a separate entity and the rules of succession to it are the rules of succession to the owner of it and not to the ancestral owner to whom prior to distribution the whole property belonged. When the smaller entity thus formed is succeeded to, the *pagwand* system may still apply but it applies within the smaller family only and not within the range of the original entire family. In short, when a separate entity, created by division or partition, comes into being the full range of the succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family, and it may quite well be assumed that within that simple family, the generally prevailing system of *pagwand* was not abandoned.

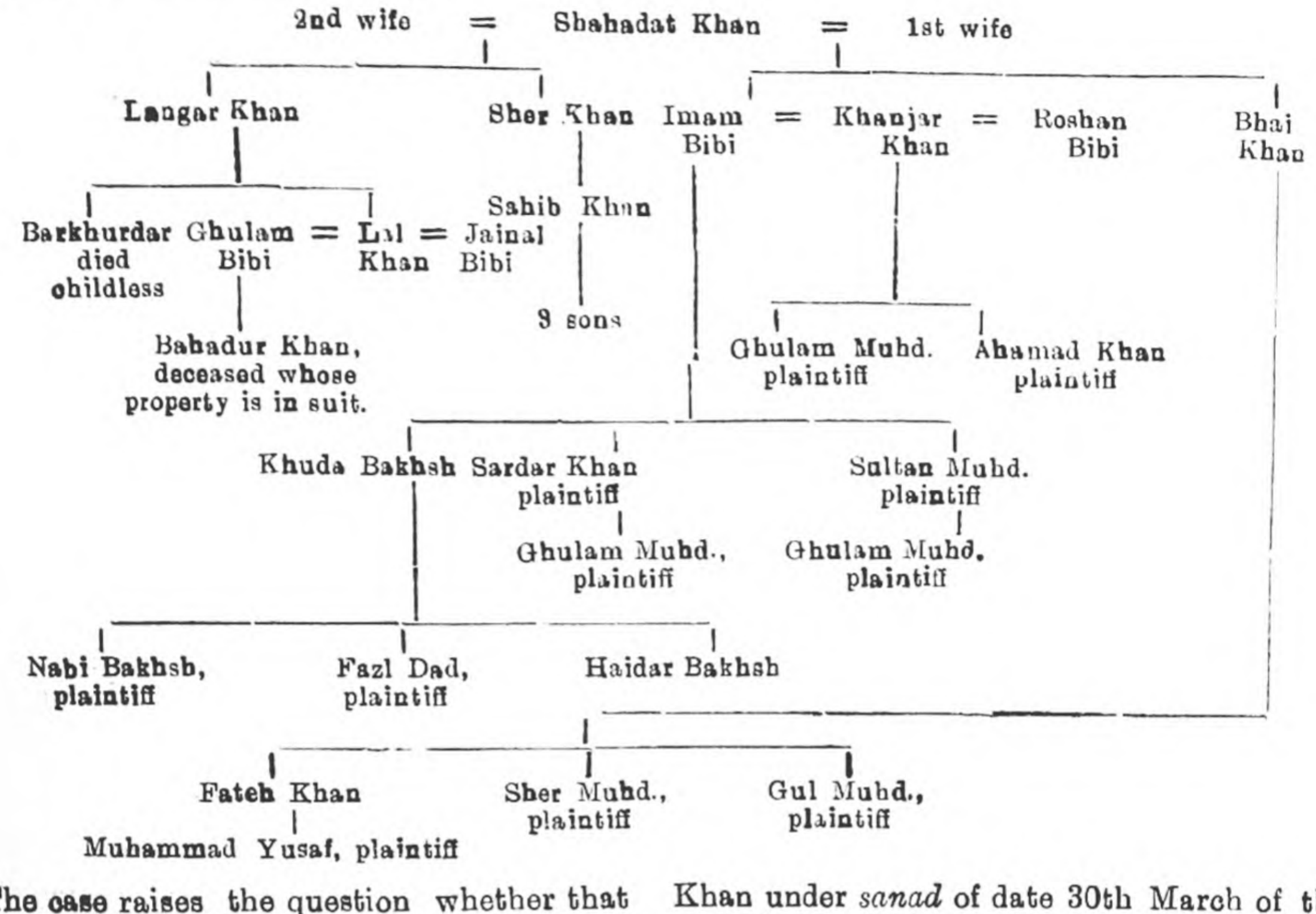
Ghulam Muhammad v. *Muhammad Baksh*, 4 P. R. 1891 (F. B.), approved.

Messrs. *R. Montgomery* and *A. Majid*, for the Appellants.

JUDGMENT.—This is an appeal from a decree of the High Court of the Punjab at Lahore, dated 24th January, 1920, reported as 55 Ind. Cas. 171, reversing a decree of the Court of the Senior Subordinate Judge of Shahpur at Sargodha, dated 10th July 1915.

The point for determination in the case relates to the succession to the property of a certain Bahadur Khan who died on the 26th April, 1907. The pedigree table is as follows :—

NABI BAKSH *v.* AHMAD KHAN



The case raises the question whether that property (of Bahadur Khan) devolves on Sahib Khan, son of Sher Khan, or whether it devolves also upon the descendants of Khanjar Khan and Bhai Khan. Reduced to a still simpler form, which, if necessary, can be particularised in the genealogical table, the question in the appeal is,—in the succession of Bahadur Khan, does the full-blood exclude the half-blood? If it does, then the appeal fails and Sahib Khan succeeds, he and Bahadur being descendants of Shahadat Khan by his second wife. If it does not, then the appellants, being descendants of Shahadat by his first wife, come in by right of the half-blood to share in the succession to Bahadur.

It is important to state the matter in this way, apart from committing oneself at the outset, on the subject of whether the case is governed by the pagwand rule or by the chundawand rule. This, for a reason to be afterwards specified.

Shahadat Khan, by his first wife, had two sons, namely, Khanjar and Bhai. He had also two sons by his second wife, namely, Langar and Sher. He died in the year 1860. In the year 1855, however, he purported to divide the property of Kot Bhai Khan under *sanad* of date 30th March of that year, from which *sanad* it clearly appears that the two sons of the first wife obtained certain specified lands and that the two sons of the second wife obtained certain other enumerated lands.

After a year or two, however, differences arose in regard to the payment of certain debts by the descendants of the first wife. On the 27th January, 1858, a petition was filed by Shahadat declaring that these two sons, namely, Bhai and Khanjar, had disgraced him and put him to trouble and he accordingly demanded that a parwana be issued to the Thasildar directing him to put the father back into possession and to dispossess these objectionable sons.

An arrangement was speedily come to. In the Court of Pandit Moti Lal, Extra Assistant Collector and Commissioner, there was on the 16th February, 1858, presented an application for partition of the property. Thereafter, on the 10th April, 1858, there was executed by Shahadat Khan a deed of partition, the construction of which has been, the subject of much discussion. Upon that, and generally upon the whole case, the Board had the advantage of a very able argument by Mr. Montgomery.

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It appears to the Board to be clear that the property "previously divided" as the deed narrates (that is to say, in 1855), is again divided. It may be difficult to identify the names, but there appears to be no doubt that Kot Bhai Khan was again divided by giving to the two sons of the first wife jointly certain named lands or properties on the one hand, and on the other hand by giving certain other named lands or properties for joint possession and ownership by the sons of the second wife.

The phrase, however, occurs *viz.*,

"All my four sons shall be the owners in equal shares of the lands situated in the Ba." * * * * * * "The property situated at Kot Bhai Khan remains joint among my sons."

This deed, namely of 1858, is executed as a deed of partition "so that it may serve as an authority in future. After my death my four sons shall act upon this deed of partition."

This deed had appended to it an endorsement of a threefold character. This question is put:—"whether or not you have any objection to the deed of partition filed by you." That question is put separately and in the first place to the father Shahadat Khan. In the second place it is put to Khanjar and Bhai, the sons of the first wife jointly; and in the third place it is put to Langar and Sher, the sons of the second wife jointly. No objection is tendered, but on the contrary an acceptance is given, first for the sons of the first wife, and second for the sons of the second wife.

From that time, and for the long period of about 60 years there seems to their Lordships to be little, if no doubt, that as between these two families (or even as between the four sons, a question, however, which it is unnecessary for the purpose of this case to decide), there was a complete separation of the possession and ownership of the properties thus partitioned.

Their Lordships at this stage think it right to observe on the careful and satisfactory nature of the judgments of the Courts below, and they have adopted the narrative as to possession so clearly given in the judgment of the High Court.

The differences of opinion, however, in the Courts below arise in this way. In the Court of first instance, the learned Judge holds it to be proved that in the "village, partition of property takes place according to the pagwand system," and he concludes that, that being so, he is bound to the conclusion that the property in suit, which *de facto* is part of the property partitioned in 1852 which originally belonged to Shahadat Khan must fall under the rule that the full-blood and the half-blood, as within the family of that propositus, share and share alike, and that accordingly the succession to Bahadur must be regulated upon that footing. The learned Judge is so far confirmed in this that it is established, and it is indeed admitted by the High Court, that the pagwand system did obtain there. But the learned Judge makes no allowance for the true effect of the partition of property which had been made 60 years ago and upon which separate possession had followed. In the opinion of the Board it was necessary to take this carefully into account; and the judgment is erroneous in not having given full and correct effect to that transaction.

The learned Judges of the High Court did not fall into this error. In the opinion of their Lordships they were right in holding that the separate ownership and possession for about 60 years was as stated. But, in so doing, they appeared to be under the impression that the succession to Bahadur's share must not be governed by the pagwand rule, which includes the half-blood, but must be governed by the chundawand rule, which excludes it. They, therefore, preferred the respondents—holding, with accuracy, that "in the distribution of 1858 it was intended that thenceforward each group of sons should hold its own portion in the estate independently of the other." But they introduced into their judgment the following sentences:—

"Chundawand" and 'pagwand' are, however, rules rather of distribution among heirs entitled than rules of succession, and it was pointed out in *Ghulam Muhammad* v. *Muhammad Bakhsh* (1), that the above presumption could only be made when the existence of an ancestor with issue by at least two wives, and a pagwand or chundawand distribution of his estate, whether before or after his death, had been proved."

(1) 4 P. R. 1891 F. B.

If this means that the succession to Bahadur in this case must be regulated by the abandonment of the pagwand rule and as a necessary consequence the adoption of the chundawand rule their Lordships cannot agree. They are not quite sure, from consideration of the judgment, whether the learned Judges affirmatively take up that position. In the result, however, they reach the conclusion with which their Lordships entirely agree, to the effect that in the distribution of the succession to Bahadur the full-blood excludes that half-blood which is claiming in this case.

The truth is that, as the learned Judges of the High Court clearly point out, the question being dealt is (1) a collateral succession and (2) a collateral succession to property given to a child of a first wife and partitioned off and separated from property given over to the children of the second wife.

The theory of abandoning the pagwand rule for the chundawand rule need not necessarily be put forward. For when the distribution or segregation which occurred and has been so long acted on arose, each portion of property thus succeeded to by the children of the first wife became a separate entity ; and the rules of succession to it are rules of succession to the owner of it and not to the anterior or ancestral owner to whom, prior to distribution, a much larger entity, inclusive of that portion, belonged. It is, therefore, possible and it is necessary to decide this case on the simple ground that when the smaller entity thus formed is succeeded to the pagwand system may still apply, but it applies within the simple family consisting of Shahadat's second wife's children and not within the range of the complex family consisting of the children of his two wives. In short, when a separate entity, created by division or partition, comes into being the full range of the succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family, and it may quite well be assumed that within that simple family, the generally prevailing system of pagwand was not abandoned.

But the partition was a definite, an accomplished and a long recognised, fact and annot be ignored. And accordingly the mbit of that system is confined to searching for the full-blood and half-blood within the divided and separated area. In that search it is not permissible to undo the distribution and search for the collaterals as if under the succession to the owner of the undivided property.

In affirming accordingly the Judgment of the High Court their Lordships are glad to be able to find that in their judgment the law of the Punjab, in this particular, stands as has now been stated upon what in their opinion is the very highest authority, namely, that of the Full Bench of the Punjab and specially of the very valuable exposition of the law in the case already cited by Plowden, J.

They mention the following passages :—

"That the portion allotted to a group should belong as an entirety to the members, who, for the time being, form or represent the group until the group is extinct, is no departure from the ordinary rule as to the devolution of shares. As to the redistribution of the portion, and devolution of the shares into which the portion is redistributed among the members of a group, that is a matter which concerns them alone, until the group is extinct exactly as in the case of the share of an individual and his descendants *qua* other sharers and their descendants. On this view, there is not really, at any time, a competition between half-blood and whole-blood, for the sons have been separated once for all at the original distribution, into several groups, such that all the members of each are related *inter se* by the whole-blood, and so far each group resembles a single family."

In a further passage the same learned Judge further states the question :—

" It is quite intelligible that when, by reason of matters subsequent to a pagwand distribution, the sons of several wives have arrived at condition not distinguishable from the result of a chundawand distribution among groups of sons, the same customary rule should apply in cases of collateral succession, as applies when there has been a chundawand distribution. But the basis of the preference of the whole-blood, when it exists in such a case, clearly is the association of the uterine brothers into distinct groups, the pagwand distribution notwithstanding."

There are other passages in this remarkable judgment which show how clearly the combined issues of a succession which is (1) collateral and (2) to a property after distribution by a common ancestor have been considered. When that ancestor makes a division or partition among the members of his complex family with the result of the creation of a number of single families, then among these simple familes, the question in instances like the present has solved itself, for there is within that limited ambit no half-blood to compete.

Their Lordships do not conclude this opinion without observing upon the expense in curred. It was agreed that the entire points in the appeal were substantially covered by a reference to a few documents; and accordingly these could have been presented to the High Court in a succinct and businesslike paper-book of a few pages. In the present appeal, however, there was printed in India an elaborate book of 1163 pages containing, it may be observed, very many inaccuracies. Their Lordships think it right to say that, in their judgment, this mass of printing is an abuse. When the Registrar looked at the case sometime before the hearing, he was of opinion that a large part of the record could not under any circumstances be necessary to put before their Lordships. He, therefore, communicated with the appellants' solicitors, and the atter, after consultation with their counsel, eliminated more than 540 pages. These were actually taken out of the bound books and were never before the Board. Had the judgment been favourable to the appellants the entire costs of that printed matter would have been disallowed.

Their Lordships will humbly advise His Majesty that the appeal shall be disallowed.

N. H. *Appeal disallowed.*

Solicitors for the Appellants—Messrs. *Francis and Harkar.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 575 OF 1922.

December 6, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

RUDRAPPA SANVIRAPPA MENSINKAI —APPELLANT

versus

CHANBASAPPA MALLAPPA BHUSAD —RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879) s. 15 B—Decree ex parte against agriculturist—Execution of decree-Instalments whether can be allowed.

Where a decree is passed *ex parte* it is open to the judgment-debtor, in execution proceedings, to show that he was an agriculturist at the date of the decree and to ask for instalments under section 15 B of the Dekkhan Agriculturists' Relief Act.

Devu Jetiram Gujar v. *Ravappa Sattappa*, 67 Ind. Cas. 840; 24 Bom. L. R. 370; (1922) A. I. R. (B.) 220; 46 B. 964, distinguished.

Appeal from the decision of the District Judge, Dharwar, in Appeal No. 94 of 1922, confirming the order of the First Class Subordinate Judge at Dharwar in Darkhast No. 567 of 1921.

Mr. *H. B. Gumaste*, for the Appellant.

JUDGMENT.—In this case a decree was passed *ex parte* against the defendants for Rs. 3,000 and costs on October 22, 1921, by the Joint Subordinate Judge of Dharwar. The defendants were described in the plaint as being occupied in business. When the plaintiff applied for execution, the first defendant asked to be allowed instalments on the ground that he was an agriculturist at the date of the decree. The Subordinate Judge said: "The defendant is not an agriculturist in the decree. I cannot grant him instalments." The learned District Judge upheld the order on the ground that the decision of this Court in *Devu Jetiram Gujar* v. *Revappa Sattappa* (1) was applicable. All that that case

(1) 67 Ind. Cas. 840; 24 Bom. L. R. 370; (1922) A. I. R. (B.) 220; 46 B. 964.

decided was that the Court cannot under the provisions of section 15B of the Dekkhan Agriculturists' Relief Act grant instalments under a decree to a person who at the time the decree was passed was not, but has since become, an agriculturist. What the defendant sought to prove was that he was an agriculturist at the time of the decree, and unless it can be said that that question has already been decided against him, and is now *res judicata*, there is no reason why he should not be allowed to prove it in execution. Otherwise whenever an *ex parte* decree is passed and the defendant is not described as an agriculturist, he would be debarred from proving that fact thereafter, because he was not described as an agriculturist in the plaint and in the decree. In these proceedings we see nothing from which it can be held that the matter is *res judicata*. Therefore, the appeal will be allowed, the decree of the lower Appellate Court set aside, and the *Darkhast* sent back to the First Class Subordinate Judge to try the question whether the 1st defendant was an agriculturist at the time the decree was passed. No order as to costs.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.
FULL BENCH.

APPEALS AGAINST ORDERS NOS. 85 AND 86 OF 1921.

October 24, 1923.

Present: —Sir Walter Salis Schwabe, K. C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

THIRUMALAI GANDAMA NAGAYA RAMAKRISHNA KADIRVELUSWAMY NAICKER (MINOR) BY HIS MOTHER AND GUARDIAN VELYTHIAMMAL—DEFENDANT—APPELLANT

versus

THE EASTERN DEVELOPMENT CORPORATION LTD., LONDON —DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 52—Income from impartible Zemindari, whether liable for debts of deceased Zemindar—Attachment—Mode of execution—Full Bench, reference to—Referring judges agreed—Reference, whether competent.

Under section 52 of the Civil Procedure Code, the income of landed property which has passed from one *Zemindar* to the next, the property being an impartible *raj*, is liable in execution for the debts of the deceased *Zemindar*.

Palaguppa Chetty v. *Arbuthnat*, 14 B. L. R. 115; 3 Sar. P. C. J. 318; 21 W. R. 38; 1 I. A. 268, followed.

Income which has accrued since the death of the late *Zemindar* and has come into the hands of the new *Zemindar*, can be attached in execution for the debts of the late *Zemindar* and dealt with according to the provisions of the Code.

Where the Judges of a Division Bench are agreed as to a point there is no necessity to refer it to a Full Bench, merely in order to have an important point clearly defined.

Appeals against the order of the District Court, Madura in E. A. Nos. 274 of 1017 and 619 of 1917 in E. P. No. 5 of 1918 and E. P. No. 4 of 1915 respectively in O. S. No. 65 of 1897 on the file of the Court of the Subordi-Judge, Tinnevelly.

Mr. *K. V. Sesha Ayyangar*, for the Appellant.

Messrs. *A. Krishnaswamy Ayyar* and *C. A. Seshagiri Sastri*, for the Respondent.

ORDER OF REFERENCE TO THE FULL BENCH.

Oldfield, J.—The essential facts in these appeals lie in a small compass. The decree in Original Suit No. 65 of 1897 on the file of the Subordinate Court, Tinnevelly, was for the recovery of the amount due on a usufructuary mortgage by sale of the impartible *zemindari* of Gantamanayakkanur. The *Zemindar* against whom the decree was passed, died and

was succeeded by his son 6th Defendant, the present Appellant, in 1908, before any of the proceedings to be referred to. They began with an abortive attempt to recover by sale and the appointment of a Receiver to collect the profits and credit them against the decree. The Respondent Company then became solely entitled to execute it and at a sale, confirmed on 8th September 1914, purchased the *zemindari* taking delivery in January 1915, and the Receiver was then discharged. On 25th March 1915, a personal decree for the balance still due was passed by the lower Court against 6th defendant. That decree was set aside, as passed without jurisdiction. But previously on 24th April 1915 another Receiver had been appointed to collect certain rents and profits outstanding for the years 1910—1913, after appellant became *Zemindar*, but before the sale, and it is the right to the amount collected by him, which is now in dispute. After the personal decree was set aside by this Court, another personal decree was obtained in the Subordinate Court, Tinnevelly, and was transferred to the lower Court for execution by recovery of the balance due from this fund. Appellant in E.A. No. 619 of 1917 asks for restitution of a portion of it, which was paid out to Respondent, under the first personal decree, since set aside, and in E.A. No. 274 of 1919, he claims the balance still with the Receiver against the Respondent's attachment. The lower Court in the orders under appeal dismissed these applications.

In the lower Court the claim was also to certain properties said to have been bought in by the Receiver at Court sales in the course of his recovery of the rents. But here it is not disputed that these purchases were made by him, not as Receiver, but in the capacity, which he also held, of Manager of the *zemindari* under the respondent Company; and, therefore, nothing more need besaid of that part of the claim. The claim to the fund is the sole matter now in dispute; and it has been argued, it is material, only with reference to the question whether the fund should be regarded as liable in the hands of respondent for the deceased *Zemindar's* judgment-debt and the personal decree obtained against respondent as his legal representative, no objection having been made to the assumption that the realizations by the Receiver were made on 6th defendant's behalf, as though he had received them directly.

The provisions of law in question are sections 52 and 53 of the Civil Procedure Code, the former being relevant in case appellant claims the *zemindari* and, therefore, the fund, which accrued from it, by survivorship and it is to be deemed to be property liable in his hands under Hindu Law for the payment of the debt of his deceased father; the latter in case he claims it by heirship. The point is that, if respondent can proceed in execution against the fund at all, a question to which I return, different objections to his doing so are relied on according to the nature of appellant's right to the estate. For it is urged that, if he took the estate by survivorship, the fund, its income, nevertheless reached his hands as his absolute property and was not subsequently merged by him in it by any course of dealing; and it, therefore, is not liable as part of his share of joint property for his father's debt. If, on the other hand, the estate was his inheritance and was liable for the last owner's debt in his hands, the question raised is whether its subsequent income would not also be so, as an accretion to it. Before dealing with these questions I observe that no issue was joined and no evidence was given in the lower Court as to the nature of his succession; and no suggestion was made and no finding was recorded as to any conduct by him indicative of an intention to merge these profits, which in the first instance were certainly separate property, in the *zemindari* and, if the *zemindari* was family property, to impress them with that character. On the latter point the only possible conclusion is no doubt in the negative. For he never obtained the profits, which were with the Receiver from their realization, and had no opportunity of treating them as possessing one character rather than the other. The former also is not material. For, if the *zemindari* is ancestral or family property, I still hold that the fact is relevant only for the purpose of determining the person entitled to succeed to it, not the nature of his rights in it on succession, which will in any case be a right to it as separate property with the full power of enjoyment and alienation, which has been recognized fully by authority. It will serve no useful purpose to state my reasons for this

conclusion at any length, since I can add nothing to the enumeration of authorities at the date of decision of the Privy Council in *Bijinath Prasad Singh* v. *Tej Bali Singh* (1) in Mayne's Hindu Law and Usage, 9th Edition 796, except that this decision seems to me in no degree to entail the conclusion reached in *Shiva Prasad Singh* v. *Banimahab Chowdhury* (2), or to displace that reached by this High Court in *Rajah of Kalahasti* v. *Achigadu* (3), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanams* (4), *Maharaja of Bobbili* v. *Zamindar of Chundi* (5), and *Avalappa Naicker* v. *Murugappa Chettiar* (6).

On the basis, however, that the zamindari is separate property inherited by appellant and that, therefore, only section 52 need be considered, two questions of some difficulty and importance have been raised, which should, we think, be laid before a Full Bench. The first is whether in such a case not only the inherited property is liable for the debts of its deceased owner but also the profits, such as the fund at present in dispute, which have accrued from it after his death; and the second whether clause 1 of section 52 authorizes execution against a deceased's property in the hands of his legal representative in this extended sense and by any method other than that actually specified in it, attachment and sale. The first question is one of substantive right, the second one of procedure and construction, its importance being that, if it must be answered in the negative and if respondent's attachment cannot in consequence of the nature of the property be followed by a sale, that attachment was not authorized by the section and can be no obstacle to appellant's claim.

On the first of these questions there is no doubt the clear principle that the deceased's assets are liable for his debts. But it is argued on behalf of appellant that the assets include only what is available during deceased's lifetime and can be described as accruing to him, not what may become realizable only after his death. On the other hand, the contrary is argued in accordance with general principle as supported by English authority and with the Satute Law of India regulating the distribution of estates by executors or administrators. As regards the former, it seems clear that in England goods which have accrued by increase since the death of a testator are assets, this having been so always in respect of personal property, *vide* Williams on Executors, 11th Edition, 1272; and, although real property became assets only in consquence of a course of legislation ending with the Land Transfer Act (60 and 61 Victoria, Ch. 65), there has never been any doubt that so far as it is assets its profits also are liable as assets because they are accretions to it. In re *Hyatt Bowles* v. *Hyatt* (7) explained in In re *Moon Holms* v. *Holmes* (8). In India the Succession Act (X of 1865) and the Probate and Administration Act (V of 1881) no doubt contain no general provision as to accretions, but they are dealt with in connexion with specific legacies and in connexion with the residue in sections 309 and 310 of the former and 128 and 129 of the latter and under other sections of both Acts they are liable subject to the other rules laid down for the distribution of the estate equally with property, with which they are connected. It is true, that there is nothing in the latter Act regarding accretions to the estate of an intestate Hindu and their liability in the hands of the administrator for his debt. But it may fairly be contended that their liability will be the same, whether there is or is not a will and further whether or no the estate is distributed by an administrator appointed by the Court. This reference to the Statute Law, which is not directly applicable to the fund in dispute is of course relevant only as indicating that the English Law as to accretions has been adopted in India; but even such an indication is important, when very

(1) 60 Ind. Cas. 534; 43 A. 228; 19 A. L. J. 317; 33 C. L. J. 388; 40 M. L. J. 387; (1921) M. W. N. 300; 25 C. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 3 U. P. L. R. (P.C.) 35; 29 M. L. T. 358 (P.C.).

(2) 70 Ind. Cas. 24; 1 Pat. 387; (1922) A. I. R. (Pat.) 529; 4 P. L. T. 6.

(3) 30 M. 454.

(4) 2 Ind. Cas. 18; 32 M. 429; 9 M. L. J. 401.

(5) 8 Ind. Cas. 860; 35 M. 108; 9 M. L. T. 155; (1911) 1 M. W. N. 101; 21 M. L. J. 593.

(6) 18 Ind. Cas. 49; 36 M. 325: (1913) M. W. N. 86; 12 M. L. T. 571; 23 M. L. J. 658.

(7) (1888) 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 227.

(8) (1907) 2 Ch. 304; 76 L. J. Ch. 585.

little authority regarding them and their liability for debts has been adduced. For only two decisions, which are really in point have been cited, and in one *Azeemoonisa* v. *Ameeroonnisa Khatoom* (9) the liability is maintained but without any discussion. So also it was negatived in *Rani Kunno Dai* v. *Lacy* (10), the portion of the judgment at present material being, however, *obiter*, since the right to execute against accretions was then negatived also by an agreement with the heir. In *Rajah of Kalahasti* v. *Prayag Dossejee Varu*, (11) however, the creditor's right to proceed against accretions was recognized, on full consideration, the case last mentioned being distinguished and *In re Hyat Bowles* v. *Hyatt* (7) being referred to. There is certainly very little authority on a question, which, it might be supposed, would have been raised and decided in all the Presidencies. But we have been shown no reason for refusing to follow the decision of this Court just cited, and I should have been prepared to decide in accordance with English Law and the rule to be deduced from Indian Statutes that accretions are liable, if it were not advisable to leave the matter open for determination in connexion with the further question now to be stated.

On the assumption that the conclusion just suggested is correct, we have next the facts that section 51 of the Civil Procedure Code in terms authorizes execution only by attachment and sale and that this method of execution is not applicable to a fund, such as that now in dispute. Execution by attachment and sale is applicable only to the descriptions of property, to which that method of execution is applied in O. XXI and this fund is not one of them, since other methods of realisation are provided, when money in the hands of a third person is concerned. No doubt a debt due to the judgment-debtor may be attached and sold under O. XXI, r. 46 (1) (*a*) and 79 (3). But, although the fund in the hands of the Receiver may be payable to the Appellant or to Respondent, if he can'claim it in any other way, for instance in administration proceedings, it is not a debt due to the former for money had and received or otherwise, when it reached and is being retained by the Receiver (in spite of the invalidity of his appointment) in consequence of and subject to the orders of the Court and on'its behalf. The case in fact is covered, as regards attachment by r. 52 and as regards further proceedings by the reference to the further orders of the executing Court therein; and if the reference to attachment and sale in section 52 is to be read literally, the Respondent's claim based on the application of that section must be rejected. This, it may be observed, refers directly to the portion of the fund, which is still with the Receiver. As regards the portion already paid to Respondent, restitution of which is asked for in E. A. No. 619 of 1917 it may be pointed out that it was in fact paid out on the order of the Court and without execution by sale.

The question is then whether the limitation to attachment and sale of the methods of execution open to decree-holders, such as Respondents, which a strict construction of section 52 entails, should be sustained. It is true that a reason for such limitation is difficult to conjecture, particularly in view of the general reference to execution without specification of any method in section 50, dealing with decrees obtained against the deceased himself and only to be enforced against his representatives. Against this, however, it may be suggested that the intention of the legislature was to restrict execution against the deceased's property to cases in which liability is clear and identifiable, moveable or immoveable items of it are available for sale, insisting in accordance with some principle corresponding with that of the Administration of Estates Act (3 and 4, William IV, Ch, 104) on the creditor obtaining an administration judgment in others, *vide In re Moon Holmes* v. *Holmes* (8) already referred to. That Act, it may be pointed out, did not deal with claims such as those covered by section 50, which had not become merged in a judgment before the testator's death and which were left to be recovered in India, as they were recoverable in England, by ordinary execution, *vide* Williams on Executors, 11th Edition I, 778. And the use in the Code of the expression "property" instead of "assets of the deceased" may be consistent with this view;

(9) 15 W. R. 285.

(10) 19 A. 235 ; A. W. N. (1897) 88 ; 9 Ind. Dec. (N. S.) 154.

(11) 35 Ind. Cas. 224 ; 30 M. L. J. 391 ; (1916) 2 M. W. N. 92.

for the latter term has been in use in India since the Succession Act of 1865 and it is possible that the former, replacing the term "estate" in the Code of 1882, may have been deliberately preferred in order to avoid the implications, which a reference to "assets" would have entailed.

All these, however, is conjectural; and the actual wording of the section is the firmer ground for a conclusion. Respondent contends that a free construction is made necessary by the inconvenience, if not the absurdity, of the result of adherence to the wording as it stands and that for "attachment and sale" we should read "attachment or attachment and sale" or else that the sentence should run simply "it may be executed against any such property," the words "attachment and sale" being merely a generic reference to execution procedure other than that relating to arrest. But it may be doubted whether the inconvenience or absurdity involved by a literal construction is great enough to justify these violent suggestions. As regards the first, more would still be required in the present and other cases, since attachment alone would not be sufficient to give the decree-holder his remedy and a reference to his obtaining the further orders of the Court would be required, *vide* O. XX, rr. 52 and 53; and provision for equitable execution by the appointment of a Receiver under O. XL, r. 1, would still be wanting. As regards the second, it is true that the enumeration in section 51 of methods of execution specifies, apart from the residuary item (*e*) and the appointment of a Receiver as item (*d*), only attachment and sale, item (*b*), as an available method of recovering under a money decree from the judgment-debtor. But, if section 51 is read in the light of O. XXI, it cannot be regarded as exhaustive and, as it was first enacted in any form in the present Code, it cannot control the interpretation of section 52, which is almost identical with section 252 of the Code previously in force. Neither suggestion is in any degree probabilized by the context and the improbability that the legislature through oversight excluded the remedy appropriate in certain cases is really all that respondent can rely on.

As observed already in connexion with another portion of the case, there is very little authority regarding the liability of a fund such as that now in dispute and there is not likely to be more regarding the way in which that liability can be enforced. In *Rajah of Kalahasti* v. *Prayag Dossjee Varu* (11), already referred to, the latter question did not arise, as execution was being taken against the legal representative's own property under section 52 (2); and no decision dealing with that question in connexion with other descriptions of property for which sale is not the appropriate method of execution, has been shown us. My learned brother is, I understand, more inclined than I am to a construction of section 52, such as respondent contends for; and it is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined. We, therefore, refer for the decision of a Full Bench the questions above stated.

Venkatasubba Rao, J.— As my learned brother has very fully dealt with the questions raised, I shall in a few words state what my own view on the point is. Subsequent to the passing of the decree against the *Zemindar* he died and was succeeded by his son, the Appellant before us. The respondent Company, assignee-decree-holder, executed the decree and purchased the *Zemindari* at a sale confirmed on 8th September 1914 and took delivery thereof in January 1915. On 23rd March 1915 a personal decree for the balance due was passed against the Appellant, and on 24th April 1915 a Receiver was appointed to collect rents and profits outstanding for the faslis 1321 to 1323 (1911 to 1913), that is for the period between the death of the previous *Zemindar* and the sale referred to above. The personal decree was, however, set aside on 5th March 1917 as passed without jurisdiction and another personal decree was obtained on 24th September 1917. The following items of property were attached on 6th March 1918:—"(1) Amounts due under decrees in rent suits obtained by the Receiver, (2) arrears of rent due to the judgment-debtor for faslis 1321 to 1323." The learned District Judge observes: "The real dispute relates to the outstandings of the estate in the shape of rents and mesne profits for the faslis 1321 to 1323, whether decreed or not and whether realized or not."

The lower Court upheld the right of the respondent to the items attached.

Two questions were argued before us, one relating to mere procedure and the other to substantive rights of the parties.

Dealing first with the question of procedure raised, I find it difficult to understand how on the facts stated by the District Judge the points urged by the learned Vakil for the Appellant arise at all. His contention is this: under section 52 of the Civil Procedure Code when a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, the decree may be executed by the attachment and sale of any such property. The personal decree in execution of which the Receiver was appointed having been subsequently set aside, the appointment of the Receiver was void and any amounts realized by him or decrees obtained by him should be regarded as monies in his hands or decrees obtained by him not in his character of Receiver but as an utter stranger But I do not find it stated that the Receiver was in possession of any monies at all. But whatever the true facts may be, the assumption underlying the argument is that under section 52, there cannot be an attachment of property unless the property can be sold in execution. Turning to the words of the section the argument is put in this way: "The decree may be executed by the attachment and sale of the property." If the property against which execution is taken out happens to be property which cannot under the Code be sold subsequent to the attachment, the attachment cannot be effected at all. I assume that there is such property in the hands of the Receiver. For instance, if he had cash or currency notes, the property may be attached but it cannot be sold. In that event, is there immunity in the case of cash or currency notes on the mere ground that when attached there cannot be a sale under the provisions of the Code? O. XXI, r. 56 provides that when the property attached is coin or currency notes the Court may direct that such coin or notes be paid over to the decree-holder. Thus the plaintiff obtains satisfaction of the decree without having to sell the property attached. To take another similar instance, under O. XXI r. 53 when the property attached is a decree the creditor who has attached the decree may proceed to execute the attached decree and the net proceeds may be applied in satisfaction of the decree sought to be executed. If the argument of the appellant is correct, if a debtor dies leaving assets in the shape of decrees obtained by him or ready cash, they will not be available to his creditors for the mere reason that the assets left happen to be in that shape. One would expect that if a debtor died leaving cash and there was no question of the cash having been secreted or otherwise disposed of the creditor would be most easily enabled to obtain satisfaction of his debt. There would be no need to go through the lengthy execution proceedings which should be had if the assets left happened to consist, say, of immoveable property. But the contention curiously is that in that very event the creditor is without a remedy. What are the further implications of this position? If a decree is passed against a legal representative of a deceased person the decree-holder can never ask for appointment of a Receiver in execution. Section 51 clearly lays down that one of the methods of executing a decree is by appointing a Receiver. O. XL, section 1 enacts that the Court may appoint a Receiver of any property whether before or after decree. If a decree is obtained against a debtor in his life-time, a Receiver may be appointed in execution to realise the debts due to the debtor; but if a decree is obtained after his death against his legal representative such a course is not open to the decree-holder; and that is the argument and I need hardly say that this leads to an absurdity. O. XXI, r. 46 provides that in case of a debt not secured by a negotiable instrument, the attachment shall be made by a written order prohibiting the creditor from recovering the debt and the debtor from making payments thereof and that a debtor so prohibited may pay the amount of his debt into Court and that such payment shall discharge him effectually. If the contention of the appellant is correct, the debt attached must be sold and the debtor cannot pay the amount into Court. Even if the debtor offers to pay the amount into Court, it is beyond the power of the Court to receive it, but the debt must be sold. I cannot believe that the legislature intended that such absurd consequences should ensue.

HEM SINGH *v.* BHAGWAT SINGH

In my opinion the words "attachment and sale," in section 52 must not be literally construed, as a too literal interpretation leads to inconvenience and absurdity. Section 50 refers to execution of the decree where judgment-debtor dies after the decree but before the decree is satisfied. Section 52 contemplates proceedings in execution when the decree is passed against the legal representative himself. The object of the two sections seems to be to enact that the property of the deceased debtor shall alone be liable. Section 51 provides various methods of execution and when any of those methods is appropriate, it is not the scope of section 52 to exclude that particular method. The words used are inapt but the construction which I am inclined to adopt seems to be the only reasonable construction.

Next dealing with the construction of substantive rights raised, my learned brother has dealt with it at considerable length and it will serve no useful purpose to once again discuss the various English authorities that were cited before us. The result of the authorities appears to be that in England the income is treated as assets for the purpose of payment of debts. Is there any reason for refusing to give effect to this rule in India? I see none. I shall first take the case of a man dying leaving property which his successor inherits. Why should the successor in such a case be treated differently in India and be held not to be under an obligation to pay the deceased's debts out of the income of the property in his hands? The heir or successor may, if he chooses, sell the property immediately after the debtor's death. In that event he gets no income whatsoever from the property. Or the heir may derive income from the property and pay debts from and out of the income. If the income so derived is sufficient for the payment in full of the debts, the corpus remains in the hands of the heir and it will remain at his absolute disposal. But if the heir chooses to derive an income and the corpus itself is not sufficient to pay the debts, I fail to see why the income should not be available to the creditors. That is to say, there is no reason why a successor who postpones the sale of the corpus or defers the payment of the debts should be in a better position than one who the moment after the deceased's death disposes of the property or discharges the debts. In the case of a son liable to pay out of joint family property his father's debts there is even greater reason to apply the rule. The son is liable under the Hindu Law to pay the debt not only out of his father's share of the property but also out of his own share. How then can he be heard to say that the income from the property is not liable?

Turning to the case of an impartible estate I find that it is difficult to distinguish it for this purpose from the case of an ordinary partible estate. Whether in the hands of the father it was self-acquired property or joint family property and whatever the rule of succession applicable may be, I cannot imagine how the case of an impartible estate can be put on a different footing for this purpose from any other kind of property. The argument that accretions are the absolute property of the successor does not in the least touch the question. They may be the son's absolute property in one sense. But they are not necessarily his absolute property in the sense that they are not available to the father's creditors to the extent they are required for the discharge of his father's debts.

In the result, I agree in the Order of Reference proposed by my learned brother.

JUDGMENT.

Schwabe, C. J.—This reference ought not to have been made to this Bench. The two Judges who heard the matter were agreed, and I see no reason for adding anything to their statements on the points on which they were agreed.

The first point is quite a simple one, whether under section 52 of the Civil Procedure Code the income of landed property which has passed from one *Zamindar* to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased *zamindar*, that is to say, in this case, the father of the appellant. *Olagappa Chetty* v. *Arbuthnot* (12) is a direct authority for the proposition that the income of such property is liable. The English Law is perfectly plain, and to the

(12) 1 I. A. 268 14 B. L. R. 115; 3S ar. P. C. J. 318; 21 W. R. 38.

same effect, as laid down in a long series of cases relating to the income from realty which has descended to the heir-at-law. *Stratford* v. *Ritson* (13) is a good instance, in which it was held that the income of such real property is liable for the debts of the deceased as his assets in the hands of his heir, though it is not to be taken until the *corpus* is exhausted.

There is a further point raised by the reference as to whether the money, income accrued since the late *Zemindar's* death, which has come into the hands of the new *Zemindar* can be attached and sold. It can be attached, and it is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. There was no necessity to refer that point, nor do I think it necessary to say anything about it.

The appeals are dismissed with costs.

Coutts-Trotter, J.—I think that this case is covered by the decision in *Olagappa Chetty* v. *Arbuthnot* (12) and I venture to put in my respectful protest against the reasoning on which this case was referred to this Bench. My brother Oldfield says :

> " It is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined."

Personally I protest against a Bench being called upon to define generally the rights of decree-holders and I entirly decline to do so. It is enough to say that this case is covered by *Olagappa Chetty* v. *Arbuthnot* (12) and this appeal should be dismissed with costs.

Ramesam, J.—I agree.

Z. K. *Appeal dismissed.*

(13) 10 Beav. 25; 16 L. J. Ch. 176; 11 Jur. 177.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2074 OF 1919.

April 11, 1923.

Present :—Mr. Justice Campbell and Mr. Justice Moti Sagar.

NIHAL CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

GURDITTA MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872) ss. 101, 110—Burden of proof, when material—Appeal, second—Finding of fact based on evidence whether binding.

The question of *onus* of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Court to come to a conclusion. Where, however, evidence is adduced by both the parties, the question of the burden of proof becomes immaterial, and the Court has to determine the question on the evidence before it.

Jhari Singh v. *Tokharam Marwari*, 52 Ind. Cas. 860; 1 P. L. T. 57; *Ram Khelawan Singh* v. *Ram Nath Singh*, 1 P. L. T. 640; *Seturatnam Aiyar* v. *Venkatachala Goundan*, 56 Ind. Cas. 117; 43 M. 567; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 47 I. A. 76; 26 C. W. N. 485 (P. C.), relied on.

A finding of the first Appellate Court on a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

Appeal from the decree of the District Judge, Shahpur at Sargodha, dated the 24th June 1919, reversing that of the Subordinate Judge, Sargodha, dated the 4th April 1919.

Messrs. *Tek Chand* and *Har Gopal*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The facts are sufficiently stated in the judgment of the lower Appellate Court. The sole question for determination in this appeal is whether the defendants are full proprietors and are, therefore, entitled as such to share in the village *shamilat* on partition. The learned District Judge has held that they are not so entitled and has decreed the plaintiffs' suit with costs in both Courts.

NIHAL CHAND *v.* GURDITTA MAL

The defendants have now come up in second appeal to this Court, and it has been contended on their behalf that the finding is vitiated by reason of the fact that certain important documents on the record have been misread and misconstrued while some have not been considered at all by the learned Judge of the Court below. It is further contended that the onus of proving that the defendants were only *malikan qabza* and were not full proprietors was upon the plaintiffs and that they had failed to discharge this onus. In our opinion there is no force in any of these contentions. The question of onus of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Court to come to a conclusion. Where evidence is adduced by both the parties, then the question of the burden of proof becomes immaterial, and the Court has to determine on the evidence before it *vide Hari Singh* v. *Tokharam Marwari* (1); *Ram Khelawan Singh* v. *Ram Nath Singh* (2); *Seturatnam Aiyar* v. *Venkatachela Gounden* (3).

As to the second contention, *Bakhshi* Tek Chand, the learned Advocate for the appellants, has taken us through the whole facts of the case and has specially invited our attention to the documents (P. 2 and D. 1) which, he says, have been misread and have not been correctly construed by the learned District Judge. P. 2 is a copy of the judgment passed in 1857 between the predecessors-in-title of the present parties. It appears that in 1857 the predecessors-in-title of the present plaintiffs brought a suit against the predecessors-in-title of the present defendants for redemption of certain lands in Patti Massu in Mangowal village of the Shahpur Tahsil. This suit was dismissed on the ground that the plaintiffs had failed to establish that the lands were under mortgage with the then defendants. It is contended by *Bakhshi* Tek Chand that this document does not in any way determine the rights of the defendants in the village *shamilat* and does not prove that they are merely *malikhan qabza* and not the full proprietors. The learned District Judge, however, does not base his judgment on his document alone. He merely takes this document into consideration as a relevant piece of evidence and holds that it was found in 1857 that the defendants had acquired title in the village by purchase, that they were not the descendants of the original founders of the village and that this fact lends support to the plaintiff's contention that the defendants are *malikan qabza* and not the full proprietors. This inference he was certainly entitled to draw from the judgment and we do not think that in drawing this inference he has misread or misconstrued the document or that he has committed any error of law which vitiates his judgment.

The next document objected to is D. 1. It is contended that this document does not help the plaintiffs in any way whatever, and that the learned District Judge was wrong in holding otherwise. D. 1 is a copy of the *Shajra nasah* of certain proprietors in this village and shows that they acquired title either by purchase or gift or by long possession. The learned District Judge was of opinion that as the present plaintiffs were grouped together with these proprietors, they must belong to the same category and that their rights could not in any way be superior to those of other non jhamat proprietors who acquired title by gift or purchase. This was a perfectly correct interpretation of the document, and we do not think that the defendants are right in contending that the interpretation put upon it by the learned District Judge is wrong.

It is further contended that D. 15 has not been considered by the Court below, which showed that the defendants were co-sharers in the *shamilat* Patti Messua. This document has certainly not been referred to in the judgment, but we do not think it was necessary that the learned District Judge should have referred to each and every piece of oral and documentary evidence which he had taken into consideration. The evidence had been considered as a whole and there is nothing to show that this document was ignored. There was no error or defect in the procedure, and there is abundant authority for holding that the finding of the first Appellate Court

(1) 52 Ind. Cas. 860 ; 1 P. L. T. 57.

(2) 1 P. L. T. 640.

(3) 56 Ind. Cas. 117 ; 43 M. 567 ; (1920) M. W.N. 61 ; 27 M. L. T. 102 ; 11 L. W. 399 ; 38 M. L. J. 476 ; 22 Bom. L. R. 576 ; 18 A. L. J. 707 ; 47 I. A. 76 ; 25 C. W. N. 485 (P.C.).

upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. In our opinion there was sufficient evidence before the learned District Judge to support his finding and we do not see any reason to differ from the conclusions arrived at by him.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 239 OF 1921.

June 1, 1922.

Present :—Mr. Justice Walmsley and Mr. Justice Ghose.

SASHI MUKHI DASI AND OTHERS — APPELLANTS

versus

ABINASH CHANDRA HALDER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 23—Suit not decided on preliminary point—Remand by appellate Court—Appeal—Inherent powers of remand.

A remand under the inherent powers of the Court can only be made where the justice of the case requires it.

The mere fact that an order of remand contravenes the provisions of O. XLI, r. 23 of the Civil Procedure Code does not mean that it is made under the inherent powers of the Court and to say that there is no right of appeal in such a case would be to refuse an appeal in every case in which the order of remand is erroneous.

Appeal from a decision of the Subordinate Judge, Twenty-Four Parganas, dated the 19th July 1921.

Messrs. *A. N. Bose* and *S. N. Mukherjee*, for the Appellants.

Messrs. *J. Kanjilal* and *S. Banerjee*, for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal from an order of remand. A preliminary objection has been taken on behalf of the respondents that no appeal lies as the order has not been made under O. XLI, r. 23 Civil Procedure Code, the Trial Court not having disposed of the suit on a preliminary point. It appears to us that this order was not made under the inherent powers of the Court to order a remand which can be made only where the justice of the case requires it. To say that there is no appeal where the Court acts in contravention of r. 23 of O. XLI, Civil Procedure Code and reverses the judgment of the Trial Court and remands the case would be to refuse an appeal in every case where the order of remand is erroneous. We are, therefore, of opinion that in this case, the appeal is competent.

Then with regard to the order complained of, it appears that the learned Subordinate Judge has sent back the case for trial of the second question mentioned in his judgment, namely, whether the plaintiff's alleged right was extinguished by an user for more than twelve years before the suit. This question was tried by the first Court under the first and the fifth issues and decided against the plaintiffs. The Subordinate Judge was of opinion that the mode in which this question was decided by the Trial Court was erroneous and he accordingly remanded the case for retrial of the question having regard to the observations made by him in his judgment. It seems to us that the learned Subordinate Judge ought to have decided the question himself and, if he thought that further evidence was necessary, he might have acted according to the provisions of r. 27 and 28 of O. XLI, Civil Procedure Code and come to a decision on the question himself. We, therefore, set aside the order of remand and direct that the Subordinate Judge do rehear the appeal and try all the questions himself.

An objection has been taken on behalf of the appellants that the finding of the Subordinate Judge with regard to point No. I stated in his judgment is erroneous and the contention, that the question can be raised in this appeal, is based upon the argument that

if the learned Subordinate Judge had found the question in the defendant's favour as the Trial Court has done, there would have been no occasion for deciding the second point or for sending the case back on remand to the Trial Court. As we have heard both the parties on the question, it is not necessary for us to say whether it is competent to the appellants to raise the question at this stage of the case but we should decide it now as both parties desire it. It is contended on behalf of the appellants that the Subordinate Judge was wrong in saying that the plaintiff No. 1 had title to the land in dispute. It is urged that, although he was a co-sharer of the defendants and was the representative of a party to the partition suit, No. 79 of 1884, he was not given any right of passage over this strip of disputed land as he was not given any land by the partition contiguous to the disputed land. But the fact is that this piece of land was included in the partition suit which shows that it belonged to all the co-sharers, and that it was not allotted to any one person as appertaining to his share by the decree in the partition suit. The result is that the plaintiffs remain joint owners of the disputed land with the other co-sharers and, therefore, the decision of the learned Subordinate Judge on this question appears to be right.

Then objection is taken with regard to the finding of the Subordinate Judge as regards the right of the plaintiffs Nos. 2 and 3. The Trial Court found that the plaintiffs Nos. 2 and 3 had no right to the disputed land. The Subordinate Judge does not come to any definite finding on the question but simply says " even if the plaintiffs Nos. 2 and 3 had no right to the land, the right of the plaintiff No. 1 could not be questioned. It was necessary for him to find, in order to pass a proper decree whether the plaintiffs Nos. 2 and 3 had any right or not. It is stated on behalf of the defendants that the plaintiffs Nos. 2 and 3 are the representatives in interest of some of the parties to the previous partition suit. The Subordinate Judge will, therefore, decide the question as regards the title of these plaintiffs.

The order of the lower Appellate Court is accordingly set aside and the case sent back to that Court for being dealt with having regard to the observations made above. We make no order as to costs.

Walmsley, J.—I agree.

N. H. *Case remanded.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No 1767 OF 1919.

August 25, 1923.

Present : –Mr. Justice Kajiji.

BAI PRATAPGAVRI—PLAINTIFF

versus

MULSHANKAR PREMCHAND—DEFENDANT.

Hindu Law—Inheritance, exclusion from—Dumbness, whether must be congenital—Widow-Maintenance, assessment of, principles governing—Settlement, deed of, whether can be set aside at instance of person entitled to maintenance.

It is not necessary according to Hindu Law that dumbness must be congenital in order to disqualify a person from sharing in the inheritance.

Charu Chander Pal v. *Nobo Sundari Dasi*, 18 Cal. 327; 9 Ind. Dec. (N. S.) 219, relied on.

Case-law discussed.

The principle which should govern the Court in fixing the maintenance of a Hindu widow is first to look to the mode of life of the family during her husband's lifetime and the amount fixed must be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life-time, then to see what the husband's estate is and also to see how far that estate is sufficient to supply her with maintenance on this scale, without injustice to other members of the family who also have their rights to maintenance out of the estate, like hers.

Sm. Karoonamoyee Dabee v. *The Administrator-General of Bengal*, 9 C. W. N. 651 at p. 653, relied on.

A deed of settlement executed by a Hindu widow cannot be set aside at the instance of a person who has only a right of maintenance out of the estate.

BAI PRATAPGAVRI *v.* MULSHANKAR

Mr. *V. S. Bhandarkar*, for the Plaintiff.

Mr. *M. C. Setalvad*, for the Defendant.

JUDGMENT.—The plaintiff has filed this suit for a declaration that she, as the heir of her deceased husband, is entitled to all the properties left by him and that Bai Premcore, her mother-in-law, had no right or interest in the estate left by her son except that of maintenance and residence and for a declaration that the deed of settlement made by Premcore is null and void and does not affect the plaintiff's interest in her husband's estate; and that the first defendant has no right or interest therein as a trustee and in the alternative for a declaration that Bai Premcore had no right to fix the amount of her maintenance and the amount so fixed is not binding on her.

It appears that the plaintiff was married to one Maganlal Ghelabhai in the year 1915 when she was about twelve years old and Maganlal Ghelabhai died on October 27, 1916, leaving him surviving the plaintiff his childless widow and a mother named Bai Premcorebai. There is no dispute that the plaintiff should have been the heir of Maganlal Ghelabhai according to Hindu Law but the defendant's case is that the plaintiff is disqualified from inheriting the estate left by her deceased husband because she is deaf and dumb.

The plaintiff's case is that in order to disqualify her from sharing in the inheritance she must be proved to have been deaf and dumb from birth or in other words congenitally. The plaintiff's case is that she was attacked with plague in Samvat year 1964 and in consequence of that disease she lost her power of speech and also her sense of hearing. The plaintiff's case is that unless it is satisfactorily proved that she was deaf and dumb by birth she is not disqualified from sharing in the inheritance.

On the other hand it is contended on behalf of the defendants by Mr. Setalvad that it is not necessary that dumbness must be congenital or by birth. It is enough if it is proved that the dumbness is incurable and that the plaintiff was dumb at the time when the inheritance opened, *i. e.*, at the time when Maganlal died; and he further states that if it is held that dumbness must be congenital, the evidence in this case sufficiently and satisfactorily proves that the plaintiff was dumb and deaf from her birth. It is common ground that the plaintiff was dumb at the time of the death of her husband, *viz.*, in October 1916. It is also common ground that the plaintiff has been dumb and deaf since she was about three or three and a half years old. Therefore the question I have to determine is whether under Hindu Law, to exclude a person from inheritance it is necessary that a person should be deaf and dumb from birth or is it sufficient if a person is proved to be deaf and dumb at the time when the inheritance opens out. Many cases have been cited at the bar. The text from Manu has been cited and it reads as follows:—

"Eunuchs, and outcastes, persons born blind or deaf, mad men, idiots, the dumb and such as have lost the use of a limb are excluded from a share of the heritage."

It has been argued on behalf of the defendants by Mr. Setalvad that under this text, in order to disqualify a person from inheriting he must be blind and deaf from birth, the adjective 'born' does not apply to the other disqualifications which are mentioned, *viz.*, mad men, idiots and those who have lost a limb. It is urged that in the case of *Murarji Gokuldas* v. *Parvatibai* (1) Westropp, C. J. has decided that "according to Hindu Law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital" and under the text in Manu also it is quite clear that blindness must be from birth, *i. e.*, persons who are born blind and the learned Judge in the course of a very exhaustive, learned and considerate judgment considers other grounds of exclusion also and comes to the conclusion that the other grounds of exclusion must also be congenital. Although this dictum was obiter so far as the decision in *Murarji Gokuldas* v. *Parvatibai* (1) was concerned, yet coming as it did from an erudite and learned Judge like Sir Michael Westropp it is entitled to very great respect. I have therefore, now to consider whether under Hindu Law, dumbness must be congenital in order to exclude a person from sharing in the inheritance. It has

(1) 1 B. 177; 1 Ind. Dec. (N. S.) 118.

been urged by Mr. Bhandarkar for the plaintiff that the case of *Vallabhram Shivnarayan* v. *Bai Hariganga* (2) decides that dumbness must be congenital to exclude a person from inheriting. I must say that having regard to the question that was at issue in that case, it was assumed that the person there was deaf and dumb by birth and the only question at issue there was whether the text applied to females also. The text writers have mentioned other cases showing that dumbness must be congenital. Then the case of *CharuChunder Pal* v. *Nobo Sunderi Dasi* (3) has been cited. This case clearly shows that it was assumed that the person there was born deaf and dumb and this question about the exclusion of a person from inheriting on account of dumbness from birth was not decided at all by Norris, J. as appears from his judgment which says (p. 330) :—

"Baboo Umakali contended that dumbness to render the person afflicted therewith incapable of performing religious ceremonies, and, therefore, of inheriting, need not be, as in the case of blindness and deafness, congenital; that if a man was dumb when the succession opened out, he was *ipso facto* excluded from the inheritance as being a person incapable of performing religious ceremonies, and thereby conferring spiritual benefits on the deceased owner of the property. In the view I take of the first branch of the learned pleader's contention, I think it is unnecessary to express any opinion upon this point."

Therefore, in this case Norris, J. does not express any opinion on the point, *viz.*, whether dumbness must be congenital or not. Similarly Bannerji J. in his judgment at p. 332 also says "a good deal of argument was addressed to us on behalf of the appellant to show that dumbness in order to disqualify a person from inheriting need not be congenital." Therefore, it is quite clear that both the learned Judges did not decide whether dumbness must be congenital or not, but Bannerji, J. goes further and expresses an opinion that "if it were necessary to decide that question in this case I should have felt inclined to answer it in favour of the appellant's contention." Further it must be observed that Sir Michael Westropp in *Murarji Gokuldas* v. *Parvatibai* (1) has stated that blindness also should be congenital to exclude a person from sharing in the inheritance. On that point both the Madras and our own High Court have subsequently decided that it need not be congenital, for in *Muthusami Gurukkal* v. *Meenammal* (4) it is held that insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital, and our present Chief Justice in *Bapuji Narso* v *Dattu Aniaji* (5) has stated that (p. 407) : —

"It would appear from the judgment of Sir Michael Westropp in *Murarji Gokuldas* v. *Parvatibai* (1) that although the learned Judge was only considering the question whether blindness to cause exclusion from inheritance must be congenital, after examination of the texts he expressed the opinion that madness, as well as blindness, to disqualify a person from inheritance, must be congenital. That opinion, although entitled to the very greatest respect, still cannot be regarded as anything else but obiter."

The conclusion he has come to is that it need not be congenital. But having regard to the text of Manu I feel diffident in expressing an opinion on the text of Hindu Law, not knowing Sanskrit, on which the whole interpretation is based. I do not profess to be very learned in Hindu Law but having regard to the position of the word 'born' before the words blind or deaf (I read the text from Manu) it is clear that in order to exclude persons only blind and deaf, these defects must be there from birth. There are no decided cases on this point nor have the text writers given any authority for the proposition that dumbness must be also congenital. On the authority of the expression of opinion by Bannerji, J. in *Charu Chunder Pal* v. *Nobo Sunderi Dasi* (3) I hold that it is not necessary according to Hindu Law that dumbness must be congenital in order to disqualify a preson from sharing in the inheritance.

But it is further contended by Mr. Setalvad that the evidence in this case clearly shows

(2) 4 B. H. C. R. (A. C. J.) 185.
(3) 18 C. 327 ; 9 Ind. Dec. (N. S.) 219.
(4) 55 Ind. Cas. 576 ; 43 M. 464 ; 38 M. L. J. 291 ; (1920) M. W. N. 253 ; 27 M. L. T. 329.
(5) 73 Ind. Cas. 279 ; 25 Bom. L. R. 404 ; 47 B. 707 ; (1923) A. I. R. (Bom.) 425.

that the plaintiff was dumb by birth. For that purpose it is necessary to examine the oral evidence that has been adduced in this case. [After a discussion of the oral evidence on the point, the judgment proceeded:] Therefore, on the oral testimony I must hold that the facts in this case clearly prove that the plaintiff was dumb congenitally and not as a result of any malady such as an attack of plague she had in Samvat year 1964.

Then the other question which Mr. Bhandarkar has urged is the question of maintenance fixed by Premcore the plaintiff's mother-in-law. Mr. Bhandarkar has urged that the amount of maintenance so fixed by Premcore is inadequate and insufficient for her needs and the plaintiff is not bound to accept the same and that she should be treated more liberally in respect of her maintenance.

Mr. Bhandarkar has urged that under Hindu Law, in a case like this, where a woman but for this disqualification would have become the heir of her deceased husband and got all the property, the basis of awarding maintenance should be the income of the whole property. He cited in support of this a passage from Sircar's Hindu Law, p. 377. Unfortunately the passage does not support him. The passage is in these terms :—

"Hence what the Hindu Law seems to provide is that their shares should be in the possession of the other members who must furnish them and their family with maintenance and defray the expenses or marriage of their daughters."

This does not mean that the income of the whole share which but for this disqualification would have been theirs, should be given to them. It only means that if she is a female and has daughters then the marriage expenses of such daughters must be provided for. If a male member is disqualified by reason of dumbness, not only what is necessary for him must be provided, but what is also necessary for marriage expenses of his daughters should be provided for.

Further he relied on a passage which is cited by Wilson, J., in the case of *Sm. Karoonamoyee Dabee* v. *The Administrator-General of Bengal* (6). With every word in that passage I agree *viz.* :—The principle which should govern the Court in fixing the maintenance of a Hindu widow is first to look to the mode of life of the family during her husband's life-time and the amount fixed must be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life-time. Then to see what the husband's estate is and also to see how far that estate is sufficient to supply her with maintenance on this scale, without injustice to other members of the family who also have their rights to maintenance out of the estate, like hers.

Mr. Bhandarkar has urged there are no other members of the family whose rights to maintenance out of the estate have to be considered and as there would be no injustice done to any other member of the family, the whole income of the property left by her deceased husband should be given to her.

In fixing the maintenance of a Hindu widow the principles laid down in the above passage have always been followed. Those principles will be followed even in this case but it has not yet been clear in this case what the total income of the properties left by her deceased husband is. For the purpose of fixing the amount of maintenance, I have to take into account the income of the property the subject-matter of the deed of settlement also. Further it was urged that Bai Premcore sold one of the properties to the first defendant. Then Bai Premcore in her application for letters of administration of the property of her deceased son has sworn the property to be worth Rs. 58,000. The Court is not yet in a position to know what income the properties yield. But having regard to the principles referred to above there will be no difficulty in coming to a conclusion as to what amount should be given for maintenance to the plaintiff when the income of the properties is properly assessed.

The last point urged on behalf of the plaintiff is that the deed of settlement made by Premcore must be set aside. It is, however, well-established law that a deed of settlement cannot be set aside at the instance of a person who has a limited interest. It

(6) 9 C. W. N. 651 at p. 653.

could be done at the instance of even a remote reversioner. In any case I cannot set aside the deed of settlement at the instance of the plaintiff who is only entitled to a right of maintenance. The best course for the plaintiff would be to advertise for the next reversioner and then file a suit for setting it aside.

There was one point which I have omitted to mention and that is about the conduct of Kanji the next friend of the plaintiff. It is urged that Bai Premcore made an attempt to make a Will. Kanji had read it and had approved of the provisions and had undertaken to carry out the provisions of that Will and to-day he is in Court as the next friend of the plaintiff. I do not attach much importance to the conduct of Kanji for on the materials we have in this case there is ample evidence to show that the plaintiff was dumb congenitally. This dumbness was not the result of any malady or the result of the attack of plague she had as testified by Dr. Choksey.

Mr. Bhandarkar urges that there is no sufficient evidence that this dumbness of the plaintiff is incurable. So many people observed her while she was young. The plaintiff is now about nineteen years, a *Vaid* from Jamnagar had occasion to see the plaintiff and he said that medicine could do nothing in her case. Nothing has been done for the last sixteen years and we may take it for granted that the plaintiff will have to remain in this unfortunate position for the rest of her life.

I must hold that this is a case of incurable dumbness.

The result is that as far as the maintenance is concerned, the suit connot be dismissed but as to the declarations which the plaintiff has asked for those must all be refused and I hold that the plaintiff is disqualified from sharing in the inheritance on account of her incurable dumbness which need not be congenital. But if it is held that it should be congenital the facts in this case clearly prove beyond any doubt that in the case of the plaintiff, the dumbness was congenital.

Z. K. *Suit dismissed in part.*

1 C—23

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2545 OF 1922.

March 14, 1923.

Present :—Mr. Justice Moti Sagar.

Mt. CHANDO *alias* SIVANWALI—PLAINTIFF—APPELLANT

versus

SIRI RAM—DEFENDANT—RESPONDENT.

Second Appeal—Finding based on no evidence—Conjectural grounds—High Court, whether will interfere.

A finding of fact that is based on no evidence at all or on purely conjectural grounds is not binding and is liable to be set aside in second appeal.

Appeal from the decree of the District Judge, Karnal, dated the 13th July 1922.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Kanwar Narain*, for Mr. *Nanak Chand Pandit*, for the Respondent.

JUDGMENT.—This was a suit by one *Musammat* Chando of Kaithal in the Karnal District for recovery of Rs. 770 on the basis of a promissory note, dated the 24th of February 1915. The defendant denied the execution of the promissory note in 1915 and stated that he was at Bikaner at the time when the promissory note is alleged to have been executed. He further stated that he had given a promissory note to the plaintiff in 1911 at Hissar which had been paid off and that the date of that promissory note had been altered from 1911 to 1915 in order to bring the suit within limitation. The Trial Court found in favour of the plaintiff and decreed the claim.

The learned District Judge, however, came to a contrary finding and held that the figure 1911 in the promissory note had been altered to 1915 and that the suit was not maintainable on the basis of this promissory-note.

The plaintiff has now come up in second appeal to this Court and it has been contended on her behalf that the finding of the learned District Judge as to the alteration of the date

in the promissory note is based upon conjectural grounds and should, therefore, be set aside. In my opinion this contention is well founded and must prevail. The learned District Judge has given three grounds for coming to the finding that the date in the promissory note has been altered :—

(1) that the promissory-note is stamped with a King Edward stamp which was probably not in existence in 1915 ;

(2) That the defendant was at Bikaner when the promissory note is alleged to have been executed ; and

(3) That the alteration in the promissory note is obvious.

As to the first ground it is admitted by the learned Counsel for the respondent that it is conjectural and that the learned District Judge was not justified in the absence of any evidence to the contrary to come to a finding that there were no King Edward stamps in existence in 1915.

As to the second ground it is clear from the evidence that it has not been definitely proved that the defendant was at Bikaner in 1915. Certain entries from a school register at Bikaner have been produced, but no attempt has been made to prove those entries. I am unable to hold on the basis of these entries alone which are unproved that the defendant was actually at Bikaner at the time the promissory note is alleged to have been executed. Moreover, I do not think that the defendant's presence at Bikaner in February 1915, is of much consequence so far as this case is concerned. The plaintiff's case is that there were dealings between her and the defendant's wife and that the promissory note in question was handed over to her by the defendant's wife at Hissar. It is quite possible that the defendant may have been at Bikaner and that he may have forwarded the promissory note from Bikaner to his wife at Hissar for delivery to the plaintiff. In these circumstances the cause of action could certainly arise at Hissar and the defendant's absence from that place would not be of any importance and would not have any bearing on the decision of this case.

As to the third ground I am unable to agree with the Court below that the alteration is obvious. I have carefully examined the promissory note in question and am unable to see any alteration therein. In any case the finding of the learned District Judge upon this point is not based upon any evidence whatever. There is no evidence on the record to show that the defendant had executed a promissory note in 1911 in favour of the plaintiff and that the date of that promissory note was altered from 1911 to 1915. The finding not being based on any evidence is not binding on this Court and must, therefore, be set aside.

I accept the appeal, and reversing the order of the Court below, decree the plaintiff's suit with costs throughout.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 154 OF 1922.

March 8, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

PANDURANG VEDURAM—PLAINTIFF—APPLICANT

versus

MOHAN CHHATRABHUJ—DEFENDANT—OPPONENT.

Civil Procedure Code, (Act V of 1908). s. 115, O. IX, r. 8—Absence of plaintiff—Dismissal of suit—Revision—Procedure.

If on the date of the hearing of a suit, the plaintiff does not appear and his pleader has no instructions to conduct the suit, then there is no reason for the Court to raise issues or, if they have been already raised, to find on them. The suit must be dismissed under O. IX, r. 8 of the Civil Procedure Code. In such a case the aggrieved party can apply for a review of the order or apply for an order to set aside the order of dismissal. The fact that the Court erroneously finds on the issues and rejects the claim does not entitle the aggrieved party to move the High Court in revision.

Application against the decree of the Second Class Subordinate Judge, Yaval, in Small Cause Suit No. 2101 of 1921.

NANG MUN *v.* LABYA NAW

Mr. *V. D. Limaye*, for the Applicant.

JUDGMENT.—The plaintiff has filed this suit to recover Rs. 112-8-0 from the defendant with costs and interest representing the estate of the deceased Chhatrabhuj. The defendant denies the claim. On the record it appears that issues were raised, the Judge found on the issues and rejected the claim with costs. An application was made to this Court, in revision on the ground that the Court, on the day of the hearing when an application was made for adjournment as the plaintiff was ill, rejected the application and dismissed the suit wrongly. If the plaintiff was absent and the pleader had no instructions to conduct the suit then there was no reason for the Court to raise issues or if issues were raised to find on them. If the plaintiff does not appear either in person or by a pleader who has instructions to go on with the suit, then the suit must be dismissed under O. IX, r. 8. In such a case the party aggrieved by the order can apply for a review of the order or apply for an order to set aside the order of dismissal. The plaintiff applied neither for review nor for a rule. Owing to the Judge having found on the issues he thought that the order passed was a decree. That was most unfortunate and it may very well be that the plaintiff was misled in making this application owing to the way in which the case was dealt with by the Subordinate Judge. It is still open to the plaintiff to apply to the Subordinate Judge to restore the suit to the board if he can induce the Judge to excuse the delay. We cannot direct that the delay shall be excused but no doubt when the application is made everything that has been urged before us as regards the misunderstanding, which was the reason why the plaintiff did not make the application sooner, will be heard and considered by the Judge. The rule must be discharged.

N. H. *Rule discharged.*

RANGOON HIGH COURT.

CIVIL REFERENCE NO. 8 OF 1923.

December 14, 1923.

Present :—Mr. Justice Young, Mr. Justice May Oung and Mr. Justice Carr.

NANG MUN—PETITIONER
versus
LABYA NAW—RESPONDENT.

Divorce Act (IV of 1869), s. 10—Divorce—Petition by wife—Adultery and cruelty—Husband living with another woman—Wife required to live under orders of mistress.

A Kachin christian who was married to another Kachin Christian, reverted to Animism and began to live with a Shan woman. He refused to let his Christian wife live with him except as a lesser wife under the orders of the Shan woman as chief wife. The Christian wife could not bear this indignity and left him. The husband continued to live with the Shan woman and the Christian wife sued him for divorce ;

Held, that the petitioner was entitled to a divorce on the ground of adultery coupled with legal cruelty. In considering the question of cruelty the Court will take into consideration the husband's general conduct towards the wife and if this be of a character tending to degrade her, and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to hold the cruelty proved.

Swatman v. *Swatman*, 4 S. and T. 135 ; 164 E. R. 1467, relied on.

Civil reference for confirmation of a decree for divorce.

JUDGMENT.—In this reference for confirmation of a decree for divorce the parties are Kachins, and were, as found also by the trial judge, Christians at the time of marriage, though the respondent declares that he reverted to Animism a short time before the marriage.

Yet whatever he has done since, he was shortly before the marriage a Christian and asked to be married according to Christian rites. We think he was a Christian at the time of marriage.

JAYAVANT RAO NARAYAN DESHMUKH *v.* NARSING SAKHARAM DESHMUKH

Shortly after his marriage, he left his wife and went to Rangoon to get veterinary training there.

The course lasted three years, presumably till May 1921, and though in the first two years he had one month's holiday in each year, he did not spend it either with his wife or contribute to her support.

At the expiration of the three years, *i.e.* about May 1921, he returned to Bhamo as a veterinary assistant and soon afterwards proceeded to live with a Shan woman named Ma Tin.

About a year ago the petitioner went and stayed for about 9 days with the respondent and Ma Tin : she, however, quarrelled with Ma Tin, whereupon she says respondent kicked her and slapped her drawing blood ; she, however, continued to live in the house about 4 days and then finding that she was expected to live as the lesser wife and be under Ma Tin's orders, she left the house for good, being unable to bear the indignity. On these grounds she seeks for a divorce, which the learned Judge granted to her on the ground of desertion coupled with the fact that he was a Christian when he married the respondent and that he had since exchanged Christianity for Animism, and was living in adultery with Ma Tin. The desertion prior to her return to her husband if it was an abandonment contrary to her wish, was condoned by her return to her husband's house, and though I should be prepared to hold that he had deserted her by refusing to let her live with him unless Ma Tin lived with them as the chief wife, the date of this refusal was only about a year ago, therefore, there was no desertion for the statutory period of two years.

The adultery is similarly condoned, though I should hold that the offence was revived by the continuance of the relations with Ma Tin, after petitioner left the respondent's house. So far, therefore, the suit is premature. It remains to consider the last of the grounds found by the learned Judge, which is, that he had exchanged Christianity for another religion, and also, whether, the divorce can be granted on facts not relied on by the trial Court. The change of religion is no ground for a divorce ; it would be absurd if it were, nor is mere change of religion coupled with adultery a ground of divorce ; there has to be a change of religion coupled with the respondent having gone through a form of marriage with some other woman, a clause inserted in consequence of a Madras decision to the effect that a Hindu, who, after his conversion to Christianity and contraction of a Hindu marriage, reverted to Hinduism and re-aquired his rights of polygamy. If the fact that the respondent and Ma Tin lived together openly as husband and wife constitutes marriage amongst Kachins, as it would do if the parties were Burmans, I should be prepared to hold that there was a ground of divorce even though there was no actual marriage form gone through, but I think the decree may be supported on the ground of adultery coupled with cruelty, the cruelty being the refusal to let her live with him and Ma Tin except as a lesser wife under the orders of Ma Tin, an indignity which the petitioner says she could not bear, and so preferred to leave the house. "The Court will take into consideration the husband's general conduct towards the wife and if this be of a character tending to degrade her, and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to hold the cruelty proved." *Swatman* v. *Swatman* (1).

I would confirm the decree.

Z. K. *Decree confirmed.*

(1) 4 S. and T. 135 ; 164 E. R. 1467.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 213 OF 1923.

January 25, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

JAYAVANT RAO NARAYAN DESHMUKH —APPLICANT

versus

NARSING SAKHARAM DESHMUKH —OPPONENT.

Civil Procedure Code (Act V of 1908), ss. 52, 152—Personal decree against legal representative—Amendment of decree—Belated application, whether maintainable.

JAI NARAIN *v.* RAMJI LAL

It is not competent to a Court to pass a decree against the legal representative of a deceased defendant so as to make him personally liable and the mistake should be rectified even though it is brought to the notice of the Court at a rather late stage of the proceedings.

Appeal from the decision of the District Judge, Nasik, in Miscelleneous Appeal No. 32 of 1921.

Mr. *D. R. Patwardhan*, for the Applicant.

Mr. *D. A. Tuljupurkar*, for the Opponent.

JUDGMENT.—A suit was brought against one Narayanrao in the Court of the Joint Subordinate Judge at Nasik, being Civil Suit No. 225 of 1917. Narayanrao died pending the proceedings, and his son was brought on the record as his legal representative on the 16th June 1918. The suit was dismissed on the 20th June 1918. But in appeal the decree of the trial Court was reversed and a decree was passed against the son on the 16th June 1919. The proper decree of the Court would have been against the son as the legal representative of his father to the extent of any assets which might come into his hands from the estate of his father. No one, however, seems to have taken any notice of the error which had been made and even in 1920, when the *Darkhast* was filed Narayanrao's son paid Rs. 10. A fresh *Darkhast* was taken out in 1921 asking for the personal arrest of the present petitioner who then applied for a review of the decree of the Appellate Court for the purpose of amending the decree in conformity with section 52 of the Civil Procedure Code. The District Judge considered that there was no error apparent on the face of the decree ; that it would have been an error of this description if the petitioner when brought on the record had asked the Trial Court not to pass a decree against him, and if a decree had been made, it should be made against the estate of the deceased which might come into his hands ; and that no such prayer was made. It seems to me it is not an excuse for an error of this description that the party affected by the error made no application at the time. To pass a decree against the legal representative of the deceased defendant so as to make him personally liable is not, in my opinion, competent to a Court to direct. When the attention of the Court was drawn to the error, even, although it might be at a rather late stage of the proceedings, there was no reason why on that account the mistake should not be remedied. I think the Rule must be made absolute and the decree must be amended so as to direct the payment by the defendant out of the assets which may have come into his hands from the estate belonging to his deceased father. No order as to costs.

Decree amended,
Rule made absolute.

K. S. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2644 OF 1922.

March 15, 1923.

Present :—Mr. Justice Moti Sagar.

JAI NARAIN—PLAINTIFF—APPELLANT
versus
RAMJI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal - New plea—Point of law patent on the record.

A point of law which is patent on the record may be raised for the first time in appeal.

Appeal from the decree of the District Judge, Delhi, dated the 25th July, 1922.

Mr. *Amar Nath Chona*, for the Appellant.

Messrs. *N. C. Mehra* and *Shamiar Chand*, for the Respondents.

JUDGMENT.—The facts of the case giving rise to the second appeal are very simple, and may shortly be stated as follows :—

On the 23rd of August, 1910, one Ramji Lal mortgaged a house in village Khera Kalan in the Delhi Province to one Moti Ram for a sum of Rs. 70 by means of an unregistered

mortgage-deed. Shortly after, Moti Ram died and was succeeded by his mother *Musammat* Phulo who sold her rights under the mortgage-deed in question to Jai Narain, plaintiff. On the 26th of March, 1913, Ramji Lal sold the house in question to Nathu, defendant. Nathu has now died and has been succeeded by his sons Lal Chand, Des Raj and Nanhun, defendants Nos. 2, 3 and 4 in this case. On the 17th of August, 1921, the plaintiff Jai Narain brought the present suit for the recovery of Rs. 200 due on his mortgage and prayed that the sum claimed be made a charge on the property mortgaged. The suit was resisted by the defendants, sons of Nathu, on the ground that they were holding the property under a registered sale-deed and that they had no knowledge of any prior encumbrance in favour of the plaintiff.

The following issues were framed :—

(1) Did Ramji Lal execute the mortgage-deed for consideration in favour of Moti Ram ?

(2) Did he promise to pay interest and how much interest is the plaintiff entitled to ?

(3) If the case of the plaintiff is proved what is the effect of the sale in favour of the defendants Nos. 2 to 4 ?

The Trial Court found in favour of the plaintiff and decreed the claim. The learned District Judge, however, came to a contrary finding and held that under section 50 of the Indian Registration Act the defendants' registered deed of sale had priority over the plaintiff's unregistered deed of mortgage. As a result of this finding the plaintiff's suit was dismissed in its entirety.

The plaintiff has now come up in second appeal to this Court, and it has been contended on his behalf that the defendants had not raised any plea in the trial Court on the question of the priority of their sale-deed over the plaintiff's mortgage deed and that in these circumstances the learned District Judge was not justified in allowing plaintiff to raise an entirely new point for the first time in appeal to his Court ; in my opinion there is no substance in this contention and it must be overruled. It is clear from the written pleas filed by the defenants that the plea had been distinctly raised and an issue framed by the Trial Court on this point. In the grounds of appeal to the lower Appellate Court also the point was specifically raised, and it cannot, therefore, be said that the plaintiff was taken entirely unawares or that he was in any way prejudiced by the learned District Judge allowing parties to address arguments upon this point. In any case the point was one of law and patent upon the face of the record, and the learned vakil for the appellant has not been able to cite any authority why in the case of competition between a registered and an unregistered deed, the registered deed is not entitled to have priority. In my opinion there is no force in this appeal and I dismiss it with costs throughout.

K. S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

CIVIL APPLICATION NO. 225 OF 1922.

March 8, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

D. B. MANKE—PLAINTIFF—APPLICANT
versus
B. WALWEKAR, SECRETARY, SEW SPORTS CLUB, BOMBAY—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 151, O. IX r. 9—Suit dismissed for default—Restoration, application for—Second default—Application, whether can be restored—Court, inherent power of.

There is no rule in the Code of Civil Procedure that enables the Court to restore an application made under O IX, r. 9 of the Code which has been dismissed for want of prosecution.

Nor can the Court make such an order in the exercise of its inherent powers under section 151 of the Code.

Application against the order of Small Cause Court Judge, Bombay, in Suit No. 283 of 1922.

Mr. *V. D. Limaye*, for the Applicant.

UMME KHAIR *v.* AZIZ ALI

Messrs. *T. N. Walavalkar* and *K. M. Bodas*, for the Opponent.

JUDGMENT.—The plaintiff filed a suit No. 283 of 1922 in the Small Causes Court, Bombay, to recover wages from the Opponent. The suit was decreed *ex parte* because although the Opponent engaged a pleader he did not attempt to contest the suit at the hearing. The Opponent then filed an application for setting aside of the *ex parte* decree and notice was issued to the plaintiff and the day fixed for hearing was 10th April 1922. That notice was issued under O. IX, r. 9. The notice was struck off for want of prosecution. Again the Opponent presented an application for setting aside the *ex-parte* decree. That was clearly time-barred, the Court considered that it was an application to restore the application previously made under O. IX, r. 9. Considering the application as restored, it passed an order against the plaintiff for a new trial. The application is made to us to revise that order as being without jurisdiction. It cannot be said that there is any rule in the Code of Civil Procedure that enables the Court to restore an application made under O. IX, r. 9, which has been dismissed for want of prosecution. It is urged upon us that the Court has inherent powers to make orders within the provisions of section 151 and that this was an order made accordingly. There is no reference made in the decision of the Court that the order was made under section 151. It is quite clear that if that section had been considered, the order under revision could not possibly have been made under it. That section gives the Court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The plaintiff has got a decree and the defendant had every opportunity of appearing in Court at the time of hearing and also when notices were issued by him against the plaintiff for a new trial. It cannot be said, therefore, that in any circumstance it is necessary for the ends of justice that he should have yet another opportunity of harassing the successful party. Therefore the rule is made absolute with costs.

K. S. D. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 833 OF 1920.

January 20, 1920.

Present:—Mr. Justice Stuart.

Musammat UMME KHAIR—PLAINTIFF—APPELLANT

versus

AZIZ ALI—DEFENDANT—RESPONDENT.

Suits, Valuation of—General rule—Value assigned by plaintiff—Value found by Court—Jurisdiction, appellate, how determined—Suit decided unsatisfactorily—Court, inherent power of—Civil Procedure Code (Act V of 1885) s. 151.

The value of the subject-matter of a suit is the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that either purposely or through gross negligence the true value of the suit has been altogether misrepresented in the plaint.

Mahabir Singh v. *Behari Lal*, 13 A. 320; A. W. N. (1891) 107; 7 Ind. Dec. (N.S.) 202; *Madho Das* v. *Ramji Patak*, 16 A. 286; A. W. N. 1 (1894) 84; 8 Ind. Dec. (N.S.) 186, followed.

In civil suits the valuation given by the plaintiff determines the jurisdiction both originally and in appeal.

Where the plaintiff fixes the value at a certain minimum plus as much more as the Court may find due on the evidence, the valuation should then be taken to be value as found by the Court.

Where both the Trial Court and the Court of first appeal fail to decide a matter satisfactorily, the High Court should exercise its inherent jurisdiction under section 151 of the Code of Civil Procedure and wipe out the whole proceedings and send back the case for trial.

Mr. *Nehal Chand*, for the Appellant.

Mr. *Raza Ali*, for the Respondent.

JUDGMENT.—The handling of the case both by the parties and by the Courts below has been anything but satisfactory. The plaintiff *Musammat* Umme Khair instituted a suit in the Court of an Assistant Collector of the first class for arrears of profits. The suit was under the provisions of section 165 of the Tenancy Act. The plaint as it stood should

have been sent back for amendment, for it asserted that the *mahal* in question consisted of 72 *sishams* of which the plaintiff owned 19 of which Hamid Hasan owned 15 and Nur Jahan owned 16 and that the plaintiff was in possession of 41. The principal defendant is a certain Aziz Ali, who is never mentioned in the plaint as holding anything. The plaintiff should have been asked to be a little more explicit as to the persons against whom she made her claim. Aziz Ali was of course defendant. Aziz Ali put in an objection that he had not collected anything more than what was due to him. The plaintiff claimed Rs. 70 only but added that if anything more was due to her she should receive it. The case then went on to hearing. The Assistant Collector framed the following luminous issue "What is the correct amount of arrears of profit and with whom it is due." That is all. The hearing then proceeded according to the worst traditions of the Revenue Courts. No evidence was called, not even that of the *patwari*, but a certain *Babu* Bindeshwari Pershad was appointed as Commissioner. *Babu* Bindeshri Pershad put in a statement which went to show that Aziz Ali had collected Rs. 158—5—1 more than his share. If this were the case a certain proportion would have been due to the plaintiff and a certain proportion to the other sharers. The Assistant Collector did not trouble to take any further evidence and refused to call Bindeshri Pershad as a witness although he was asked to do so. He decided the case breezily by awarding the whole of the Rs. 158—5—1 to the plaintiff. Aziz Ali appealed. The plaintiff met him on appeal by the plea that no appeal lay because the suit was a suit for less than Rs. 100 and under section 177 of the Tenancy Act, an appeal in such a suit only lies to the District Judge from the decree of an Assistant Collector of the first class, if the amount or value of the subject-matter exceeds Rs. 100. The plaintiff's plea was certainly ingenious. It is to be noted, the plaintiff sued for Rs. 70 and asked more if she could get it. Receiving Rs. 158—5—1, she then objected to the defendant's appealing because she said she only asked for Rs. 70. The Judge, however, refused to pay any attention to this plea and heard the appeal on the merits. On the merits he found that Aziz Ali had been making collection both on behalf of himself and another sharer called Nur Jahan and that he had not collected in excess in respect of the two. He, therefore, dismissed the suit. The plaintiff has filed a second appeal, the first point taken being that no appeal lay to the District Judge. This is a point of some importance. This Court has undoubtedly laid down in the case of *Mahabir Singh* v. *Behari Lal* (1), that the value of the subject-matter of the suit must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that either purposely or through gross negligence the true value of the suit has been altogether misrepresented in the plaint. This decision was affirmed in the case of *Madho Das* v. *Ramji Patak* (2). It obviously is the case that in civil suits the valuation given by the plaintiff determines the jurisdiction both originally and in appeal, but it has nowhere been laid down that where the plaintiff fixes the value at a certain minimum plus as much more as the Court may find due on the evidence, the valuation should then be taken to be the minimum value assigned by the plaintiff in the plaint and should not be taken to be the value as found by the Court. Under the peculiar conditions of the present Tenancy Act it is obvious that unless in a case of this kind the valuation be taken to be the value as found by the Court, the plaintiff is given a most unfair advantage. By putting her relief at Rs. 70 and adding that she wished as much more as the evidence disclosed, she was not confined to a relief of Rs. 70. By paying later an extra Court-fee she obtained a decree for Rs. 158—5—1. She cannot, in my opinion, be allowed thus to turn round and say that no appeal lies. She could either have taken Rs. 70 in which case no appeal would have lain or taken Rs. 158 subject to an appeal. So upon this point I agree with the learned District Judge. But the difficulty in the case is that the learned District Judge had absolutely no evidence before him on which he could find that Aziz Ali had been making collections on behalf of Nur Jahan. True it is urged by the Counsel for the

(1) 13 A. 320 ; A. W. N. (1891) 107 ; 7 Ind. Dec. (N. S.) 202.

(2) 16 A. 286 ; A. W. N. (1894) 84 ; 8 Ind. Dec. (N. S.) 186.

respondent that there was no evidence upon which the suit could have been decreed. But this is not exactly correct. The statement of the Commissioner, unsatisfactory as it is, is evidence of a sort although its value has been very largely diminished by the circumstance that the Assistant Collector did not call him as a witness when requested to do so. I am thus left with a judgment of the Assistant Collector, which is about as unsatisfactory as it can be, and a decision of the lower Appellate Court, which has proceeded upon no evidence. The question is what should be done. It is clearly a case for which section 151, Civil Procedure Code makes provision. The matter having been decided unsatisfactorily, I wipe out the whole proceedings and send the case back to the successor of the Assistant Collector to be tried over again. I trust on this occasion it will be tried more satisfactorily. Costs will follow the result.

K. S. D. *Case remanded.*
N. H.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 201 OF 1923.

February 5, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

ANGIRBAI GULABRAO POWAR —DEFENDANT—APPELLANT

versus

PANDURANG BALKRISHNA POWAR —PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Mother succeeding son, whether can adopt.

A Hindu mother, who succeeds to the estate of her son is entitled to make an adoption, where the son has died without leaving any other nearer heir, even though he may have attained the age of ceremonial competence and may have been married before his death.

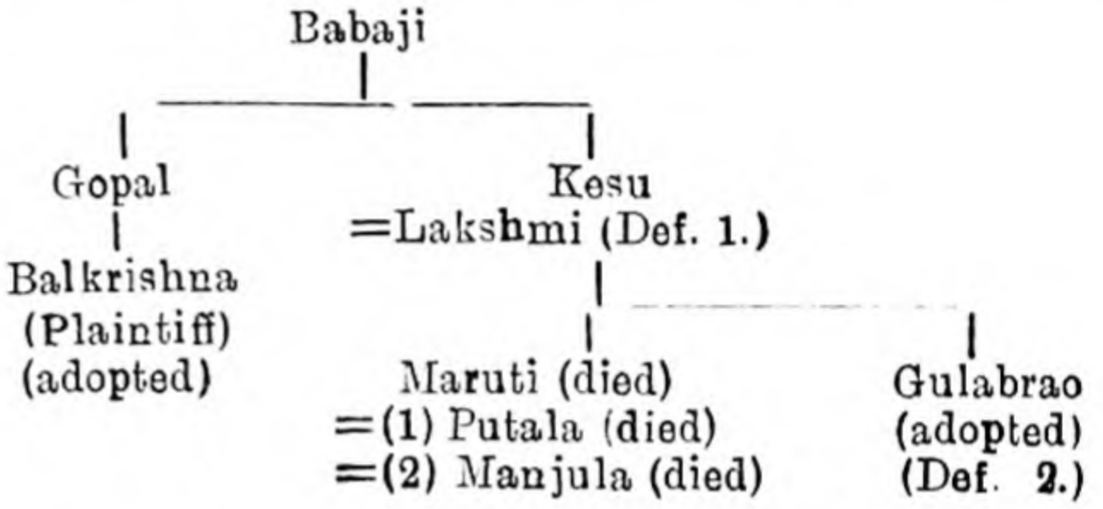
Appeal from the decision of First Class Subordinate Judge, Satara, in Appeal No. 388 of 1921 reversing the decree passed by the Subordinate Judge, Karad, in Civil Suit No. 18 of 1917.

Mr. *G. N. Thakor*, with Mr. *P. V. Kane*, for the Appellant.

Mr. *H. C. Coyajee* with Mr. *D. C. Virkar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The genealogy of the parties in this appeal is as follows :—



Gopal and Kesu, the sons of Babaji, were divided. The plaintiff in this case is the grandson of Gopal. Kesu died leaving a widow Lakshmi, the first defendant, and a son Maruti. Maruti had two wives, but both died before him, so that on Maruti's death his mother Lakshmi succeeded to him as his heiress. Subsequently she adopted the second defendant. The plaintiff seeks to obtain a declaration that the second defendant is not a validly adopted son of the first defendant. The Trial Judge said :—

"As Maruti left no widow or issue, the defendant No. 1 had authority according to Hindu Law to adopt a son to her husband. I, therefore, find the third issue in the affirmative."

The appellate Judge considered himself bound by the authority in *Madana Mohana* v. *Purushothama* (1), and consequently, held Lakshmi's power of adoption had come to an end on the ground that Maruti had attained full legal capacity to continue the line, either by the birth of a natural born son or by the adoption to him of a son by his own widow. On a careful consideration of the judgment in that case, it seems to me that the question now in issue was not decided, for, in that case

(1) 46 Ind. Cas. 481 ; 45 I. A. 156; 20 Bom. L. R. 1041; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 23 C. W. N. 177 (P. C.).

admittedly Brojo Kishore left a widow, and consequently, his estate would go to her and not to his mother.

The point in issue was decided in *Venkappa Bapu* v. *Jivaji Krishna* (2). The head-note runs :—

"A mother succeeding as heir to her deceased son who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage, investiture or otherwise before his death."

So that the plaintiff's adoption was valid inasmuch as it only affected the interests, and did not affect the vested rights of others.

In *Ramkrishna* v. *Shamrao* (3), the converse was held, namely, that: —

" Where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

The opinion expressed by the Court in that case appears to be *obiter* as the point in issue was whether, where a Hindu grandmother succeeds as heir to her grandson who had died unmarried, her power to make an adoption was at an end. However the principle laid down by Chandavarkar, J., with regard to the case of a Hindu dying leaving a widow and a son was approved of in the case mentioned by the learned appellate Judge, *viz.*, *Madana Mohana* v. *Purushothama* (1).

In the Privy Council case of *Verabhai Ajubhai* v. *Bai Hiraba* (4), a Hindu died leaving a widow and a son, who died between fifteen and sixteen years of age and *unmarried*. The widow then adopted a son to her husband, and it was held that the adoption was valid. But the question did not arise how the case would have stood if it had been proved that the son had attained ceremonial competenee. Their Lordships said that that question might be open to controversy, and they saw no reason for pursuing the inquiry.

In *Madana Mohana* v. *Purushothama* (1), it is clear that Brojo Kishore left a widow, and the passage in the judgment, which I think might give rise to some difficulty, is as follows :—

" That widow was not a party to the suit, and, whether or not she had power to adopt to Brojo it has not been established against her that she had no such power. Their Lordships think it right to draw attention to this circumstance, but they do not desire to be understood as saying that even in its absence the succession of Brojo and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of Adikonda's widow, who was not the widow of the last owner and could not adopt a son to him."

Although *obiter* it is suggested in the last edition of Mayne, p. 154, that that passage left no doubt what their Lordships' view would have been if Brojo Kishore had died having attained full legal capacity to continue the line (by which I presume that their Lordships meant his being capable of begetting a son). The case came from Madras and the circumstances to which their Lordships thought it right to draw attention was the existence of a widow with a power to adopt and the word 'absence' refers to the power and not to the widow. Whether the son's widow has or has not a right to adopt, the decisive factor is her survival of her husband and the vestinig in her of a life estate in her husband's property. Whether the son has attained ceremonial competence or was capable of begetting a son would only be matters of importance as affecting his mother's right to adopt if he died unmarried or if his wife predeceased him, and with all due respect to the learned editor of Mayne, in my opinion these questions in this presidency have remained beyond controversy since the decision in *Venkappa Bapu* v. *Jivaji Krishna* (2) the correctness of which has never been disputed in this Court and has not been in any way disturbed by the *obiter dicta* in *Madana Mohana* v. *Purushothama*. (1) It seems to me that we must follow the *ratio decidendi* in the judgment of Mr. Justice Ranade, at p. 312, where he discusses whether the attain-

(2) 25 B. 306 ; 2 Bom. L. R. 1101.
(3) 26 B. 526; 4 Bom. L. R. 215.
(4) 27 B. 432 ; 5 Bom. L. R. 534 ; 7 C. W. N. 716 ; 30 I. A. 234 (P. C.).

ment of ceremonial competence of a son could affect the rights of his mother to adopt in case he died without leaving a son or a widow :—

" The limitation on the widow's powers has reference more to the ceremonial law than to the civil law as administered by the Court, and the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others. The vested rights of no other relations were affected by Tulsava's adoption of the plaintiff. "

I think, therefore, this appeal must be allowed and the suit must be dismissed with costs throughout.

Shah, J.—I agree. I desire to make it clear that Gopal and Kesu were divided, and that the contention of the plaintiff is that the mother had no right to adopt after the death of her son, Maruti, as he died after attaining the age of ceremonial competence and after he was married. It is found in the case that Maruti's wives predeceased him, and when Maruti died there was no nearer heir to him than his mother. Lakshmi inherited Maruti's estate as his mother and afterwards adopted defendant No. 2. An adoption effected by the mother under such circumstances according to the decisions of this Presidency is valid. See *Gavdappa* v. *Girimallappa* (5), *Sangapa* v. *Vyasapa* (6) and *Venkappa Bapu* v. *Jivaji Krishna* (2). It is quite true that in *Verabhai Ajubhai* v. *Bai Hiraba* (4) this question as to the power of the mother to adopt after the son had attained the age of ceremonial competence was raised, but their Lordships of the Privy Council did not decide that question ; and it may be said that in fact there is no decision up to the present day in which the power of the mother to adopt after her son's death when the son has left no nearer heir than herself, has been held to come to an end in consequence of the circumstance that at the time of his death the son had attained the age of ceremonial competence or was married. The observations of their Lordships of the Privy Council in *Madana Mohana* v. *Purushothama* (1) relate to a different state of facts. In that case it is clear that the son had left a widow, and it is not disputed and cannot be disputed, that if the son leaves a widow or any other heir except the mother, then the power of the mother to adopt would come to an end. These observations do not suggest, in my opinion, that if the son had attained the age of ceremonial competence or was married before his death and if the mother inherited his estate, the mother would not be competent to adopt or that in such a case the power of the mother to adopt would come to an end. In the absence of any decisions to the contrary, it seems to me that the view taken by Mr. Justice Ranade in *Venkappa Babu* v. *Jivagi Krishna* (2) that the mother is entitled to adopt, when the son has died without leaving any other near heir even though he may have attained the age of ceremonial competence and may have been maried before his death, must be accepted.

Z. K. *Appeal allowed.*

(5) 19 B. 331 10 Ind. Dec. (N. S.) 224.
(6) (1896) P. J. 528.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 300 OF 1920.

March 27, 1922.

Present :—Mr. Justice Coutts and Mr. Justice Ross.

Musammat MAKHDUMAN—DEFENDANT—APPELLANT
versus
SAIYED ALTAF HUSSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 91, scope of—Disposition of property—Deed not produced—Oral evidence of transaction, whether barred.

All that section 91 provides is that when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or disposition of property, except the document itself. This, however, refers only to the method of proof of the terms of contract, grant or disposition of property ; it does not exclude other proof of the transaction itself.

MAKHDUMAN *v.* SAIYED ALTAF HUSSAIN

Appeal against a decision of the Additional Subordinate Judge, Gaya.

S. M. Mullick and *Siva Narain Bose*, for the Appellant.

Mr. *Kailaspati*, for the Respondents.

JUDGMENT.

Coutts, J.—This appeal is against a decision of the Additional Subordinate Judge of Gaya, dismissing an appeal against the decision of the Munsif in a suit which was brought by one Saiyed Altaf Hussain and others for a declaration of their permanent *mokarrari* interest in 10 *dams* and odd share of village Aurapokhar.

The case of the plaintiff is that 8 annas *milkiat* of the village originally belonged to the ancestors of Saiyid Abdul Rahim and Sayid Fazl Tauhid. These persons granted *mokarrari* of their 8 annas *milkiat* to *Musammat* Hayatan, the widow of Shah Mehdi Ali, by a *patta* dated the 4th of February 1805. Out of this 8 annas *mokarrari* 4 annas went to Shah Rahat Hussain, Mehdi's brother's son and 4 annas remained with *Musammat* Hayatan. Saiyed Muhammad Nasir, one of the sons of Rahat, got by inheritance 19 *dams* and odd out of the 4 annas *mokarrari* which had gone to Rahat and in respect of this he executed a *Bainakasha* in favour of his wife *Musammat* Kubra in 1895. In the following year *Musammat* Kubra executed a *kabala* conveying this 19 *dams* and odd to the plaintiff No. 1 in 1915 executed a *darmokarrari* deed in favour of his sons, plaintiffs Nos. 2 and 3. During the survey, however, the defendant No. 13 and the defendant No. 6 fraudulently arranged that the defendant No. 1 should get the name of the plaintiff No. 1 recorded only in respect of 1 *dam* 19 *kowris* and odd out of the 19 *dams* as *mokarraridar*.

The defendant's main plea was that neither Rahat Hussain nor his sons, including Nazir, nor *Musammat* Kubra had any interest in the *mokarrari*. He alleged that the suit was barred by limitation as the plaintiff had not been in possession within 12 years, that out of the 8 annas *mokarrari* defendant No. 1 got 4 annas from her mother-in-law Hayatan as a present and the other 4 annas was divided amongst the heirs of Hayatan. Her husband gave her 18 *dams* and odd out of his own inherited share in lieu of her dower. Later on she became possessed of 4 annas 18 dams *milkat* by virtue of a *kabala*, dated the 22nd of June 1898, and thus her *milkiat* and *mokarrari* right became equal in extent and she was accordingly recorded correctly in the *khatian*.

The suit was decreed in the Court of first instance, and this decree has been upheld on appeal by the Additional Subordinate Judge. The defendant No. 1 has appealed to this Court.

The first point urged in appeal is that as the *Bainukasha* deed has not been produced, the plaintiff is not entitled to adduce evidence of this transaction, and this being so the plaintiff has failed to establish his title. This argument is based on a misapprehension of scope of section 91 of the Evidence Act. All that section 91 provides is that when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or disposition of property, except the document itself. This, however, refers only to the method of proof of the terms of contract, grant or disposition of property ; it does not exclude other proof of the transaction itself, and this being so, the Courts below were entitled to consider the other evidence which was adduced in proof of the *Bainukasha* transaction.

The next point urged is that certain documents which have been relied on by the learned Subordinate Judge are not admissible in evidence. These are exhibits 9, 7 and 3. From exhibit 9 it appears that one Saiyed Mehdi Hussain brought a suit for specific performance of contract of sale against *Musammat* Kubra and the plaintiff No. 1. In that suit it was urged that *Musammat* Kubra had entered into a contract to sell her *mokarrari* share to Mehdi Hussain, and in that suit neither the title of *Musammat* Kubra nor the title of Rahat Hussain was denied, although the defendant No. 13, the husband of defendant No 1, gave evidence against the plaintiff. It is clear that the husband of the defendants No. 1 has for long been trying to dispossess the plaintiff No. 1 from the disputed share. That document then is clearly evidence for

what it is worth. The next document is exhibit 7. This mentions that Nazir gave an *ijara* of 14 *dams* and odd share along with other properties to the defendant No. 13, and what the learned Subordinate Judge says in regard to this is that this share although it is stated to be *milkiat* evidently refers to the *mokarrari* interest as it is nobody's case that Nazir had any share in the *milkiat* of village of Rampokhar. The inference may perhaps be a wrong one, but it is certainly a legitimate one to draw and here again the document is clearly evidence for what it is worth. Similarly exhibit 3 also shows that defendant No. 13 had knowledge of the plaintiff No. 1's purchase and this again is evidence. The Courts below were therefore entitled to consider all these documents, and their findings are findings of fact with which we cannot interfere in second appeal.

The last point urged is that the decree which has been granted to the plaintiff contains a declaration that the defendant No. 1 is the proprietor, and it is contended that this is not a declaration to which the plaintiff is entitled. This is admitted by the learned Vakil for the respondents and this declaration should clearly be omitted from the decree.

In the result, then, I would dismiss this appeal except for the slight modification to which I have referred, namely, that that part of the decree, which declares that the defendant No. 1 is the proprietor, should be expunged. The appellant will bear the costs.

Das J.—I agree.

N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 5 OF 1921.

March 1, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Coyajee.

IRABASAPPA BIN GANGAPPA DALAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BHADRAWA KOM DOD BASAPPA PRABHU SHETTI—DEFENDANT—RESPONDENT.

Second appeal—Finding of fact—Distorted view of evidence—High Court, whether will interfere.

Where the lower AppellateCourt has taken a wholly distorted and indefensible view of the evidence in the case, the High Court will interfere with a finding of fact on second appeal.

Appeal from the decision of the First Class Sub-Judge, Dharwar, in Suit No. 73 of 1919.

Messrs. *Bhadurji* and *Nilkanth Atmaram*, for the Appellants.

Messrs. *Strangman* and *A. G. Desai*, for the Respondent.

JUDGMENT.—The plaintiff, a minor, filed this suit through his next friend, the natural father, to get a declaration of his title under a Will which he propounded as being the last Will of one Dod-Basappa. This document is a holograph Will, purporting to have been written and executed by Dod-Basappa on the 16th September 1918. Dod-Basappa at that time was a comparatively young man, but he was suffering from chronic asthma; and although a person may be suffering from asthma for many years without any fatal result, it is common knowledge that attacks of asthma are very unpleasant. They may vary in severity, and one of these severe attacks might have induced a desire in Dod-Basappa to make provision for the future.

Briefly, the Will, after reciting that the testator had no heirs such as near Bhaubands etc., and no male or female issue, but only his

wife Bhadri, directed his wife to adopt the plaintiff, and no one else. Then there is a further direction that if the plaintiff was not adopted by Bhadri, even then he was to be the full owner of the testator's property.

There is nothing whatever against the possibility of Dod-Basappa having executed such a document. It has been suggested, and this suggestion found favour with the learned Judge, that the very iniquitous nature of the Will was *per se* a cogent factor against the plaintiff's case. As the learned Judge says "the plaintiff's case totters to the ground by the sheer weight of its own wickedness." But we see nothing unnatural in a Hindu, sonless, and not in a good state of health, writing a document by which directions are given to the widow to adopt the testator's nephew. He would be aware that if he died, and the adoption was made, the adopted son would succeed to the property, but during his minority the property would be managed by the widow, and the widow in any event would be entitled to maintenance even if she refused to adopt, and the boy directed to be adopted became the owner of the property. That would not, and could not, defeat the widow's rights to maintenance.

The plaintiff's case is that the Will having been made on the 16th, the testator left on the 17th for Hubli. Before leaving, he handed the Will to his aunt Irawa for safe custody. She says that after making the Will Dod-Basappa handed it to her and asked her to keep it, saying that he was suffering from asthma and that he had made a document in plaintiff's favour. He not only told her and sister Rachaway the purport of the Will, but also read out the Will to them. He put the Will in a piece of cloth, and while delivering it to her, told her to return the document, if he recovered from his illness and returned home, if not, to hand it over to the plaintiff's father. The learned Judge says that "this story sounds like a fiction. It was ridiculously absurd and incredible, if not actually inconceivable, that a business man like Dod-Basappa would deposit for safe custody an important document like a Will with an old and illiterate woman albeit she was his aunt."

We do not know whether Dod-Basappa was a business man. But in any event we do not see anything incredible or inconceivable in his handing over this document to Irawa for safe custody, while he went away to Hubli and to Kopbal.

Dod-Basappa was treated by a Doctor at Hubli, and then went on to Kopbal, where he fell ill in December and died on the 7th. 10 or 15 days after his death the plaintiff's father went to Nidgundi and obtained the Will from Irawa. Certainly, the Will was produced by him by the 15th of January, by which time the question with regard to the correction of the Record of Rights had become important, and it is difficult to say that the delay of 20 days in producing the Will must necessarily throw doubt on its genuineness.

We see, therefore, nothing in the circumstances which would throw any suspicion on the story told by the plaintiff's witnesses. Therefore, the important question is whether the evidence of the attesting witnesses could be relied upon, remembering always that this purports to be a holograph Will entirely written by the testator, and it is certainly extremely improbable that a person wishing to put forward a forged Will, would run the risk of imitating the handwriting of the deceased, or get it imitated by some one else, when it would be so easy to attack a forged document spreading over more than a folio page. It would be much simpler to have had the Will written out by a professional writer, in which case it would only be necessary to imitate the signature of the deceased. Therefore there is nothing improbable in the whole story put forward by the plaintiff with regard to the genuineness of the Will, and on the other hand when a holograph Will is attacked, the probability against such a forgery being attempted is very strong.

Having read the evidence of the witnesses who attested the Will, we do not think the strictures made against them by the learned Judge can be supported. He says "their evidence is not free from conspicuous defects. Much of it is obscure and unsatisfactory. The boldness of it is highly suspicious. The witnesses come on the scene, hear the Will read out by the testator, see him appending his signature, attest the Will and then disperse. This is their story in a condensed shape."

There are many cases where that is exactly what happens with regard to the attestation of a Will. A witness is called to sign. He is either told, or not told, that the document which he is being asked to attest is a Will. It is not necessary even for the Will to be read out to him. He sees the testator sign the document, and then he attests and then he is told to go.

Then the Judge says. " They (the attesting witnesses) are singularly reticent as to the other important particulars concerning the Will. They do not know whether any draft was prepared or by whom or whether any lawyer or other person was consulted. None of them, not even Huchappa, who claims to be his intimate friend and was his partner in a gin, was consulted by the deceased in respect of the Will. They did not know until the last moment why they were summoned by the so-called testator. They do not even pretend to have witnessed the writing of the Will by Dod-Basappa or to speak to the identification of his handwriting. They do not say why the Will was left unregistered, when it could have been easily registered or why the deceased made no provision at all for his wife, whom he left absolutely at the mercy of a stranger like the plaintiff's father. On all these important matters the witnesses throw no light at all, though they speak in a parrot-like fashion the minute particulars as to the order in which they attended and left the place and the order in which they attested the Will." We should have been very much surprised if they had possessed all that information which the Judge expected of persons who attest a Will, with the result that if they could not give all these details to the Court, suspicion would be cast on their evidence.

No doubt, in the first place, the plaintiff has to prove the document on which he relies, but when he has once gone as far as putting before the Court a *prima facie* case which bears the signs of its being genuine, then it is for the defendant to produce reliable grounds for upsetting the plaintiff's case, and satisfy the Court that it is not only improbable but impossible.

With regard to the writing of the Will, the Judge has to admit that there is much resemblance in the signature on the Will with the deceased's signature in the school register Exhibit 146. He compares the writing of the Will with the hand-writing on certain post-cards written by the deceased, and sets out many differences with regard to particular letters, comparing those letters in the Will with similar letters in the post-cards.

Now, as the learned Counsel for the appellant pointed out, it is not fair to compare the free handwriting spread over a folio page, with plenty of space, and a post-card in which the writer has to condense all he wishes to say, in the exiguous space provided by the Post Office. The writing must necessarily be far more cramped, and naturally various letters in the post-card writing would differ from the writing which is not cramped. Therefore, although we do not profess to have any knowledge of Kanarese, we are not prepared to accept all these minute differences between the writing on the Will and the writing on the post-cards which are relied on by the learned Judge as helping him to arrive at the conclusion that the Will is a forgery.

The learned Judge himself was of opinion that the whole of the evidence produced by the defendants was suspicious and much of it concocted. That of course is not by itself conclusive, as the plaintiff had undoubtedly to prove the Will on which he relied. But it certainly shows the length to which the defendants were prepared to go in order to defeat the plaintiff's case. We cannot agree with the grounds which the learned Judge gives for not relying upon the evidence of the attesting witnesses, and the opinion he has formed as to the surrounding circumstances which went to support his appreciation of that evidence. It seems to us that having once made up his mind to dismiss the plaintiff's suit on the ground that the Will was a forgery, he was forced to take a distorted view of the plaintiff's evidence and the surrounding circumstances, in order to give reasons why he did not believe the plaintiff's case. Thus although we are adverse to upsetting the decision of the Court below on a question of fact, we think on a very careful consideration of the evidence in this case, and all the circumstances connected with it, that the Judge was not justified in dismissing the plaintiff's suit. Therefore, we must allow the appeal and hold

that the Will has been proved. But as the learned Judge points out " the first defendant cannot be ousted from the possession of the plaint property, unless she is first given an opportunity to adopt the plaintiff within a reasonable period of time, say six months or so. If she fails to adopt the plaintiff during this period, she should lose her right to the possession and enjoyment of the property." We think that was a right conclusion to come to in the events that have been proved. We direct that the 1st defendant should have from the time the proceedings reach the lower Court six months, within which to adopt the plaintiff, and in default of adoption, the plaintiff will have liberty to apply for a decree for possession. No order as to costs.

N. H. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 564 OF 1921.

January 3, 1922.

Present :—Mr. Justice Newbould and Mr. Justice Cuming.

GOUR CHANDRA GOSWAMI AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

THE CHAIRMAN OF THE COMMISSIONER OF THE NABADWIP MUNICIPALITY, DISTRICT NADIA—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. VIII —Inherent powers, exercise of—Court, whether can introduce new forms of procedure—Counter-claims.

The Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the law.

Order VIII of the Civil Procedure Code provides for dealing with set off but makes no provisions for counterclaims.

Messrs. *Dwarka Nath Mitra* and *Tarakeswar Pal Choudhury*, for the Petitioner.

Mr. *D. N. Bagchi*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the Munsif, first Court of Krishnagar, allowing the defendant, opposite party to file an additional written statement and to let it be treated as a cross-plaint. The suit between the parties is one for declaration that certain property was not liable to assessment to house tax.

The Code of Civil Procedure provides in O. VIII for dealing with set-off but makes no provision for counter-claims. In English Law the modern counter claim is the creation of the Judicature Act. Order VIII only provides for set off in suits for recovery of money. It is quite clear that there could be no set off in a suit like the present one. The Munsif was not justified in introducing the principle of English Law in the trial of a suit in this country. There would be no hardship on the defendant in requiring him to file a separate suit to obtain what he claimed as relief in his additional written statement. The usual procedure of trying two cross-suits together could be followed if the Court in which these suits were pending in the exercise of its discretion thought it desirable that that should be done. The Munsif was not justified in applying his powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the law.

We accordingly make this Rule absolute and set aside the order of the Munsif allowing the defendant's additional written statement to be treated as cross plaint. This order will be no bar to the defendants bringing a separate suit on the same cause of action if he thinks fit to do so.

The petitioner is entitled to his costs of this Rule. Hearing fee one gold mohur.

K. S. D. *Rule made absolute.*

RAMABAI *v.* HARNABAI

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 1, 1924.

Present :—Lord Shaw, Lord Blanesburgh and Sir John Edge.

RAMABAI—APPELLANT
versus
HARNABAI—RESPONDENT.

Hindu Law—Adoption, power to make—Disqualification—Leprosy.

Under the Hindu Law, leprosy, in order to deprive a person of the power of making an adoption, must be of a nature to cause deformity and unfitness for social intercourse.

Kayarohana Pathan v. *Subbaraya Thevan*, 19 Ind. Cas. 690 ; 38 M. 250 ; 13 M. L. T. 460 ; (1913) M. W. N. 642; 25 M. L. J. 251; *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Roghunandan Ramanuj Das*, 22 I. A. 94 ; 22 C. 843 ; 6 Sar. P. C. J. 536 ; 11 Ind. Dec. (N. S) 558 (P. C.), *Janardhan Pandurang* v. *Gopal*, 5 B. H. C. R. 145, (A. C. J.), referred to.

Mr. *Narasimham*, for the Appellant.

Messrs. *De Gwyther* and *Parikh*, for the Respondent.

JUDGMENT.—The case for the appellant has been stated with admirable clearness and brevity by his Counsel, but their Lordships do not think it necessary to call for any argument for the respondents.

This is an appeal from a decree of 5th December 1918 of the High Court of Judicature at Bombay, which affirmed a decree dated 1st November 1916, of the Court of the Additional First Class Subordinate Judge at Poona.

The only question submitted to the Board, and now subsisting, is as to the condition of body, and possibly of mind, of one Narayan Mawal. The appellant maintains that Narayan Mawal was so afflicted with leprosy as to deprive him of the position of being joint owner of certain family property, and, secondly to deprive him of the ability to make a valid adoption of a son. His natural son had died, and the adoption was made a few weeks before his death. Had Narayan not been a leper, this natural and proper act could not have been challenged.

In the opinion of the Board, no question of fact arises on this appeal. It appears to be definitely concluded by both of the Courts below, which both concur in their findings. The High Court in terms expresses approval of the decision of the Court of first instance; and the decision of the Court of first instance is to the effect that Narayan Mawal was not so crippled or disabled by bodily infirmity or deformity as to cease to be a useful member of society, capable of holding and enjoying property. Their findings show that, although he was afflicted with a certain type of leprosy, it was a type not very apparent except to minute inspection, and certainly a type which did not unfit him for performing both social and religious duties in company with others.

In these circumstances, the law of the case is attacked by appellant's Counsel, but the law of the case may be stated to have been well settled in India for very many years. In the case of *Kayarohana Pathan* v. *Subbaraya Thevan* (1) a joint judgment of Benson and Sundara Ayyar, JJ. concludes with the following proposition:—

"Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test."

In the case of *Mohunt Bhagawan Ramanuj Das* v. *Mohunt Roghunundun Ramanuj Das*(2), Sir Richard Couch delivered a judgment of this Board which substantially agreed with that test. Sir Richard Couch was already deeply committed on the subject for so far back as the year 1868, in the case of *Janardhan Pandurang* v. *Gopal* (3), he had expressed himself in nearly similar terms.

The result is that their Lordships will humbly advise His Majesty that this appeal be disallowed with costs.

Z. K *Appeal dismissed.*

Solicitors for the Appellants, *T. L. Wilson & Co.*

Solicitor for the Respondent, *Edward Dalgado.*

(1) 19 Ind. Cas. 690. 38 M. 250 ; 13 M. L T. 460; (1913) M. W. N. 642 ; 25 M. L. J. 251.
(2) 22 I. A. 94 ; 22 C. 843. 6 Sar. P. C. J. 536 ; 11 Ind. Dec. (N. S) 558 (P.C).
(3) 5 B. H. C. R. 145. (A. C. J.)

RULYA RAM *v.* RADAME

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2744 OF 1917.

June 14, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

RULYA RAM AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
Mt. B. RADAME AND ANOTHER—
DEFENDANTS—RESPONDENTS.

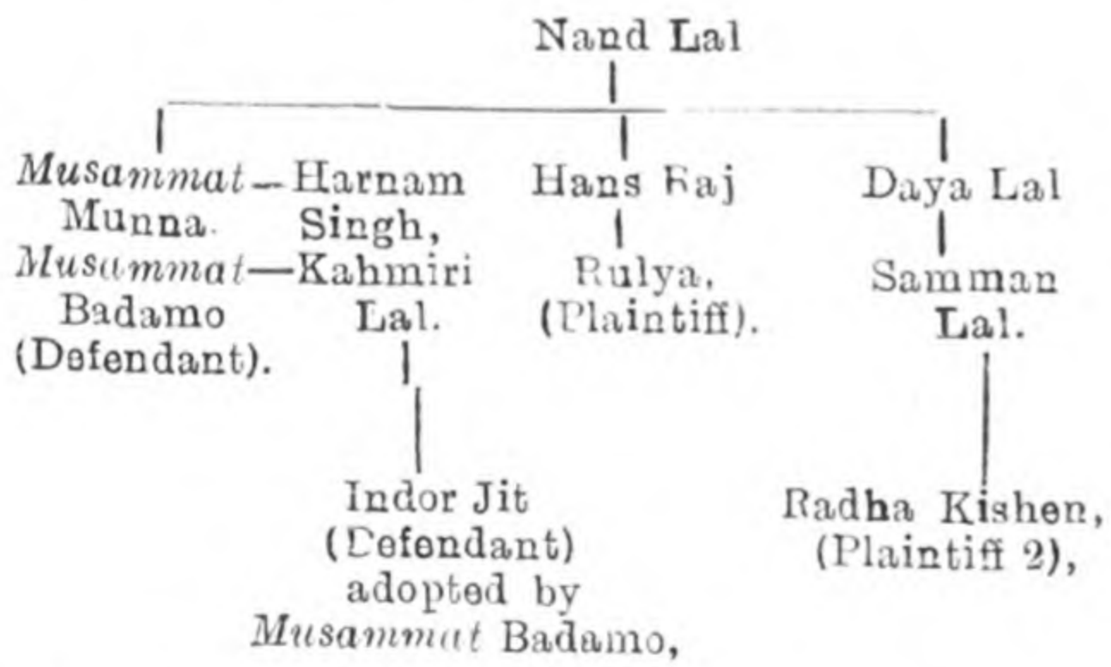
Specific Relief Act (I of 1877) s. 42—Adoption invalid—Presumptive heir—Declaratory suit, maintainability of.

A reversioner who is the presumptive heir can maintain a suit to have an adoption made by the life-tenant declared invalid so far as he himself is concerned.

Messrs. *Muhammad Rafi* and *Bakhshi Tek Chand*, for the Appellants.

Messrs. *Madan Gopal* and Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The following short pedigree-table will illustrate this case:—



The plaintiffs Rulya and Radha Kishen instituted a suit against *Musammat* Badamo and Indar Jit asking for a declaration to the effect that an alleged adoption by *Musammat* Badamo of Indar Jit should be declared illegal and set aside so far as the plaintiffs were concerned. The pleas raised by the defendants are indicated by the issues settled by the Trial Court (page 4 of the printed paper book). The Trial Court held that the adoption was invalid and that the plaintiffs' suit was well founded. During the course of the trial an application was put in on behalf of the plaintiffs to the effect that in their opinion it was not necessary to come to a decision with regard to issue No. 3. The Trial Court gave no decision on that issue holding that on the findings arrived at by it, it was not relevant. The plaintiffs having been granted a decree *Musammat* Badamo and Indar Jit preferred an appeal to the District Judge. There again, the plaintiffs respondents through their Counsel, urged that the decision on issue No. 3 was not essential for decision of the case. At the same time their Counsel said that if the Court should be of opinion that a decision was necessary, there was sufficient material on the record and a decision could be arrived at. The learned District Judge came to the conclusion that a decision on the said issue was imperative but considered that it was necessary to decide that issue as the plaintiffs appeared to be unwilling to have it decided. Holding that a suit for a mere declaration without any consequential relief did not lie, he accepted the appeal and dismissed the suit on the ground that no cause of action was disclosed. Against this dismissal the plaintiffs have come to this Court in second appeal through Mr. Tek Chand and we have heard Mr. Fakir Chand on behalf of the defendants respondents.

Various authorities have been cited before us by Mr. Tek Chand, for example, *Cheruvolu Punnamma* v. *Cheruvolu Perrazu* (1), *Kalova Kom* v. *Padapa* (2), *Soudagar Singh* v. *Pardip Narain Singh* (3). We do not, however, think it necessary to discuss these authorities as in our opinion the appeal must succeed.

Section 42 of the Specific Relief Act provided that any person entitled to any legal character may institute a suit against any person denying, or interested to deny, his title to such character and the plaintiff need not in such suit ask for any further relief. Here it seems to us that the question involved is one of the

(1) 29 M. 390; 16 M. L. J. 307; 1 M. L. T. 183.
(2) 1 B. 248; 1 Ind Dec (N. S.) 165.
(3) 43 Ind. Cas. 484; 45 C. 510; 45 I. A. 21; 4 P. L. W. 52; 34 M. L. J. 67; 23 M L. T. 31; 16 A. L. J. 61; 7 L. W. 146; 27 C. L. J. 186; 22 C. W. N. 436; (1918) M. W. N. 323; 20 Bom. L. R. 509.

status of the parties. In the Court below the defendants respondents admitted that the plaintiffs appellants were reversioners, and a perusal of the pedigree-table shows that ordinarily speaking the plaintiffs would succeed to any property left by Harnam Singh. In this case, therefore, it seems to us that they may well be termed presumptive heirs and therefore, they are entitled to challenge the adoption. In this view we are supported by Illustration (*f*) to section 42 of the Specific Relief Act. It may be that the defendants could prove that *Musammat* Badamo was the full owner of the estate left by Harnam Singh, and that for that reason the plaintiff had no right to the said property. That question has been raised in issue No. 3 and as the learned District Judge considered that a decision of that issue was necessary, in our opinion he should have adjudicated on that issue when the case was before him.

We accept this appeal and setting aside the order of the learned District Judge return the case to him for a re-hearing and disposal in accordance with law. Costs will be costs in the cause. Stamp on this appeal will be refunded.

N. H. *Order set aside.*

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CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 26 OF 1921.

January 9, 1923.

Present :—Mr. Justice Mookerjee and Mr. Justice Rankin.

HARISH CHANDRA SAHA—APPELLANT

versus

HARISH CHANDRA CHUCKERBUTTY AND OTHERS—RESPONDENTS.

Way, right of—Public high-way—Private pathway—Suit to enforce right—Special damage.

" By the Common Law of England, there are three distinct classes of rights of way and other similar rights. First, there are private rights, in the strict sense of the term, vested in the particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term, which exist for the benefit of all the Kings' subjects, and the source of these is ordinarily dedication."

A suit for the enforcement of a private right of way is maintainable without proof of special damage. It is only in the case of a public high-way that the question of special damage arises.

Appeal against the decree of Mr. Justice Panton, dated the 15th July 1921, in F. A. No. 778 of 1920.

Messrs. *Atul Chandra Gupta* and *Bhagirath Chandra Das*, for the Appellant.

Mr. *Gopal Chandra Das*, for the Respondents.

JUDGMENT.—This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Panton in a suit for declaration and enforcement of a village path-way in village Backrabad ordinarily known as Ram Chandrapore.

The plaintiffs asked for declaration of a village path-way used by all the people of the village for certain specified purposes. The defendants contended that the alleged path-way was not a public highway but was a permissive foot track. Thereupon several issues were raised ; the sixth was to the following effect :

" Did the lands of schedule 2 of the plaint ever appertain to a public gopath as alleged in the plaint : Was there any public gopath over the lands of schedule 1 of the plaint or any part of it ? If so, what was its breadth and have the defendants encroached upon it in the way described in the plaint, namely, by the erection of fences seven years prior to the institution of the suit."

The Trial Court considered the evidence and came to the conclusion that the case alleged by the plaintiffs had been made out. In one passage of his judgment, the Munsiff states that "subject to some difference between the parties as to the breadth of the gopath it is an admitted fact that the existence of th

gopath is admitted, subject only to the dispute as to the right of passage of men with ploughs etc., over the bari of the defendant No. 1 and the other defendants." The Munsiff then considered the evidence and held that the existence of the village path was established. He next discussed the question of the width of the gopath and summarised his conclusion in these terms: " It is no doubt a gopath used by the men of the locality and they have the right to pass with plough, cattle bundles, processions and with dead bodies." In the concluding portion of his judgment he directed the suit to be decreed in a modified way and declared the public right of gopath in the suit land.

The defendants appealed to the Subordinate Judge and two of the questions urged before him were formulated in the following terms: " (1) Whether the plaintiffs can institute the suit without proof of special damage and whether any special damage has been proved and (2) what was the extent and nature of the path and whether it is a public path." It would be observed that the plaintiffs did not ask for a declaration of a public high-way nor had any issue been raised to that effect. No question had further been raised in the Trial Court as to the proof of special damage to the plaintiffs, and how the matter came to be argued before the Subordinate Judge, has not been explained. The reason might have been that the Trial Court, in the concluding portion of the judgment, had given a declaration of what is loosely called " a public right of gopath " in the suit land. It is manifest however that there was some confusion of ideas in the arguments addressed to the Subordinate Judge. The parties apparently overlooked the distinction between the different classes of ways which were explained by Mr. Justice Wilson in the following well-known passage from his judgment in *Chunilal* v. *Ram Kishen Sahu* (1).

" It may be useful to premise that by the Common Law of England, there are three distinct classes of rights of way and other similar rights. First, there are private rights, in strict sense of the term, vested in the particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly there are public rights in the full sense of the term, which exist for the benefit of all the Queen's subjects, and the source of these is ordinarily dedication."

In our opinion, there can be no question that the suit was for the enforcement of a way of the second class namely, a village pathway, and had no reference to a way of the third class, namely, a public highway. This distinction has been overlooked, not infrequently, and Sir Lawrence Jenkins, C. J. had occasion to emphasise it again, in *Kali Charan Naskar* v. *Ramkumar Sardar* (2). It is only in the case of a public highway that the question of special damage arises; where the case is one of a village path, there is no question of special damage; *Harihar Das* v. *Chandra Kumar Guha*. (3) It follows that the Subordinate Judge should not have gone into the question of proof of special damage but should have confined himself to the extent and nature of the path.

But, the judgment of the Subordinate Judge shows that notwithstanding the confusion pointed out, he did in fact consider the real question in controversy, namely whether the existence of the alleged village path had been satisfactorily established by the evidence on the record. He states in one part of his judgment as follows: " That there was a village path there, is not disputed. In fact, it was admitted by the present appellant in the case under section 133 Criminal Procedure Code. What he then contended and now contends is that it was a path some three cubits, used for only passage of men of the village. The lower Court has found this contention to be untenable on the evidence on the record, and after a perusal of the entire oral and documentary evidence in the case, I am not disposed to disagree with him on the point". In this view, the Subordinate Judge has confirmed the decree of the Trial Court. That decree has been confirmed by Mr. Justice Panton.

(1) 15 C. 460 2 Ind. Jur. 425; 7 Ind. Dec. (N.S.) 892 (F. B).

(2) 18 Ind. Cas. 67; 17 C. W. N. 73.
(3) 49 Ind. Cas. 79; 23 C. W. N. 91.

MANSA RAM *v.* KALU RAM

We are of opinion that notwithstanding the use of inaccurate expressions in the judgment of the Subordinate Judge and possibly in one passage in the judgment of the Trial Court, the real question in controversy has been tried out. There is, consequently, no reason to set aside the concurrent decisions of all the Courts. We direct, however, that in the declaration which has been granted to the plaintiffs instead of the expression " public right of gopath," the expression " village right of gopath " be substituted ; subject to this amendment in the decree, the appeal will stand dismissed with costs.

N. H. *Decree modified.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2504 OF 1922.

March 17, 1923.

Present :—Mr. Justice Moti Sagar.

MANSA RAM—PLAINTIFF—APPELLANT
versus
KALU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement—User from time immemorial, plea of—Pleadings—New plea in appeal—Easement—Immemorial user.

Plaintiiff sued to restrain the defendants from taking water from a certain *kul* which he claimed to be the exclusive property of himself and his brother having been constructed by his grand-father. Defendants disputed the plaintiff's right of exclusive ownership and alleged that they had been taking water from this *kul* from time immemorial. The first Court having decreeed the suit, on appeal the District Judge came to the conclusion that the defendants had acquired an easement to irrigate their lands from the *kul* and dismissed the suit. Plaintiff appealed to the High Court :

Held (1) that the plea of user from time immemorial did not amount to plea of easement ;

(2) that the defendants could not put forward a new plea in appeal.

Appeal from the decree of the District Judge, Ambala, dated the 11th July 1922.

Mr. *Shamair Chand*, for the Appellant.

Dr. *Gokul Chand Narang*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the lower Appellate Court and it is not necessary to repeat them here at length. The sole question for determination in this case is whether the defendants have succeeded in establishing a right of easement to irrigate their lands from the *Kul* known as the *Baoriwali Kul* in the town of *Kalka* and claimed by the plaintiff and his brother Ganga Ram as their exclusive property. It appears that the *Kul* passes through the lands owned by the plaintiff and the defendants and it is alleged by the defendants that they have been using it from time immemorial. The plaintiff owns a garden in this town which is situated just below the Mandarwali land owned by defendants Nos. 2 to 11, and on a level higher to that of the land owned by defendant No. 1 Kalu. The plaintiff's case is that this *Kul* was constructed by his grand-father Hari Chand, and that no other person has the right to take water from it without his permission or consent. The defendants dispute the plaintiffs' right of exclusive ownership and alleged as already observed, that they have been taking water from this *Kul* for a very long time. The following issues were framed :—

1. Was the *Kul* in dispute constructed by Hari Chand, plaintiff's ancestor and have the plaintiff and his ancestors been irrigating their land solely from it ?

2. Have the defendants been irrigating their land from the *Baoriwali Kul* jointly with the plaintiff, and if so for how long ?

3. Is the suit barred by limitation ?

The Trial Court has found in favour of the plaintiff on all the issues and has decreed the suit. On appeal the learned District Judge has differed from the findings of the Trial Court and has come to the conclusion that the defendants have acquired an easement to irrigate their lands from the *Kul* in question. The suit has accordingly been dismissed. The plaintiff has now come up in second appeal to this Court and it has been contended on his behalf by Mr. Shamair Chand that no plea as to an easement had ever been set up by the defendants and that the learned District Judge was not justified in setting up

an entirely new case for them in appeal. He has contended that in any case an easement has not been established and that the plaintiff is consequently entitled to a decree. Dr. Gokal Chand, on the other hand, argues that usage from time immemorial had been set up and that this was tantamount to putting forward a plea of easement. He also argues that the *Kul* in question is not owned by the plaintiff and that it is a natural stream from which every person through whose land it passes is entitled to take water.

It is, however, clear that the contention as to the *Kul* in question being a natural stream had never been put forward in the Trial Court and that the only issues upon which the parties went to trial were :—

1. Whether the *Kul* was exclusively owned by the plaintiff or not, and

2. Whether the defendants have been using it for a sufficiently long time to enable them to defeat the plaintiff's claim. From the evidence produced it appears that it was the exclusive ownership of the *Kul* which was in question and not the fact that it was a natural stream or otherwise. The plaintiff in support of his contention relied upon an entry in the Settlement records of 1882 from which it appears that the *Kul* had been constructed by Hari Chand his grand-father. Other evidence was also produced in support of the plaintiff's right of exclusive ownership. Haria a witness on behalf of the defendants, admitted that the *Kul* belonged exclusively to the plaintiff and that he used to irrigate his garden with the water of that *Kul* with the permission of the former. It is clear from this evidence that the plea of the *Kul* being a natural stream was never even thought of and that it was put forward only for the first time in the lower Appellate Court. I do not think that the defendants were entitled to shift the grounds of their defence, and I must consequently overrule this contention.

As to the defendants having acquired a right of easement, it is obvious that it was never definitely stated by them that they have been using this *Kul* as an easement and as of right without interruption and for twenty years as required by section 26 of the Indian Limitation Act. What was stated by them in their pleas was that they had been using this *Kul* from time immemorial. This, in my opinion, does not amount to setting up a plea of easement, but in any case it appears to me that there is no evidence on the record in support of the finding that an easement had been acquired. The learned District Judge has referred to certain *Jamabandis* commencing from 1882 in which defendants' land has been described as *Kul* irrigated and from this description he has drawn an inference that land must have been irrigated by the *Baoriwali Kul* since 1882. I do not think that such an inference can legally be drawn from this entry. The lands may have been described as *Kul* irrigated, but this surely does not mean that they were as a matter of fact irrigated from *Kul* or that they were irrigated from this particular *Kul*. The description only means that the lands were capable of being irrigated from a *Kul*. There is no evidence on the record to show that the *Baoriwali Kul* was ever utilized from 1882 to 1906 for irrigating the defendants' lands. The *Khasra Girdawaris* from 1906 to 1912 have been placed on the record andit appears on a reference to these *Khasra Girdawaris* that some portions of the land were cultivated by artificial irrigation in these years. I do not think that this evidence alone is sufficient to warrant a presumption that the lands were irrigated from the *Baoliwali Kul*. In any case usage for six years is sufficient to create a right of easement, and I do not, therefore, think that the learned District Judge was justified in holding that the defendants were entitled to the right claimed.

I accordingly, accept the appeal and setting aside the order of the lower Appellate Court, restore the decree of the Court of first instance with costs throughout.

K. S. D. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 114 OF 1922.

August 18, 1922.

Present :—Mr. Simpson, A. J. C.

BHUSAN—DEFENDANT—APPELLANT
versus
JAGESHWAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Thekadar, *position of*—*Lease, grant of*—*Oudh Rent Act* (*XXII of* 1886), *Ss.* 67, 68.

In the absence of anything to show to the contrary, a *thekadar* should be presumed to have the ordinary powers of a landlord, including the power to grant leases.

The fact that under section 68 of the Oudh Rent Act, a *thekadar* cannot acquire the rights of a cultivating tenant does not mean that he cannot convey those rights to a tenant.

Appeal from a decision of the Sub-Judge, Sultanpur, dated the 7th January 1922.

Mr. *S. N. Roy*, for the Appellant.

Mr. *E. R. Kidwai*, for the Respondents.

JUDGMENT.—There is only one question for decision in this appeal, and it would present no difficulty were it not for an old ruling of this Court. The facts of the present case so far as they need be stated for the purposes of this appeal are that the defendant holds a certain tenancy under a lease for 7 years granted to him by the *thekadar* of the Raja of Amethi. That lease is dated 5th June 1919. The plaintiff claims the same holding under a lease granted to him by the Raja himself. It is not dated but admittedly was executed some time in November 1919. It is not disputed that the plaintiff's lease is later in date than the defendant's and that if the defendant's lease is binding on the Raja the plaintiff's suit must fail. The question for decision therefore, is whether the *thekadar* had power to grant leases.

There is a finding of fact by the first Court of appeal that it is not possible to ascertain the terms of the *theka*. Apparently there was no written document at all. There is the evidence on one side of the Raja's agent that *thekadars* in the Amethi Raj have no power to grant leases and there is the evidence of the *thekadars* on the other that he was given orally express powers to grant leases. Evidently the lower Court disbelieved both these witnesses, and concluded, as I have said that it is not possible to ascertain the terms of the *theka*. The Court, therefore, proceeded to decide the next question, namely, whether where there is, on one hand, no express grant to a *thekadar* of the power to give leases and, on the other, no express reservation by the landlord withholding from the *thekadar* the power to give leases the thekadar will be considered to have the power or not to have the power. The ruling of this Court which has been followed by the Courts below is reported in the Rent Act Rulings of Mr. Jacob. It is No. 52 (*Maharaja Jagatji Singh* v. *Rupan Murao* (1) in the book and will be found at page 80. The facts were on all fours with the present suit, that is to say the *thekadar* had altered the area and rent of a tenant's holding and the tenant claimed that he could now carry on for 7 years without being liable to ejectment. It was decided by a single Judge of this Court that the tenant could be ejected because the *thekadar* had no express authority to alter the area and rent of the tenants and that in the absence of proof of such special express authorization, the presumption is against a *thekadar* possessing such powers. I am unable to follow the reasoning of the learned Judicial Commissioner. He says that section 68 of the Act expressly declares that a *thekadar* does not acquire any of the rights mentioned in section 67, one of which is the right conferred by section 36. He continues "if then a *thekadar* cannot himself acquire such right the presumption is that he cannot give a tenant under him such right." With great respect there is a confusion of thought here. The law has conferred certain rights upon cultivating tenants. One of these is a right to retain possession of a holding for 7 years from the date of admission to the holding. In the absence of section 68 it might have been argued that a *thekadar* possessed this right

(1) Jacob Rent Act Rulings, No. 52, p. 80.

along with other rights of cultivating tenants. But the intention of the legislature was to protect cultivators. There is no reason to extend any special protection to a *thekadar* He is a person to whom the landlord transfers his own rights of rent collection. Ordinarily a *thekadar* in dealing with the tenants has exactly the same rights as the landlord. He is going to manage the estate, realise what he can out of it and pay a certain fixed sum to the landlord. If the full rights of the landlord are not conveyed to him he is hampered in his management of the estate. But because he himself cannot acquire the rights of a cultivating tenant it does not follow that he cannot convey these rights. They are rights acquired by the tenants against both *thekadar* and landlord. They follow by operation of statute upon the granting of a lease by the landlord or by any person who has authority to grant that lease. These statutory rights follow upon the granting of a lease by the *thekadar*. But this has no bearing on the question whether the *thekadar* himself is to be placed on a level with a cultivating tenant and given the protection which the law has provided for cultivators as against their landlords. I, therefore, respectfully dissent from the ruling in *Maharaja Jagatjit Singh* v. *Rupan Murao* (1).

I am glad to find that there is good authority for my own view. In *Lal* v. *Raja Udya Partap Udya Dutt Singh* (2) the judgment I have just referred to was expressly dissented from by both members of the Board of Revenue. Mr. Reid, who wrote the main Judgment is a very high authority on all matters of Revenue Law. That case has been followed by the Board again in *Kishan Dayal* v. *Thakur Prasad* (3). I, therefore, decide that on the facts found by the lower Court the proper presumption is that the *thekadar* had the ordinary powers of a landlord including the power to grant the lease which he has granted to the defendant.

The result is that the appeal is allowed, the judgment and decree are set aside and the plaintiff's suit is dismissed with costs in both Courts.

N. H. *Appeal allowed.*

(2) Sel. Dec. No. 9 of 1892.
(3) 33 Ind. Cas. 203 ; 2 O. L. J. 754.

CALCUTTA HIGH COURT.

FRIST CIVIL APPEAL No. 167 OF 1921.

February 20, 1923.

Present :—Mr. Justice Mookerjee and Mr. Justice Rankin.

BENGAL-NAGPUR RAILWAY COMPANY, LIMITED—DEFENDANT—APPELLANT

versus

FIRM BAL MUKUNDA BISESWAR LALL—PLAINTIFF—RESPONDENT.

Landlord and tenant—Forfeiture—Notice—Acceptance of rent—Waiver.

Acceptance by the landlord of rent due after forfeiture from the lessee operates as a waiver of the notice of forfeiture, notwithstanding the protest of the landlord that such acceptance is without prejudice to his right to insist upon the forfeiture.

Case-law discussed.

Appeal against the decree of the Subordinate Judge, 24 Purganas, dated the 21st June 1919.

Messrs. *T. K. Ghose, K. M. Sen* and *P. B. Gupta*, for the Appellant.

Messrs. *D. N. Mitter* and *N. C. Kar*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant Company in a suit for damages for destruction of a godown and buildings. The damages were assessed by the plaintiff at Rs. 5,000 ; a decree has been made in his favour for Rs. 3,500. The plaintiff was a lessee under the defendants and the crucial point in the litigation is, whether his tenancy had been terminated in accordance with law at the date when the godown and the buildings erected by him on the land covered by the lease were destroyed. The Subordinate Judge has answered this question in favour of the plaintiff and we feel no doubt that the view taken by him was correct.

The terms of the tenancy are embodied in two documents, dated the 16th December, 1912. The eighth paragraph of the first document states that the Company would

give three months' notice in writing to the lessee to deliver up the land and premises leased. The second paragraph of the second document states that the lessee would, during the continuance of the lease, pay to the company the rent reserved and pay the same in advance in such number of monthly instalments, not exceeding six, as the Company might direct. The fifth paragraph further provides that the lease might be terminated by either party at any time by three months previous notice in writing sent to the other party by registered post at his or their last known address. On the 23rd February, 1917, the Agent of the Company wrote a letter to the plaintiff, stating that three months notice was given under Clause (5) of the agreement and the lessee was requested to arrange to vacate the site by the 31st May, 1917. It is not disputed that this was a good and sufficient notice which made it obligatory upon the tenant to quit the premises by the date specified. Thereupon, correspondence took place between the parties; but it is not necessary to make a detailed reference to the letters for the purpose of the decision of the question raised before us. On the 7th July 1917, that is, after the expiry of the period covered by the notice, the Agent wrote to the lessee again. This letter states that the three months' notice had expired and yet the tenant had not vacated the site. Then follows this passage.

"I now give you formal notice to vacate the site and to demolish your buildings and to remove your property from Railway land and to restore the site to its former condition. In the event of your failure to do so by the 31st instant, the buildings will be demolished and the ground restored to its former condition at your cost".

Four days later, the Agent addressed the following letter to the lessee:

"I understand that you have not paid any occupation fee for the land in question since that due for the month of December 1916, although repeatedly asked for it by the Station Master, Gondia and that a sum of Rs. 37-8-0 is due from you up to the 31st May, 1917 at the rate of Rs. 7-8-0 per mensem. The occupation fee, as you are aware, is strictly payable in advance and should have been paid long ago. However, I now ask you to remit the amount forthwith to our Chief Auditor and advise me of your having done so. Rent is also recoverable for the period during which you hold over after the expiry of your notice to quit, and I hereby call upon you to pay the amount at the rate of Rs. 7-8-0 a month from 1st June 1917 to the date of actual vacation".

On the 16th July 1917, the plaintiff remitted Rs. 90 to the Chief Auditor of the Railway Company with the following intimation.

"We beg to send you enclosed herewith Rs. 90 in payment of the occupation fee for the land for one year from 1st January 1917 to 31st December 1917." The next day the Chief Auditor sent a receipt in the following terms:

"Received from Mr. Balmukund the sum of Rupees ninety only on account of occupation fee of land at Gondia from January to December 1917."

On the 24th July 1917, the lessee sent the following information to the Agent himself.

"With reference to your letter dated the 11th July 1917 we beg to inform you that we have already remitted Rs. 90 in payment of the occupation fee for the land at Gondia for the current year to your Chief Auditor, *vide* his cash receipt dated the 17th July 1917."

On the 15th August 1917, the Agent acknowledged receipt of this letter and invited the attention of the lessee to his letter of the 7th July 1917. It was added in this letter that the lessee was required to vacate the site and to demolish the buildings by the 31st July 1917 as a result of the notice served upon him in terms of the letter dated the 23rd February 1917. The lessee was informed that if he did not comply with the notice, the buildings would be dismantled by the company. It was finally added that an account would be prepared crediting the lessee with the value of the materials recovered on dismantling and with the balance of rent paid in advance for the period commencing with the date of the letter, that is, the 15th August 1917 and debiting him with the cost of dismantling. The balance so found, if in his favour, would be paid to him, if in favour of the Railway, it would be recovered from him. The lessee subsequently replied

on the 20th August 1917 that as Rs. 90 was deposited in advance as rent for the year then current, he was not liable to be ejected before the end of that year. We need not refer to the correspondence which subsequently followed. An account was made up by the Company of the sale proceeds of the dismantled godown and buildings and a sum of Rs. 34-1-9 was included in the account as the portion of the amount of rent refundable according to the letter of the 15th August 1917. On the 15th August 1918, the plaintiff instituted this suit for damages. The defendant contended that the tenancy had been validly terminated by the notice contained in the letter of the 23rd February 1917. The plaintiff urged, on the other hand, that the fact of acceptance of rent subsequent to the 31st May 1917 operated as a waiver of notice and the tenancy was in force on the 19th September 1917, when the Company proceeded to dismantle the godown and the building. We are of opinion that the contention of the defendant cannot possibly prevail.

The principle of law applicable to cases of this character is now well settled. The acceptance of rent due after forfeiture from the lessee —and this notwithstanding the protest of the lessor that such acceptance is without prejudice to his right to insist upon his forfeiture —operates as a waiver of the notice. As an authority for this proposition, it is sufficient to refer to the decision of the House of Lords in *Croft* v. *Lumly* (1), that acceptance of rent in these circumstances constitutes waiver of notice, notwithstanding that the lessor expressly states that he accepts the money as compensation for use and occupation and not as rent and refuses to recognise party paying as his tenant. A similar view was adopted by the Judicial Committee in *Davenport* v. *Queen* (2), which was followed in *Rex* v. *Paulson* (3). The proposition was recognised and applied in *Griffin* v. *Tomkins* (4), *Strong* v. *Stringer* (5) and *Hartell* v. *Blackler* (6). A tenant whose tenancy had been terminated by notice to quit in the case last mentioned wrote to his lessor enclosing money as and for rent accrued due since the expiry of the notice. The lessor sent on the letter and enclosure to her Solicitors who replied: "our client does not recognise you as her tenant, and we will retain the money for the time on account of use and occupation of her premises and not as rent." It was ruled that notwithstanding the terms of the letter, the acceptance and retention of the money operated as a waiver of the notice and constituted a recognition of a continuance of the tenancy. This case was considered in *Davies* v. *Bristowe* (7) and some doubt appears to have been expressed by one of the Judges who was a party to that decision. We must not overlook, however, that the case of *Davies* v. *Bristowe* (7), was governed by the provisions of the Rent Restriction Act, and as pointed out in *Shuter v. Hersh* (8), the effect of that decision is that where a tenant remains in possession after receiving notice to quit, there is no necessity for the landlord to give him a fresh notice to quit before raising the rent to the extent permitted by the statute, unless a new tenancy has been actually created, and the mere fact that the landlord accepts rent after giving the notice to quit cannot be taken as a waiver by him of the notice to quit so as to create a new tenancy. The decision in *Evans* v. *Enver* (9), which followed a dictum in *Toleman* v. *Portbury* (10), was based on its special facts, which have no similarity to those of the present litigation. It may be contrasted with the decision in *Penton* v. *Barnett* (11), which was followed in *Shah Wali Ahmad* v. *Hussaini Begum* (12),

(1) (1858) 6 H. L. Cas. 672; 27 L. J. Q. B. 321 ; 4 Jur. (N. S.) 903 ; 6 W. R. 523 ; 10 E R. 1459 ; 108 R. R. 252.

(2) (1878) 3 A. C. 115 ; 47 L. J. P. C. 8 ; 37 L J. 727.

(3) (1921) 1 A. C. 271 ; 90 L. J. P. C. 1 ; 124 L. J. 449.

(4) 42 L. T. 359 ; 44 J. P. 457.

(5) (1890) 61 L. T. 470.

(6) (1920) 2 K. B. 161; 89 L. J. K. B. 838; 123 L. T. 171.

(7) (1920) 3 K. B 423; 123 L. T. 655. ; 36T. L. R. 753.

(8) (1922) 1 K. B 438; 91 L. J. K. B 263; 126 L. T. 346; 20 L. G. R. 148 ; 66 S. J. 159; 38 T. L. R. 127.

(9) (1920) 2 K. B. 315; 89 L. J. K B. 845; 123 L.T. 328; 64 S. J. 464; 36 T. L. R. 441.

(10) (1872), 7 Q. B. 344; 41 L. J. Q. B. 98; 26 L. T. 292; 20 W. R. 441.

(11) (1898) 1 Q. B. 276; 67 L. J. Q. B. 11; 77 L. T. 645; 46 W. R. 33; 14 T. L. R. 11.

(12) 42 Ind. Cas. 655; 2 P. L. J. 595; 2 P. L. W. 52.

where *Mansur Ali* v. *Abdul Karim* (13), and *Padmanabhya* v. *Ranga* (14), were cited in support of the position that though acceptance of rent due prior to service of notice to quit does not operate as waiver, acceptance of rent due subsequent to such notice has the opposite effect.

In our opinion, it is plain upon well-settled principles that the tenancy in this case was not terminated on the 31st May 1917 by reason of the acceptance of rent by the landlord from the tenant. In this view no other point arises in this appeal, we see no reason to doubt the correctness of the decision of the Trial Judge upon the question of quantum of damages.

The result is that the decree of the Subordinate Judge is affirmed and this appeal is dismissed with costs. We assess the hearing fee at ten gold mohurs.

Z. K. *Appeal dismissed.*

(13) 1 Ind. Cas. 753; 10 C. L. J. 187.
(14) 6 Ind. Cas. 447; 34 M. 161; 8. M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

February 12, 1924.

Present :—Lord Shaw, Lord Blanesburgh and Lord Salvesen.

SAHU RAM KUMAR—APPELLANT
versus
MUHAMMAD YAKUB AND ANOTHER
—RESPONDENTS.

Construction of document—Building contract—Builder contracting to allow rebate to owner on scheduled rates of materials supplied—Dispute between parties Building not completed—Owner, whether entitled to rebate.

The defendant contracted to build a house for the plaintiff within one year. The plaintiff under took to advance small sums of money to the defendant and the latter agreed to allow a rebate or deduction of 10 per cent. in favour of the plaintiff on the scheduled rates of articles to be supplied by him. If the work was done honestly and well it was left to the kindness of the plaintiff to allow something to the defendant from this commission. As the work commenced the plaintiff began to order changes in the construction almost doubling the size of the building. Disputes arose between the parties the plaintiff declined to make further advances and the work was stopped. Thereupon the plaintiff brought a suit to recover his commission. It was found that the work done was well worth the full scheduled rates :—

Held (1) that the arrangement by way of rebate or 10 per cent. commission in favour of plaintiff was an arrangement that was only exigible and became crystallised when the work was completed.

(2) that *a fortiori* this deduction was never agreed to in respect of the additions ordered in the original building;

(3) that as the work was not completed and the defendant was in no way to blame and there was no injustice done to the plaintiff the latter was not entitled to recover anything.

Messrs. *L. De Gruyther* and *J. M. Parikh*, for the Appellant.

Messrs. *A. M. Dunne* and *W. Wallach*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 4th March, 1919. This decree reversed that of the Additional Subordinate Judge of Moradabad, dated the 30th September, 1916, decreeing the plaintiff's claim.

A building contract by way of offer and acceptance had been concluded between the plaintiff, who was the owner of certain land and the respondent, a builder apparently in a humble way of business, who was a contractor. Certain subsidiary matters of accounting were referred to in the minute argument delivered before the Board. Even if that argument had been in all points sound, it would have resulted in a relatively trivial readjustment of the figure of the alleged balance. Their Lordships content themselves with observing that the appeal is decided upon a consideration of the only ground which appears in the reasons of the appellant. It is not legitimate to raise at this Board other and subsidiary points which were apparently neither raised nor canvassed in the Courts below.

The reasons for the appellant's appeal to this Board are substantially confined to one

point. That has reference to a 10 per cent. allowance, to be made by the contractor to the owner for commission.

The Board will now proceed to discuss the matter in the light of the contract between the parties. The form of the suit is by the owner against the contractor for a sum amounting to nearly Rs 10,000 on the allegation that that Rs. 10,000 consisted of over-payments made by him as compared with the sums to which the contractor was entitled under the bargain. The appellant made certain strong allegations against the respondent and declined to make further advances and the work was stopped.

Their Lordships refer in particular to the offer of the 27th May 1913. The early portion of that offer is in these terms, and it is that early portion which raises, and completely raises, the question now at issue before the Board:—

"In compliance with your order the undersigned applicant"—that is the contractor—"is willing to construct the new *Kothi'* in the bagh near the distillery in *mauza* Manpur at the rate specified below less Rs. 10 per cent. for commission. Rs. 500 will remain as an advance, which will be deducted from the amount of the last bill. If the work is done honestly and well, something by way of reward may kindly be allowed to the undersigned from the Rs. 10 per cent. commission."

There is further reference in the acceptance to what is manifest, and is agreed. There was a most important circumstance, namely that the work was to be done within one year. In the acceptance of the offer this and another point are made clear, namely."

(1) "you should within a year construct" the building, and (2) "If you would require money during the progress of the work you will continue to get money weekly also according to need. Finally it may be stated that under the contract no provision or bargain is made as to additions or alterations."

Their Lordships have carefully considered the ambit of these clauses. It appears to the Board to be clear that the contract refers to one particular building, the size, dimensions and even plans of which had already been fixed. The new *kothi* thus singularised was that which had been the subject of an application submitted with plans, to the local authority and by that date approved.

As this contract work proceeded, however, it was found that the views of the owner were very much larger than those for which he had obtained the specific sanction. Within a few weeks of the acceptance of this contract radical changes began to be ordered by the owner. To speak roughly, those consisted of the doubling of the size of the main building itself ; it was converted into a two storey instead of a one storey building ; a large and apparently extensive compound was walled in, and various other buildings including a temple. These were made the subject of orders from the owner, and work proceeded accordingly. None of these items, as already mentioned, were within at least, the express scope of the original contract.

Their Lordships are clearly of opinion that the arrangements thus made forming an addtion of a kind so substantial as to increase the original cost from Rs. 21,000 to nearly Rs. 42,000, must be attributed to a new arrangement between the parties, and that that arrangement could not, in point of fact, have been completed within anything like the stipulated period of 12 months applicable to the first and definitely limited contract.

In those circumstances it was quite clear that the builder still required and possibly in even a fuller degree to be accommodated with cash to enable him to undertake the heavy and fresh obligations under the new contract. It is also further clear on the facts that when payments to account, or payments to discharge builders' accounts or the accounts of persons supplying material, were made no deduction of 10 per cent. commission was in fact made from these. These facts have a real bearing on the question of what was the stage at which such an allowance was to be made.

It appears to their Lordships that upon a review of the first contract it is plain that the arrangement by way of rebate or a deduction of 10 per cent. commission in favour of the owner, was an arrangement which was only exigible and became crystallised when the work was completed and the final accounts at

the end of the year were to be made up. Upon that occasion the Rs. 500 originally advanced was to be deducted from the cumulative sum due to the builder, and further the estimate of the 10 per cent. commission would be made, not from the sums paid but from the scheduled rates for the articles supplied, whatever their cost had been. After this reckoning was made within or at the close of the year, there would be completely determined the amount of the debt falling under the 10 per cent. commission charged. It was then, in those circumstances, that the opportunity would have arisen to the owner, to forego making that large deduction from his contractor's prices, and to limit the 10 per cent. by such an allowance as was left to his own good-will. But the conditions for making such a deduction never arose ; the contract was not possible of completion within the year ; it in point of fact was not completed ; and the Board agree with the High Court that the failure to complete was not due to any fault on the contractor's part. The stipulation accordingly disappeared.

A fortiori, in their Lordships' opinion such deduction was never agreed to with regard to the further work. What was done was that it entered into the head of the owner that he had largely overpaid the contractor. As it turns out this idea of his was illusory ; he had not done so. On the best computation that can be made the accounts were fairly square, even at the old rates.

In those circumstances, when a suit was brought for the sum of nearly Rs. 10,000 of alleged over-payment, the parties most sensibly agreed that a skilled referee should settle the amounts. Nor does the Board question the propriety of their having said to the referee that they were willing that the rates charged in the original schedule should be made applicable to the extra works executed. But the question remains as to what was to be done with regard to what one might call the prolocation of the right to deduct 10 per cent. commission. In the opinion of the Board there was no such prolocation. It would have required a special and particular contract to make such a charge applicable to a condition of affairs entirely new.

Their Lordships, however, are further relieved to find that the referee looking, over the charges and the work, does go into the question of whether the work was fairly charged at the contract rates without any allowance being made for the 10 per cent. commission. He gives evidence which is thus narrated in the judgment of the High Court : "Rustanji "—that is, the arbiter—" admits that the work was well done worth the full rates entered in the schedule of the 27th May 1913, without any Rs. 10 per cent. deduction." No injustice as between these parties entering into this mercantile contract is to ensue. The contrary is the case. The allowance of the 10 per cent. which is now claimed in this suit by the owner of this piece of land would be an allowance which would permit him to pay only 90 per cent. of the value of the work which is actually on his property.

Their Lordships are satisfied that the result arrived at by the High Court is sound ; and they will humbly advise His Majesty that this appeal be dismissed with costs.

N. H. *Appeal dismissed.*

Solicitor for the Appellant—Mr. *E. Dalgado.*

Solicitors for the Respondents—Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.

SMALL CAUSE COURT SUIT NO. 9193 OF 1921.

November 21, 1923.

Persent :—Mr. Justice C. C. Ghose.

THE EAST INDIAN RAILWAY COMPANY—PETITIONER

versus

KANAILAL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Railways Act (IX of 1890), s. 77—Suit against railway for damages for loss of goods—Notice, absence of—Court holding notice not necessary—Revision, whether lies.

EAST INDIAN RY. CO. *v.* KANAILAL

Where a Court has jurisdiction to determine a question and it determines that question, it cannot be said to have acted illegally or with material irregularity, in the exercise of its jurisdiction, within the meaning of section 115 of the Civil Procedure Code merely because it has come to an erroneous decision. Where, in a suit against a Railway Company, for damages for loss of goods, a Court erroneously holds that notice under section 77 of the Railways Act, was unneccessary on the facts of the case, it cannot be said that it assumes jurisdiction which had not been vested in it by law, and the decision is not, therefore, open to revision under section 115 of the Civil Procedure Code

Amir Hassan Khan v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237; 4 Sar P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind Dec (N S.) 760 (P. C.); *C. D. M. Hindley* v. *Joynarain Marwari*, 54 Ind. Cas. 439; 24 C. W. N. 288; 46 C. 962; *Balakrishna Udayar* v. *Vasudava Aiyar*, 40 Ind. Cas. 650; 44 I. A. 261; 40 M. 798; 22 C. W. N. 50; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C L.J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W 501; 11 Bur. L. T. 48 (P. C.); *Amritrav Krishna Deshpande* v. *Bal Krishna Ganesh*, 11 B. 488; 6 Ind. Dec. (N. S.) 821, referred to

Mr. *Langford James*, for the Petitioner.

Sir *B. C. Mitter*, for the Opposite-Party.

JUDGMENT.—This is an application under section 115, Civil Procedure Code and it has arisen under the following circumstances :—On the 13th June 1920, the Opposite Party delivered to the Jodhpur-Bikaneer Ry. at Bikaneer Station for carriage to Howrah as passenger's luggage 12 packages, 7 of which were placed in the guard's van. At Howrah the Opposite Party received all the said packages save one of those placed in the guard's van, which had been lost in transit. On the 26th April 1921, the Opposite Party instituted a suit in the Calcutta Small Cause Court for the recovery of a sum of Rs. 981-4-0 in respect of the package which was lost against the East Indian Ry. Company. On the 7th February 1923, the suit was decreed in favour of the Opposite Party, although the Petitioner Company had taken the point that no notice of suit under section 77 of the Railways Act had been given. The Petitioner Company now contends that the learned Judge in the Small Cause Court had exercised a jurisdiction not vested in him by law in entertaining and decreeing the suit against the East Indian Ry. Company in the absence of a notice under section 77 of the Railways Act. The Petitioner Company applied to my learned brother, Mr. Justice Greaves, on the 20th August 1923, and obtained a rule under section 115, Civil Procedure Code against the Opposite Party and this rule has now come on for hearing before me.

On behalf of the Petitioner Company considerable stress has been laid on the case of *C. D. M. Hindley* v. *Joynarain Marwari* (1) and on the case of *The Assam Bengal Ry. Co., Ld.*, v. *Radhika Mohan Nath* (2) and it has been contended that usurpation of jurisdiction by the Small Cause Court by holding that a notice under section 77 of the Railways Act is unnecessary can be revised by this Court under section 115, Civil Procedure Code.

Sir Binode Mitter for the Opposite Party has contended that the present is not a case of usurpation of authority, nor is it a case of a conscious violation of a rule of law and that, therefore, on the authority of the decision of the Privy Council in *Ameer Hossain* v. *Sheo Baksh Singh* (3), the present rule ought to be discharged.

It is well settled that where a Court has jurisdiction to determine a question and it has determined that question, it cannot be said to have acted illegally or with material irregularity, simply because it has come to an erronous decision. The leading case on this subject is the case *of Ameer Hossain* (3), cited above, and following this decision it has been held that the High Court will not interfere under section 115, Civil Procedure Code, merely because the lower Court had wrongly decided that a suit was barred by limitation, or that it was barred as *res judicata*, or because the lower Court had proceeded upon an erroneous construction of the sections of an Act, or had misunderstood the effect of a document in evidence, or had excluded evidence which it ought to have admitted. The Privy Council in the case of *Balkrishna Udayar* v. *Vasudeva*

(1) 54 Ind. Cas 439; 24 C. W. N. 288; 46 C. 962.
(2) 72 Ind. Cas. 714; (1923) A. I. R. (C.) 397; 28 C. W. N. 438.
(3) 11 C. 6; 11 I. A 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

EAST INDIAN RY. CO. v. KANAILAL

Aiyar (4), observed as follows :—" It will be observed that section 115 applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." There is no doubt that conflicting views of the scope and effect of section 115 are to be found in the cases in the reports and in these latter days I do not feel called upon to reconcile these conflicting views. I ought to add that my attention has been drawn to the case of *Jannoitzer* v. *Mohinind Chatterji* decided by Jenkins, C. J. and Woodroffe, J., on the 21st January 1904, Unreported. The passages in the judgment which are specially relied upon are these :—

Per Jenkins, C. J.—"I wish to reserve for consideration, should it ever hereafter arise, the question whether rejection or admission of evidence may not be in some peculiar circumstances an illegality or material irregularity, as for instance, where it is in direct contravention of some statutory provision."

Per Woodroffe, J.—" Thus where a Court acts upon an unstamped document, where the legislature says that it is not to be acted upon at all, or on an unregistered document where registration is required, the Court has, I think, no option but to follow the mandatory provisions of the legislature, and if it does not follow such mandatory order, then it acts illegally."

No doubt there are these observations, but the real question is whether the judgment of the Small Cause Court Judge is revisable by me on the facts of the present case under the first part of section 115, Civil Procedure Code. On this point I desire to adopt the observations of West, J., in the case of *Amritrav Krishna Deshpande* v. *Balakrishna Gunesh* (5) :— "Now, jurisdiction, according to the exact conception of it formed by the Roman lawyers, consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon them. An enquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the considerations of cognizance are satisfied. There is in the determination of such a question no adjudication in the stricter sense, no ascertainment of jural relations and command consequent thereon. This enquiry, therefore, may properly be reviewed in many cases, where when the exercise of a true jurisdiction in the fuller sense has taken place, no appeal or even review may be possible. If the objection that might have been raised as a preliminary one is not in fact raised until the hearing of the case has proceeded to a certain stage, the enquiry thus provoked is not thereby changed in its character. It is only in a second intention of the Court that " jurisdiction " is used in speaking of such an enquiry as an exercise of jurisdiction; objections affecting jurisdiction must relate either to the person, the place or the character of the suit. If a Court has competence in these respects, it may exercise jurisdiction and does exercise it whether correctly or erroneously in dealing judicially with a cause placed before it. Jurisdiction again has two closely related but distinguishable senses. It means sometimes authority, sometimes the exercise of the authority and this either in investigation or by way of command. Where the law speaks of exercise of jurisdiction, or failing to exercise jurisdiction, it means using or failing to use authority in entering on an enquiry and carrying it to a judicial conclusion. The exercise of jurisdiction is not declined when such a conclusion has been arrived at, merely because, had the decision on a particular point been different, further questions would have had to be disposed of."

In my judgment, the present is not like the class of cases referred to by Woodroffe, J. Nor is it like the case where it has been held that, if a Court wrongly decides that a suit is of a civil nature and entertains the suit on that basis, the decision is open to revision under section 115, Civil Procedure Code for no Civil Court is competent to entertain a suit which is not of a civil nature. On the facts of the present case and on the judgment of the learned Small Cause Court Judge, I feel great doubt whether I can say that the Court had no jurisdiction to entertain this

(4) 40 Ind. Cas. 650 ; 44 I. A. 261 ; 40 M. 793 ; 22 C. W. N. 50 ; 15 A .L. J. 645 ; 2 P. L. W. 101 ; 33 M. L. J. 69 ; 26 C. L. J. 143 ; 19 Bom. L. R. 716 ; (1917) M. W. N. 628 ; 6 L. W. 501 ; 11 Bur. L. T. 48 (P. C.)
(5) 11 B. 488 ; 6 Ind. Dec. (N. S.) 321.

suit. No doubt the Court has said that notice under section 77 of the Railways Act on the facts of this case is unnecessary, but I think it is a strong thing to say that the Court by holding that a notice under section 77 of the Railways Act on the facts of this case is unnecessary did assume a jurisdiction which had not been vested in it by law. It may be said that this case is on the border line, but on the best consideration that I am able to give, I am inclined to think that if there is an error at all in this case, it is an error on a point of law and that no question of jurisdiction properly arises on the present application.

The result, therefore, is that this Rule must be discharged with costs.

Z. K. *Rule discharged.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 666 OF 1922.

February 1, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

HASHIMBI YAKUBSAHEB BEG
—PLAINTIFF—APPELLANT
versus
AJAMATBI MAKTUMSAHEB—
DEFENDANT—RESPONDENT.

Muhammadan Law—Gift—Possession, transfer of —Property in possession of mortgagee.

A Muhammadan father made a gift of a house and a piece of land in favour of his daughter by registered deed. The land was in possession of a mortgagee. Possession of the house was transferred to the donee immediately and she was directed to take possession of the land on redemption. After the donor's death the donee got possession of the land from the mortgagee in pursuance of the gift ;

Held, that the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

Chandsaheb Kashimsaheb v. *Gangabai*, 64 Ind. Cas. 21 ; 45 B. 1296; 23 Bom. L. R. 563, relied on.

Quaere :—Whether the equity of redemption in property which is in the possession of a mortgagee can form the subject-matter of a valid gift according to Muhammadan Law.

Appeal from the decision of the Assistant Judge, Bijapur, in Appeal No. 124 of 1920, reversing the decree of the Subordinate Judge, Muddebehal, in Civil Suit No. 609 of 1918.

Mr. *H. B. Gumaste*, for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.

Shah, J.—The question in this second appeal relates to the validity of the gift made by Kamalbeg in favour of his daughter Hashimbi, who is the plaintiff.

The facts relating to the gift are not in dispute now. On November 23, 1899, Kamalbeg made a gift of a house and certain *Inam* land described in the deed of gift which is registered. The recitals in the deed relating to possession thereof are as follows:—

"At present the said land has been leased out to another person for cultivation. On the expiration of the term of the lease you should take the same into your possession and carry on *Vahivat* thereof. The house is this day delivered into your possession for *Vahivat*."

The land which is referred to as having been given in lease was at the date of the gift in possession of Venkangowda on terms, which are stated in an award between the plaintiff and Venkangowda's representative as follows:—

"Before this gift was made the plaintiff's father had, on April 27, 1898, mortgaged this land for Rs. 800 on conditions that the mortgagee should be in possession of the land for twenty years and that heshould make improvements in the land (Kird). Malgowda is in possession of the land up till to-day on this agreement. The defendant should show the improvements as stipulated within twenty years and plaintiff should pay the amount of Rs. 800 and get back the land. Thus has the deceased Kamalbeg agreed in writing. The defendant is accordingly in enjoyment of the land for these nine years."

A decree was passed in terms of the award according to which the present plaintiff was to get possession at the end of the period of twenty years in 1920-21 without paying any

amount, and the sum advanced by the mortgagee Venkangowda to Kamalbeg was to be treated as satisfied at the end of that period. By a later compromise the plaintiff in fact got possession of the land in 1916 from the mortgagee. But the other heirs of Kamalbeg obstructed her possession, and ultimately the present suit was filed on November 19, 1918, by her against the other heirs of Kamalbeg. The Trial Court held that the gift was valid, but the lower Appellate Court held it to be invalid on the ground that there was no transfer of possession of the land.

In the appeal before us it is urged that the gift is valid. It seems to me that this argument must be accepted. It is stated in the plaint and not challenged in the pleadings nor disputed before us that the donee got possession of the house under the deed of gift. To that extent the gift is valid and has apparently been given effect to. As regards the land it is clear that it was in the possession of Venkangowda as a mortgagee at the date of the gift. No immediate transfer of possession to the donee was possible. It does not appear that anything was done to give intimation to the mortgagee at the time of the gift. But the fact remains that in a subsequent litigation between the donee and the mortgagee's heir, the donee got possession. No doubt the donor had died long before the donee got possession from the mortgagee under a compromise. The true position of Venkangowda under the so-called lease was that of a mortgagee. The litigation between Hashimbi and Venkangowda's heir which was settled by an award made by the arbitrators shows that the gift was treated as valid between them.

It is true that the donor did not do anything beyond executing the deed of gift so far as the land was concerned. That was possibly due to the fact that Venkangowda died in four days from the date of the gift. But we have the fact that the possession of the house was transferred under the deed: and nothing further by way of transferring possession of the equity of redemption was apparently possible under the circumstances. The gift would, therefore, be valid. The *ratio decidendi* in *Chandsaheb Kashimsaheb* v. *Gangabai* (1) would *a fortiori* apply to this case. But it is argued on behalf of the respondent that the gift of the equity of redemption is invalid according to Muhammadan law and reliance is placed upon the decisions in *Mohinudin* v. *Manchershah* (2) and *Ismal* v. *Ramji* (3).

The decision in *Mohinudin* v. *Manchershah* (2) has been criticised by Mahmood, J., in *Rahim Bakhsh* v. *Muhammad Hasan* (4) and on the facts of that particular case it is difficult to say that the general proposition that there could be no gift of an equity of redemption was decided. In the later case of *Ismal* v. *Ramji* (3), the gift was revoked by the donor before any possession of the land could be taken and it is not easy to say how far that circumstance influenced the judgment in any way.

There is a very useful criticism of those decisions in Wilson's Anglo Muhammadan Digest, p. 327 (5th Edition); and the view taken in the Bombay cases has been criticised by other writers on Muhammadan Law.

When the simple question arises as to whether the equity of redemption, when the property is in the possession of the mortgagee, could form the subject-matter of a valid gift according to Muhammadan Law, these decisions would require to be carefully considered probably by a Full Bench. But on the facts such as we have in this case, *viz.*, that the possession of a part of the property given by way of gift was transferred to the donee, and that as regards the rest, the donee in fact got possession from the mortgagee after the donor's death in pursuance of the gift, I feel clear that the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

The decree of the lower Appellate Court should be reversed and that of the Trial Court restored with costs here and in the lower Appellate Court on the defendants.

Macleod, C. J.—I agree.

Z. K. *Decree reversed.*

(1) 64 Ind. Cas. 21; 45 B. 1296; 23 Bom. L. R. 563.

(2) 6 B. 650; 7 Ind. Jur. 91; 3 Ind. Dec. (N. S.) 888.

(3) 23 B. 682; 1 Bom. L. R. 177; 12 Ind. Dec. (N. S.) 456.

(4) 11 A. 1; A. W. N. (1888) 266; 13 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 429.

MOHINI MOHAN ROY *v.* RAMDAS PARAMHANSA

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 375 OF 1921.

July 5, 1923.

Present :—Mr. Justice Rankin and
Mr. Justice B. B. Ghose.

MOHINI MOHAN ROY—DEFENDANT—APPELLANT
versus
RAMDAS PARAMHANSA—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Covenant to pay money, whether runs with land—Civil Procedure Code (Act V of 1908), ss. 11, 102, 115—*Suit of small cause nature—Appeal, second, whether lies—Revision—High Court, power of*—Res judicata—*Decision of Small Cause Court.*

There is no such thing as between a vendor and a purchaser as a covenant to pay money running with the land.

The predecessor of the plaintiff sold certain land to the predecessor of the defendant and contemporaneously with the sale-deed but quite independently of it, the latter executed an *ekrarnama* whereby he bound himself, his heirs and legal representatives, so long as the land was held by them, to pay to the vendor and his legal representatives the sum of twenty rupees per year for the *sheba* of a particular *Thakur*. The vendor subsequently sold the land to the defendant. Plaintiff sued the defendant in the Small Cause Court to recover the sum secured to him by the *ekrarnama* and obtained a decree. An application in revision to the High Court was dismissed. A subsequent suit for similar relief which was tried by the Munsif on the ordinary side was, however, dismissed, but was decreed by the District Judge on appeal. On second appeal by the defendant ;

Held (1) that the suit was an ordinary suit for money and was not excluded from the cognisance of a Small Cause Court by Article 4 or Article 11 of Schedule II to the Provincial Small Cause Courts Act ;

(2) that, therefore, no appeal lay to the District Judge against the decision of the Munsif dismissing the suit ;

(3) that a second appeal to the High Court was barred by section 102 of the Civil Procedure Code, but that it was open to the High Court to treat the memorandum of appeal as an application for revision and to set aside the decree of the District Judge as being without jurisdiction ;

(4) that assuming the suit was not cognisable by a Small Cause Court, it was liable to dismissal as the agreement on which it was based did not run with the land and did not bind the defendant ;

(5) that, in that view of the case, the previous decision of the Small Cause Court and the refusal of the High Court to entertain an application in revision against it, did not operate as *res judicata*, as the case was not cognisable by a Small Cause Court.

Case-law discussed.

Appeal against the decree of the District Judge, Nadia, dated the 4th January 1921, reversing that of the Munsif, Ranaghat, dated the 12th April 1924.

Babus *Amarendra Nath Bose* and *Upendra Narain Bagchi*, for the Appellant.

Babu *Satindra Nath Mukherjee* (for Babu *Tarakeswar Pal Chowdhury*), for the Respondent.

JUDGMENT.

Rankin, J.—In this case, the defendant appeals from a decision of the District Judge of Nadia reversing a decision of the Munsif of Ranaghat. The plaintiff brought the suit for a sum of money as due to him by the terms of a document called *ekrarnama*. That document is dated the 28th March 1891 and contemporaneously with it on the same day there was a conveyance of certain land by the predecessor-in-title of the plaintiff to the predecessor of the defendant. The terms of the *ekrarnama* have been discussed in the judgments of the Courts below and the first question is the question of construction. It is to be observed that the conveyance contains no reference whatever to any such covenant as I am now about to read from the *ekrarnama*. The *ekrarnama* which was executed by the defendant's predecessor-in-title was as follows :—" When you expressed your desire to sell your share of the *putni* and *jamai* right in *mouza* Goid, village Salua Parga Ukhara, I had promised before you that, if the above share was sold to me by you, I and my heirs and legal representatives shall pay you and your legal representatives for the *sheba* of the Jugal Kishore Thakur the sum of rupees twenty yearly, year after year." Later on, these words occur : " Therefore, I make this *ekrar* that, by the grace of Jugal Kishore

Thakur as long as there shall be any member in my family and as long as I shall have *zemindari* right in the above *mouza*, I and my heirs and legal representatives shall pay you and your legal representatives for the *sheba* of the Thakur the sum of rupees twenty per year." The conveyance of the same date contains no covenant to an equivalent effect and there is no recital whatever in it of this *ekrarnama*. Now, what has happened is this :—The purchaser of the property who made the promise contained in the *ekrarnama* conveyed this land to the present defendant. The present defendant is a purchaser from him. The plaintiff accordingly brought the suit against the defendant and he brought it upon the ground that the present defendant was bound by the promise of the man who had sold the land to him. Tee plaintiff says that the promise of the predeessor-in-title of the defendant was intended to bind everybody who would come to own that land and that the covenant runs with the land.

Now, in this case, it will be simplest to begin by stating the legal position of the parties. The position of the defendant in the face of a claim of that sort is that he is a person who is sued upon a claim which is unfounded in law. There is no such thing as between a vendor and a purchaser as a covenant to pay money running with the land. In the case of assingment of lease as between any one who may become interested in the term and any one who becomes interested in the reversion it is possible to talk of a covenant running with the land. At common law no covenant ever ran with the reversion. By the Statute law, some covenants may run with the term and some with the reversion and the nature of the covenants that can be said in loose language to run with the land has been described in the case-law and in the Conveyancing Acts and made more or less precise. The present covenant is not one which can run with the land as it is in no way a covenant to pay rent. There is no lessor or lessee, there is no term and there is no reversion. There is no charge on the land. The postion of a purchaser of land whose predecessor became bound by a restrictive covenant is dealt with upon the principle of *Tulk* v. *Moxhay* (1). If there is a restrictive covenant and the purchaser takes with notice of it, then the person in whose favour the covenant is made can restrain the purchaser from acting contrary thereto. The present case is far removed from anything of that sort. When one looks at the terms of the *ekrarnama*, and at the way in which these two documents of the same date were kept separate, it is abundantly plain that the vendor had a mind to sell the land with a clean title and that, as a part of the consideration, he took a personal covenant from the purchaser which was intended to bind the latter and his family and then only so long as they held the land. There is, therefore, upon the merits, no substance in the case against the defendant and there never was.

Now, the position in this case is only half dealt with when the merits are dealt with. It appears that, in the protracted series of suits—mostly but not all brought in the Small Cause Court, these parties have litigated upon this matter and the defendant has had very poor success. The present appeal is complicated by the further consideration that this suit was not brought in the Small Cause Court.

An objection has been taken by the plaintiff's pleader to the effect that, under section 102 of the Code, there is no second appeal because the suit was of a nature cognizable by the Small Cause Court. I propose to deal with the case on both assumptions; but my opinion is that the suit is simply a suit for a sum of money giving a bad reason why the defendant is bound by the covenant. That being so, I see nothing in Article 4 or Article 11 of the second Schedule to the Provincial Small Cause Courts Act, to take away the jurisdiction of the Small Cause Court.

If that be the true view, then the fact that the case was tried by the Munsif in his ordinary jurisdiction does not take away the prohibition of an appeal contained in the Small Cause Courts Act. Authority for that is cited to us from *Skankarbhai* v. *Somabhai* (2) which has been followed in this Court in the case of *Indra Chandra Mukherjee* v. *Srish Chunder Banerjee* (3). The result, therefore, on this view

(1) (1848) 2 Ph. 774; 18 L. J. Ch. 83; 13. Jur. (o. s.) 89; 12 L. T. 469; 41 E. R. 1143; 78 R. R. 289.

(2) 25 B. 417 ; 3 Bom. L. R. 129.
(3) 21 Ind. Cas. 120; 40 C. 537 at p. 539.

is that the first appeal was without jurisdiction. The second result but for section 102, Civil Procedure Code would be that this appeal would lie to set aside the decree made without jurisdiction on the first appeal. That would be on the well-known doctrines that are laid down in such cases as *Gangadhar* v. *Sekharbashini* (4) and *Aduram Haldar* v. *Nakuleswar Roy* (5). But, in this case, there is a further complication that there is a special prohibition against a second appeal. In that view, an objection has been taken by the plaintiff that this appeal is incompetent. In my opinion, on the assumption which I think to be right that the case is cognizable by the Small Cause Court, the present appeal is not competent, and is barred by section 102, Civil Procedure Code. But it is open to the appellant to ask us to treat his memorandum of appeal as an application in revision and to set aside the order made without jurisdiction. This has been done before now. One instance my learned brother points out to me is the case of *Baikunta Nath Goswami* v. *Sita Nath Goswami* (6). The question is whether on this assumption we shall exercise our revisional power. *Prima facie* when a Court is faced with a decree which is made without jurisdiction, it is a very strong thing not to interfere in revision, because otherwise all sorts of troubles may arise. The decree which is a nullity may be contested hereafter by a suit and that may give rise to infinite difficulties. We have, therefore, to see whether there is any valid reason why the decree under appeal should not be set aside. As to that the position is this :—If there was no appeal to the District Judge, the plaintiff who was non-suited by the Munsif might have applied in revision under section 25 of the Small Cause Courts Act to this High Court. Now it may be that if we had been of opinion that the plaintiff's case was a very good one on merits we would not necessarily in the circumstances of this case have felt bound now to give leave to apply in revision to set aside the decree of the learned Judge of the Court below. That is the position on that hypothesis. We think that the decree of the Court of Appeal below is without jurisdiction. We are satisfied that it is wrong on the merits and we propose apart from any question of *res judicata* to interfere.

The other view may also be considered. It may be said that the case is not cognizable by the Small Cause Court. In that event, what is the position ? The position then is this: There is a second appeal and we are entitled to deal with the case upon the facts found. Now, the only case on that footing which the plaintiff can make is the case of *res judicata* and, on the footing that the case is not cognizable by the Small Cause Court, what is the plaintiff's case for *res judicata* ? It appears that the first suit to which the present defendant was a party, was a Small Cause Court Suit of 1901. Well, if the Small Cause Court was not competent to try this case, there is no *res judicata*. It so happened that in that first suit an application in revision came up to this High Court and two learned Judges for reasons which do not appeal to me refused to interfere with the decree of the Court below holding that the defendant was liable. I am quite prepared to pay respect to that decision so far as it contains propositions not inconsistent with other decisions. But that judgment is in no way *res judicata* any more than the Small Cause Court Judge's judgment in connection with which it arose. The next suit was one of 1909 which was a suit in the Ordinary Civil Court—a decree, dated the 26th April 1901 being made for rent. I entirely demur to the proposition that this case can be governed by any result of a suit for rent. The next case was one of 1916 brought in the Small Cause Court and there it is perfectly true all points appear to have been canvassed. The defendant was then held liable but on the assumption that the suit was not cognizable by the Small Cause Court, the Judge was not entitled to try the suit. So there is no *res judicata*. Whichever way, therefore, we look at this matter, in spite of the tangle arising from the procedure adopted in this case and from the procedure adopted in the previous litigation, we see our way to decide this case according to our opinion on the merits. We propose to do so treating the memorandum of appeal presented to this Court by the defendant as an application in revision and set aside the decree of the learned District Judge with costs

(4) 35 Ind. Cas. 348; 20 C W. N. 967; 24 C.L.J. 235.
(5) 49 Ind. Cas. 137; 29 C. L. J. 48.
(6) 9 Ind. Cas. 296; 38 C . 421.

in that Court as having been made without jurisdiction. The defendant is entitled to recover his costs in this Court from the plaintiff. We assess the hearing fee at two gold mohurs.

B. B. Ghose, J.—I agree.

Z. K. *Decree set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 61 OF 1922.

July 4, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

BALBHADRA PRASAD—PLAINTIFF—APPELLANT

versus

DHANPAT DAYAL—DEFENDANT—RESPONDENT.

Contract Act (*IX of* 1872), *s.* 16 (3)—*Undue influence—Money borrowed-Urgent need-Unconscionable bargain—Equity and good conscience—Mortgage—Clog on redemption—Redemption impossible—Transfer of Property Act* (*IV of* 1882), *s.* 60, *object of—Contract—Particular covenant, relief against—Limitation—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 114, *application of.*

If a mortgagor agrees to receive a less amount than that for which he agrees to execute a mortgage the transaction is perfectly valid.

Potter v. *Edwards*, (1857) 26 L. J. Ch. 468 ; 5 W. R. 407 ; 112 R. R. 418, followed.

The mere fact that the borrewer has urgent need of money does not place the lender in a position to dominate the will of the borrower

Rani Sunder Koer v. *Rai Sham Krishen*, 34 I. A. 9; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43 ; 2 M. L. T. 75; 34 C. 150 ; 4 A. L. J. 109; 5 C. L. J. 106 (P. C.), followed.

Under section 16 (3) of the Contract Act the burden of proving the absence of undue influence can lie on a defendant only in the event of the plaintiff discharging the intitial onus of satisfying the Court that the defendant directly or indirectly was in a position to dominate the will of the plaintiff.

The maxim "once a mortgage always a mortgage" is one of equity and is not displaced by anything contained in the Transfer of Property Act.

If the substance of a transaction is a mortgage and nothing more than a mortgage it must not be made irredeemable and any covenant which clogs the equity of redemption is void.

Howard v. *Harris*, (1683) 1 Vern 190; 23 E. R. 406; Wh. & T. L. C. (7th Ed) p. 11; *Mellor* v. *Lees*, (1742) 2 Atk. 494 at p. 495 ; 26 E. R. 698, followed.

Such of the rules of English Law as are not either technical in their origin or peculiar to the customs, traditions and habits of the people of England are invariably followed in India as rules of justice, equity and good conscience.

Varden Seth Sam v. *Luckpathy Royjee Lallah Bunhah Lall*, 9 M. I. A. 303 ; Marsh 461 ; 1 Suth. P. C. J. 480 ; 1 Sar. P. C. J. 857 ; 19 E. R. 756, followed.

The object of section 60 of the Transfer of Property Act is to legalise the equitable right to redeem and permit redemption even when the right is expressly abandoned or even postponed by the contract of mortgage which is the subject-matter of a suit for redemption.

Teevan v. *Smith*, (1882) 20 Ch. D. 724 ; 51 L. J. Ch. 621 ; 47 L. T. 208 ; 30 W. R. 716, relied upon.

The question as to when a mortgagor is entitled to redeem must be answered with reference to the terms of the contract of mortgage as a whole, other relevant circumstances, and the rules of law and equity, applicable to the particular case.

When a suit is brought under a contract but one of its terms is challenged as being void in law the three years' rule of limitation does not apply.

Plaintiff sued to redeem a usufructuary mortgage executed by him in favour of the defendant. The deed provided, *inter alia*, that the balance of the realization by the mortgagee after deduction of the Government revenue was to be appropriated for the interest, the deficiency to be paid year by year by the mortgagor and in the event of default the mortgagee to be entitled to compound interest at the contractual rate. It further provided that the mortgagor shall have no right of redemption for 50 years after which period redemption would take place in payment of principal, interest and compound interest due. It appeared that the net profits of the mortgaged property were about Rs. 275 and the interest amounted to Rs. 720 thus leaving a deficit of Rs. 445 payable by the mortgagor to the mortgagee every year;

Held (1) that the combined effect of the covenant postponing redemption for 50 years and other covenants and the circumstances entailing a perpetual deficiency of profits to the extent of Rs. 445 a year was to render the mortgage in question irredeemable.

(2) that the covenant was repugnant to or inconsistent with the contractual right to redeem.

BALBHADRA PRASAD *v.* DHANPAT DAYAL

(3) that the plaintiff was entitled to redeem it at any time consistent with the usufructuary nature of the mortgage in suit on payment of what was due to the mortgagee on the date of redemption.

Appeal against the decision of the Subordinate Judge, Fyzabad, dated the 13th November 1922.

Messrs. *Bisheshar Nath Srivastava* and *Bishambar Nath Srivastava*, for the Appellant.

Messrs. *Niamat Ullah* and *N. N. Dutt*, for the Respondent.

JUDGMENT.—On the 5th January, 1910, the plaintiff who is the appellant in this Court, obtained a decree for pre-emption from the Court of the Subordinate Judge of Fyzabad in respect of the property now in suit. The decree imposed the condition of payment by the plaintiff of the sum of Rs. 3,900 within 6 months of its date.

On the 29th of June 1910, the plaintiff raised a loan from one Shyam Sunder Lal under a pronote ostensibly for Rs. 5,000 and satisfied the condition of the pre-emption decree by depositing Rs. 3,900 in the Court on the same day. The balance of Rs. 1,100 was set off against a pro-note of the 24th November 1909. The plaintiff's son, Mahabir Prasad, joined in the execution of the pro-note.

On the following day, *i.e.*, the 30th of June 1910, the plaintiff executed a deed of usufructuary mortgage in favour of Dhanpat Dayal, defendant-respondent, for a sum of Rs. 6,000 in respect of the property which he had acquired by virtue of the decree for pre-emption. The suit out of which the present appeal arises, is for redemption of the above-mentioned mortgage. The Court below has dismissed it; hence this appeal.

The terms of the deed of mortgage dated the 30th June 1910, which have a bearing on the decision of the appeal are as follows :—

1. Rate of interest—Rupees twelve per cent. per annum.

2. The balance of the realizations by the mortgagee after deduction of the Government Revenue is to be appropriated for the interest, the deficiency in the amount of interest will be paid year by year to the mortgagee by the mortgagor ; in the event of default the mortgagee will be entitled to compound interest at the contractual rate.

3. Any enhancement made by the mortgagee in the profits of the property mortgaged will be appropriated by him, the mortgagor shall have no claim to it either at the time of redemption or at any time.

The mortgagor shall have no right of redemption for fifty years; redemption will take place after the expiration of fifty years in Jeth *Khali fasal* on payment of the principal, interest and compound interest due.

5. The mortgagee will have the power of providing homesteads to new tenants, of demolition of houses, of planting groves, of sinking wells and of constructing tanks, etc., etc., for which he will be entitled to receive compensation from the mortgagor at the time of redemption.

The mortgagee will have the power of cutting groves, entirely or partly, resumption of rent-free grants and enhancement and assessment of rent. The mortgagor shall have no right to receive any mesne profits, to claim any damages or price thereof at the time of redemption.

Out of the total consideration of Rs. 6,000 the sum of Rs. 5,000 was left with the mortgagee to pay to Shyam Sunder Lal in dischage of the pro-note of the 29th of June 1910, and the balance Rs. 1,000 was received by the mortgagor at the time of the registration of the deed in suit.

The substance of the plaintiff's case is that the real consideration for the pro-note which he received was Rs. 3,900 only, that the extra amount of Rs. 1,100 was fictitiously entered, that the sum of Rs. 1,000 which he received at the registration of the deed of mortgage was returned to and taken back by the mortgagee and

(1) "that all the terms entered in the mortgage-deed have been written on account of the old age and simplicity of the plaintiff and the putting of undue influence upon him. The plaintiff is not bound by the limitation of fifty years" (Para 7 of the plaint).

(2) " That the term of fifty years regarding redemption and other terms are so hard and inequitable and constitute a clog on the equity of redemption that the plaintiff is neither legally nor equitably bound by them." (Para. 8 of the plaint.)

The defence traversed the plaintiff's case and set up one circumstance which has been relied upon in the arguments at the Bar and is also noticed by the learned Judge of the Trial Court. It is stated in paragraph 18 of the written statement which is as follows: –

"That the net profit of the mortgaged property at the time of the execution of the mortgage-deed was about Rs. 275 and the interest of the mortgage money amounts to Rs. 720. The interest cannot be paid off by the said profits, and out of the mortgaged property one property *i. e.*, Manjha Pusra has been lost by diluvion for about 20 years. If by the good fortune of the defendant Manjha emerges out of water within 50 years then he would gain immensely. On account of these considerations by the defendant inspite of the profits of the mortgaged property being much less the mortgage-deed was got executed for a period of 50 years. Therefore, the plaintiff is not entitled to redemption within limitation."

The suit has been dismissed on the preliminary ground that the term of fifty years as a part of the contract of mortgage was binding. Against this judgment of the Court of first instance, two lines of attack were taken at the hearing of the appeal :

(1) The term should not be enforced because it was the result of undue influence exercised on the plaintiff ; (2) because it is unconscionable and oppressive fettering the right to redeem.

The subsidiary point as regards the sum of Rs. 1,100 as part consideration of the pro-note of the 29th of June 1910 and the sum of Rs. 1,000 as having been taken back by the mortgagee was also pressed at the hearing of the appeal. This point may be disposed of first.

The receipt accompanying the pro-note recites that Rs. 1,100 were due to Shyam Sunder Lal for principal and interest under a previous pro-note executed by the plaintiff and his son Mahabir Prasad, on the 24th of November, 1909. The plaintiff's version is that there was no previous loan and no previous pro-note. The pro-note of the 29th of June, 1910 was in my judgment a part of the mortgage transaction of the following day, the 30th of June, 1910. Without payment of the money due under the pre-emption decree the plaintiff could not have acquired any interest in the properties and consequently could not have validly made a transfer of them by way of mortgage. The mortgage, therefore, was to follow and not precede the deposit of the pre-emption money. This explains the circumstance that money was first advanced under the pro-note and was deposited on the 29th of June so as to clear the way for the execution of the deed of mortgage on the 30th of June. I am not prepared to accept the defendant's version that the mortgage transaction was negotiated and arranged between him and the plaintiff independently of Shyam Sunder Lal and the terms were settled while the deed was being written. This version is opposed to all the reasonable probabilities of the case as pointed out above. No indication of this version was given while the plaintiff was being cross-examined on behalf of the defendant. The pro-note in question contains no stipulation for any interest on the advance. This again shows that it was merely a prelude to the mortgage transaction. Shyam Sunder Lal's son was married to the daughter of the defendant and I have no doubt that Shyam Sunder Lal was the chief figure and the moving spirit of the whole transaction. Whether the name of Dhanpat Dayal was used in the deed as a *benami* for Shyam Sunder Lal or he was to be the real beneficiary is immaterial for the purposes of this appeal. What is material is the fact that the settlement of the terms of the transaction was made between Shyam Sunder Lal and the plaintiff ; and I accept to this extent the plaintiff's statement in the witness box. The result of this view is that the consideration for the pro-note was the consideration for the mortgage with an additional sum of Rs. 1,000. The plaintiff's case, therefore, amounts to this that out of the total sum of Rs. 6,000 he received only Rs. 3,900 and that he did not receive the balance. Now if the case were to rest here, I should be prepared to

assume that the plaintiff received Rs. 3,900 only. This assumption, however, does not entitle the plaintiff to the verdict that he is not liable for the balance. If the real consideration for the loan of Rs. 3,900 was liability to repay Rs. 6,000 the plaintiff cannot escape it on the plea of non-payment of the difference by the creditor. That that must have been the real nature of the transaction I have little doubt in my mind. The plaintiff applied to Shyam Sunder Lal for an advance at a moment when he was hard pressed for time. Shyam Sunder Lal took advantage of it and struck the bargain in his favour in consideration of accomodating the plaintiff. This was perfectly legitimate. In the case of *Potter* v. *Edwards* (1) the real transaction was that the mortgagor agreed to receive 700£ and give a mortgage for 1000£. This was upheld. The plaintiff s case, however, goes further. He says that he agreed to the liability being made a part of the consideration on the faith of the promise made by Shyam Sunder Lal that he would not enforce it. This then is a case of fraud on the part of Shyam Sunder Lal. He at first induced trust in the plaintiff by taking an oath and now the defendant is betraying it by seeking to enforce the liability. I have a shrewd suspicion that the plaintiff may be right. Fraud generally masquerades in the apparels of trust. But it is a bare suspicion and beyond the plaintiff's testimony there is nothing else to support it. Shyam Sunder Lal is dead. I must hold that the fraud alleged is not established. I am, therefore, of opinion that the plaintiff is liable for the whole amount of Rs. 6,000, the principal mortgage-money, under the deed of the 30th of June 1910.

Now I come to the main question in the appeal.

I am unable to uphold the plea of undue influence. What are the facts? The plaintiff has been a *Patwari* of a village for over 30 years ; his son, Mahabir Prasad was a *patwari* at the time of this transaction. Both are literate and men of business and Mahabir Prasad is the scribe of the deed of mortgage in suit. There was no previous money dealing between them and Shyam Sunder Lal or the defendant. It is contended on behalf of the plaintiff that he was hard pressed for time to satisfy the decree for pre-emption ; Shiam Sunder Lal took advantage of the circumstance and concluded a bargain all on his side. But these facts are not enough to make out a case of undue influence. That the plaintiff had urgent need of money is true but this does not place the lender in a position to dominate the will of the borrower. *Rani Sunder Koer* v. *Rai Sham Krishen* (2). I have no doubt in my mind that the bargain is wholly on the side of the defendant and "the transaction appears on the face of it, to be unconscionable," (a matter which I will deal with hereafter), still under section 16, sub-section (3), of the Indian Contract Act, 1872, the burden of proving the absence of undue influence can lie on the defendant only in the event of the plaintiff discharging the initial onus of satisfying the Court that the defendant or Shiam Sunder Lal was in a position to dominate the will of the plaintiff. I am not satisfied that he was. The first line of attack must, therefore, be repelled.

As to the second line of attack, I have come to the conclusion, after a prolonged and anxious consideration, that it must succeed. It was strenuously contended by the learned Advocate for the respondent that the jurisdiction of this Court to grant relief against the letter of the contract is limited in this particular case by the provisions of section 16 of the Indian Contract Act, 1872 and as the case does not fall within the terms of that section the relief must be refused. Reliance is placed in support of this proposition upon the decision of the Privy Council in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3). It is also contended that the jurisdicion is further restricted by provisions of section 60 of the Transfer of Property Act, 1882 and reliance is placed upon the decision of the Bombay High Court in the case of *Genu Tukaram Tapkir* v. *Narayan Raghu Tamhane* (4). On the

(1) (1857) 26 L. J. Ch. 468 ; 5 W. R. 407 ; 112 R. R. 418.

(2) 34 I. A. 9 ; 9 Bom. L. R. 304 ; 11 C. W. N. 249 ; 17 M. L. J. 43 ; 2 M. L. T. 75 ; 34 C. 150 ; 4 A. L. J. 109 ; 5 C. L. J. 106 (P. C.).

(3) 28 A. 570; 4 C. L. J. 1 ; 1 M. L. T. 205; 3 A. L. J. 495 ; 9 O. C. 188 ; 8 Bom. L. R. 491 ; 10 C. W. N. 849 ; 16 M. L. J. 292 ; 33 I. A. 118 (P. C.).

(4) 59 Ind. Cas. 258 ; 45 B. 117 ; 22 Bom. L. R. 1147.

other hand, the learned Advocate for the appellant relies in support of his position upon a series of cases decided in this Court in rapid succession; *Durga Singh* v. *Nawab Mirza Muhammad Raza Husain Khan* (5), *Mathura Prasad* v. *Bhagwat Prasad* (6), *Ram Das* v. *Swami Dayal* (7) and *Kunj Behari Lal* v. *Pandit Prag Narain* (8). The first three cases are decisions of a single and the same Judge, the last case was decided by a Bench of two other Judges of this Court.

Before deciding between these two contentions I must ascertain the true intent and effect of the terms of the deed in suit as they can be gathered from its language and the circumstances surrounding it. It is common ground that the transaction is essentially a mortgage from beginning till redemption and not a sale at the end of the term of fifty years. It is admitted on both sides before me that the net profits of the mortgaged property are Rs. 275 a year (Written statement para. 18). The amount of interest on Rs. 6,000 at the rate of 1 per cent. per mensem comes to Rs. 720 a year. The mortgagor was, therefore, liable to pay Rs. 445 from year to year out of his own pocket for fifty years. In the event of default the mortgagee was entitled to charge compound-interest. It is further admitted that the market value of the mortgaged property is Rs. 9,000 (Written statement para. 12). Assuming first that the plaintiff had independent means to enable him to pay the sum of Rs. 445 as it fell due every year and thus prevent the compounding of the interest; but as he must continue paying this for the whole period of fifty years he shall have paid Rs. 445×50 *i. e.*, Rs. 22,250 at the end of that term. This is equivalent to about two and a half as much as the value of the property. Now take the other alternative that he had means to pay the deficiency of Rs. 445 every year. At the end of the fifty years the mortgage-money would swell to an enormous sum of about two and a half lacs of rupees. On the evidence I am satisfied that the mortgagor had no means large enough to enable him to pay the sum of Rs. 445 every year. The learned Subordinate Judge makes the following remark on this point: —"The plaintiff himself affirmed that he had an income which was sufficient to have enabled him to pay off any deficiency in interest." This is obviously an error. The plaintiff stated all the sources of his income and when they are taken into account with his other needs of life the only reasonable inference is that at the time of the contract of mortgage the plaintiff was not in a position to make good the deficiency in interest out of his own pocket. It is immaterial that the means of the family have recently improved by one of the plaintiff's sons having joined the Provincial Medical Service on a salary of Rs. 120 per mensem. Shyam Sunder Lal had been a Quanungo of the circle in which these properties lie. The defendant and Shyam Sunder Lal have also shares in the same *mahal*. The parties, therefore, knew, as the learned Subordinate Judge finds, of the deficiency and further, in my opinion, the mortgagee knew of the mortgagor's inability to pay off this deficiency. I ask, why the profits were not entered in the deed? Answer is, to make it appear that the mortgagee was liable to account. But on the terms of the deed except the sum of Rs. 275 the amount of the yearly profits as taken by the parties at the time of the transaction, all other profits accruing in future were not to be debited against the mortgagee. The profits, therefore, as the deed provides, were to remain stationary at Rs. 275 a year. The result is that by the terms of the deed the deficiency of Rs. 445 per year was secured to enure for the whole period of fifty years. I have no doubt in my mind that such being the cumulative effect of these terms of the contract, those terms are oppressive and unconscionable. The deficiency being within the knowledge of the parties the learned Subordinate Judge's view is, "From this it is clear that the mortgagee gave the mortgagor the advantage of a larger sum of money than was actually warranted by the security offered and that was a good compensation for the term of fifty years." This clearly implies what I find as an inevitable conclusion that the deficiency was to be perpetual; and the reasoning would be sound if it had a basis of fact beneath it. The security was not large enough to cover the deficiency of interest not

(5) 25 Ind. Cas. 912; 17 O. C. 313.
(6) 53 Ind. Cas. 770; 22 O. C. 191; 6 O. L. J. 474; 1 U. P. L. R. (O.) 88.
(7) 57 Ind. Cas. 559; 23 O. C. 108, at p. 109.
(8) 68 Ind. Cas. 529; 9 O. L. J. 294; (1922) A. I. R. (O.) 283.

because it was intrinsically inadequate but because all the arrears of profits which would have gone towards the reduction or sweeping off the deficiency altogether were shut out to the mortgagee. Another answer to the learned Subordinate Judge's remark is that the situation would exactly be the same if the mortgagee's intention was to kill the right to redeem altogether. But whether such was the intention or not is of no consequence when the effect of the terms of the deed and other circumstances is to make irredeemable what in law is redeemable. To my mind this contract of mortgage will execute itself as a sale at the end of the fifty years. Who in his senses will seek redemption of this property worth Rs. 9,000 at the cost of 2½ lacs? It is said that the possibility in the increase of the area of the mortgaged property by the alluvial action of the river within the period of fifty years was the consideration which induced the mortgagee in accepting less profits for the present. This is a fallacious argument. The mortgagee is not by the terms of the deed suffering any loss on account of the deficiency of profits. The balance of the interest and compound-interest is accumulating to his manifest advantage and will continue to do so for the whole period of fifty years. In theory, therefore, the mortgagor still retains and will be found to retain his ownership even at the end of fifty years but in effect he has nothing left in him now. He has validly parted with possession and the residue is not worth a penny.

I am, therefore, of opinion that the combined effect of the covenant postponing redemption for fifty years and other covenants and the circumstances entailing a perpetual deficiency of profits to the extent of Rs. 445 a year is to render the mortgage in question irredeemable.

The next question is. Is there no relief against such a condition? I would be grieved to discover that law compels me to uphold this transaction in all its grossness.

"The letter, O how often
"Justice drowns
"Between the law and letter of the law."

(Tennyson's 'The Forestors' quoted in Ghose's Law of Mortgage, Volume I).

I agree with the learned Advocate for the respondent that no relief is possible on the sole ground that the terms are unconscionable or oppressive unless this case falls under the provisions of section 16 of the Indian Contract Act, 1872. I have already held that it does not. This satisfies the requirements of the decision of their Lordships of the Privy Council in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3). But the principle of law which applies to this case is embodied in the maxim 'Once a mortgage always a mortgage.' I am not concerned in this case with the extension 'and nothing but a mortgage' which has given rise to the question as to whether a mortgagee shall or shall not reserve to himself any collateral advantage outside the mortgage contract. This question is the subject-matter of the decision in the case of *Noakes & Co., Ltd.* v. *Rice* (9), *Bradley* v. *Carritt* (10) and *Samuel* v. *Jarrah Timber and Wood Paving Corporation Ltd.* (11), and seems to have been set at rest, at all events for the present by the decision in the case of *G. and C. Kregliner* v. *New Patagonia Meat and Cold Storage Company, Ltd.*(12), in favour of a mortgagee. The broad basis of the maxim 'once a mortgage always a mortgage' when freed from the entanglement, of its off-shoots lies in the fundamental conception of a mortgage, common to all civilised systems of jurisprudence, as a transaction of loan with an obligation to repay, the transfer of property by the debtor to the creditor being a collateral security for the enforcement of the obligation. This conception is maintained by the Transfer of Property Act, 1882, in the definition of mortgage and in the provisions compelling suits for sales or foreclosures. The mortgagor's right to redeem, therefore, subsists in spite of a contract to the contrary. One covenant of the deed in suit arrests that right for fifty years and releases it at the end of that period. Perhaps there can be no objection to this, though I do not decide so in this case. But the combined effect of the covenants, as

(9) (1902) A. C. 24 ; 71 L. J. Ch. 139 ; 86 L. T. 62; 50 W. R. 305 ; 66 J. P. 147.
(10) (1903) A. C. 253 ; 72 L. J. K. B. 471 ; 88 L. T. 633 ; 51 W. R. 686.
(11) (1904) A. C. 323 ; 73 L. J. Ch. 526 ; 90 L. T. 731; 52 W.R. 673; 11 Manson. 276; 20 T. L. R. 536.
(12) (1914) A. C. 25 ; 83 L. J. Ch. 79 ; 109 L. T. 802 ; 58 S. J. 97 ; 30 T. L. R. 114.

shown above, is to deprive the mortgagor of that right altogether. This is doing indirectly what could not be done directly. To quote Lord Macnaghten; "Can you impose on the equity of redemption a fetter operating indirectly, when you cannot, as it is admitted, impose a fetter which operates directly." Vide *Bradley* v. *Carritt* (10), already cited.

The maxim 'Once a mortgage always a mortgage' is clearly one of equity and is not displaced by anything contained in the Transfer of Property Act, 1882. On the contrary, it is recognised in the several provisions of that Act as already mentioned. It is not a rule of any technical formality of English Law but is founded upon an equitable view of the primary object of a contract of mortgage. A mortgage in its primary form is a conception traceable to antiquity. "The notion expressed by the word (gage) seems to be that expressed by our 'security'; something has either been given or been seized, and the possession of it by him in whose hands it now is, secures the payment of money or the performance of some act by the person by whom it was given or from whom it was taken." History of English Law, by Pollock and Maitland, Vol, ii, p. 118.

"We infer that the gagee was usually a mortgagee in Glanvell's sense of that term." p. 119.

"If the gage be given 'without a term' then, to all seeming, the creditor can at any time obtain a judgment which will order the debtor to pay within some fixed and reasonable period, and will declare that if this be not done, the creditor may do what he pleases with the gaged thing. It will be noticed that we have here something very like those 'decrees of foreclosure' which Courts of equity will make in much later days." p. 120.

The ancient notion was, therefore, simple and workable with a solid foundation of natural justice underneath it. Later day-lawyers, however, could not conceive of 'possession' disassociated from tenancy or ownership. A mortgagee's possession was clearly not that of a tenant. It was, therefore, that of an owner. If the 'possession' was that of a tenant, there must be demise, if it was in 'fee' there must be 'enfeoffment' Pollock and Maitland, Vol. ii, pp. 121 to 124. Thus through a fetish of technical forms, the mortgagee became the owner in law of the property mortgaged. It seems to me only natural and proper that the custodians of 'conscience' should revolt against such a fiction, or I should say, imposition, of law. The Common Law doctrine mangled the natural and straightforward characteristics of a mortgage but equity restored them to their original and real condition. On my part I see no jurisdiction for denunciations of the efforts of the Equity Judges to recover their lost jurisdiction. See in this connection the judgment of Lord Bramwell in the case *Salt* v. *The Marquess of Northampton* (13). If the substance of the transaction is a mortgage and nothing more than a mortgage, then, it must not be made irredeemable and any covenant which clogs the equity of redemption is void. "For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by Equity Judges. That end has always been to ascertain.....the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing" per Lord Haldane, L. C., in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company Limited.* (12)

In Stisted's case cited in *East India Company* v. *Atkyns* (14) the mortgagor had sworn on the Bible never to exercise the right to redeem, but the transaction being one of mortgage he was permitted to redeem. On the other hand in *Newcomb* v. *Bonham* (15) the decision of Lord Nothingham allowing redemption in pursuance of the maxim 'once a mortgage always a mortgage' though the right to redeem was restricted to the mortgagor and he had died without exercising it, was reversed by the Lord Keeper (Lord Guilford) on the ground that the transaction was a mortgage in form only but really of the nature of settlements for the benefit of the mortgagee.—*Bonham* v. *Newcomb* (16). The rule deducible from the leading case of *Howard* v. *Harris* (17), is thus stated in Campbell's

(13) (1892) A. C. 1; 61 L. J. Ch. 49; 65 L. T. 765; 40. W. R. 529.
(14) 1 Comyn. 349; 92 E. R. 1105.
(15) (1681) 1 Vern. 7; 23 E. R. 266.
(16) (1684) 1 Vern. 232; 23 E. R. 435.
(17) (1683) 1 Vern. 190; 22 E. R. 406; Wh. & T.L. C. (7th Ed. p. 11.)

Ruling Cases, Vol. XVIII, p. 358. "The right of redemption is an essential and inseparable attribute of a mortgage security. Equity will relieve against any agreement purporting to defeat or restrict the right of redemption." In *Mellor* v. *Lees* (18) Lord Hardwicke laid down "if any fetter is laid upon redeeming the mortgaged estate . . . it would not avail where it is done with a design to wrest the estate out of the hands of the mortgagor." Campbells' Ruling Cases Vol. XVIII, at p. 363. This rule was given effect to in the case of *Salt* v. *Marquess of Northampton* (13) and was maintained and accepted as correct in cases where the true character of the transaction was a mortgage but no more in the recent decision of the House of Lords in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company Limited*(19) already referred to. I see no reason whatsoever why this rule should not be followed here. The jurisdiction of the Courts in Oudh is defined by the provisions of section 3 of the Oudh Laws Act, 1876, and in the absence of any legislative enactment or custom to the contrary, the Courts are empowered to act according to "justice, equity and good conscience." Such of the rules of English Law as are not either technical in their origin, or peculiar to the customs, traditions and habits of the people of England have been invariably followed in this country as rules of 'justice, equity and good conscience.' *Varden Seth Ram* v. *Luckpathy Roujee Lallah Bunhah Lal* (19). In the case of *Waghela Rojsanji* v. *Shekh Masludin* (20) Lord Hobhouse said that "'Equity and good conscience' had been generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances." See also *Govindan Nair* v. *Achuthamenon* (21) and *Kripasindhu* v. *Ananda Sundari* (22). In the case of *Rambux Chittangeo* v. *Madhoosoodun Paul Chowdhry* (23) Sir Barnes Peacock, C. J. pointed out that in cases where rights of parties are determined according to the principles of justice and equity this must be done without any distinction between the partial justice which is administered in the Court of Law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity as in England. See also to the same effect the decision of Jenkins, C. J., in *Debnarain Dutt* v. *Ram Sadhan Mandal* (24) and *Bireswar Ghose* v. *Panchcouri Ghose* (25).

In America, the rule 'Once a mortgage always a mortgage' seems to have been uniformly upheld. The Ruling Case of *Howard* v. *Harris* (17) "heads a long list of cases in 5 Pomeroy's Equity Jurisprudence, section 1193." "It matters not how strongly the parties may express their agreement that there shall be no redemption ; the intent being contrary to the rules of equity it cannot be carried into effect. *Bayley* v. *Bayley* (26).

Article 2078 of the French Code, quoted in Ghose's Law of Mortgage, Vol. I is as follows. "The creditor cannot, in default of payment, dispose of the pledge saving to him the power of procuring an order of the Court that such pledge shall continue with him in payment and up to its due amount according to an estimate made by competent persons, or that it shall be sold by auction. Every clause which shall authorise the creditor to appropriate the pledge to himself, or to dispose thereof without the above-mentioned formalities is void."

As regards the Hindu Law in its advanced stage it may safely be said that the original text of Manu 'after no length of time neither an assignment, nor a sale of the pledge, can be made' has survived in spirit if not in letter, the attempts of successive commentators to interpret it in diverse ways. "But although foreclosure was allowed the idea that time is not of the essence of the contract in a mortgage was quite familiar to our law. Thus Vrihaspati says 'After the time for payment had passed and when interest ceases on becoming

(18) (1742) 2 Atk. 494 at p. 495 ; 26 E. R. 698.
(19) 9 M. I. A. 303; Marsh 461; 1 Suth P.C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.
(20) 14 I. A. 89; 11 B. 551; 11 Ind. Jur. 315 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S) 364 (P. C.)
(21) 28 Ind Cas. 394; 39 M. 433; 2 L. W. 290; 28 M. L. J. 310.
(22) 35 C. 34; 11 C. W. N. 983; 6 C. L. J. 273.
(23) 7 W. R. 377; B. L. R. Sup. Vol. 675; 2 Ind. Jur. (N. S.) 155.
(24) 20 Ind. Cas. 630; 41 C. 137; 17 C. W. N. 1143; 18 C. L. J. 603.
(25) 74 Ind. Cas. 975; 27 C. W. N. 587 at p. 597; 37 C. L. J. 145; (1923) A. I. R. (C.) 538.
(26) 5 Gray (Mass.) 505 ; Campbell's R. C. Vol. XVIII, pp. 363, 365.

equal to the principal, the creditor shall be owner of the pledge ; but the debtor has a right to redeem it before ten days have elapsed.' Similarly, Vyasa says :—"Gold being doubled and the stipulated period having expired, the creditor becomes owner of the pledge after the lapse of fourteen days." And Colebrooke, no mean authority, is of opinion that time is not of the essence of the contract of mortgage in Hindu Law and the texts cited by him fully support the proposition." Ghose's Law of Mortgage, fifth edition, Vol. I, p. 56.

To these quotations I will add one short passage from Colebrooke's Digest, Vol. I, section 80, p. 101, 4th edition, Madras.

"By acceptation, the sense of the word *bandha* is a thing remaining in the creditor's possession by an agreement on the part of the debtor in this form. "This chattel shall remain in thy possession so long as I do not repay thy money." This clearly brings into relief the fundamental notion that the transfer of property in a real transaction of mortgage is only a security for the repayment of the loan. The decision of Westropp, C J., in the case of *Bapuji Apaji* v. *Senavaraji Marvadi* (27) is highly instructive on this point.

The Muhammadan Law is perfectly clear in this respect. The following passages taken from Hamilton's Hedaya, Vol. IV, Book XLVIII of *Rahn*, or *Pawn*, show that the object of a transaction of *Rahn* is merely to furnish security for the repayment of the loan.

'Definition of *Rahn*.— *Rahn* literally signifies to detain a thing on any account whatever. In the language of the Law it means the detention of a thing on account of claim which may be answered by means of that thing, as in the case of debt.'

"As, moreover, the *pawnee* is entitled to take possession of the pledge as a security for his claim and to detain it (for *Rahn*, in its literal sense, signified detention), it necessarily follows that a pledge is not a trust.

"It is lawful for the receiver of a pledge to make a demand of his debt and even to imprison the *pawnor* in case of refusal, because the claim still exists after the receipt of the pledge which is not considered as a fulfilment, but merely as a preservative of it."

"Whenever a *pawnee* demands payment of his debt, it is requisite that the *Kazee* order him first to produce the pledge; because as he possesses that for the purpose of obtaining payment, it is not lawful for him to take his due at the same time that he retains possession of the pledge which he holds as a security ; since if in such case, the pledge were to perish in his hands, a double payment would be induced, which is inadmissible. And when the *pawnee* shall have produced the pledge; the *Kazee* must order the depositor first to discharge the debt, in order to ascertain the *panee's* right in the same manner, as the right of the *pawnor* is ascertained, to the end that both may be placed upon an equal footing ; as in the case of bargains, where the seller having produced the goods, the buyer then lays down the purchase money :

The well-known transaction of *bai-bil-wafa* is in its ostensible form a sale with an option of repurchase but in substance is a mortgage, the design being to escape the sin of levying interest (See Hamilton's Hedaya, Vol. III and Baillie's Mohammadan Law of sale, quoted in Ghose's Law of Mortgage, pp. 63-65). The Bengal Regulation XVII of 1806, placed *bai-bil-wafa* on a strict footing of mortgage in the Provinces of Bengal, Behar, Orissa and Benares by giving the mortgagor the right to redeem in spite of the contract to the contrary. The effect of the provisions of the Transfer of Property Act 1882, is the same. See the Privy Council decision in *Balkishen Das* v. *W. F. Legge* (28).

There is yet another broad and simple ground on which a decision in favour of the appellant in this case may be based. The deed in suit provides that the mortgagor will have the right to redeem with a stipulation that he shall not do so for fifty years. This is his contractual right separate from and independent of his equitable right or the right in law to redeem. But the effect of the other clauses of the deed is, as shown before, to take away that contractual right if the covenant as to the postponement of the exercise of that right for fifty years is given effect to. The covenant is, therefore, repugnant to or inconsistent with the contractual

(27) 2 B. 231 ; 1 Ind. Dec. (N.S.) 580.

(28) 22 A. 149; 4 C. W. N 153; 2 Bom. L. R. 523; 27 I. A. 58 ; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P.C.).

right to redeem. It must, therefore, be held to be void for repugnancy. The conclusion is supported by the illuminating and instructive judgment, if I may respectfully say so, of Lord Parker in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company Limited* (12) already referred to.

It now remains to consider the argument of the learned Advocate for the respondent founded on the expression 'at any time after the principal money has become payable,' occurring in section 60 of the Transfer of Property Act, 1882. The argument comes to this that the time when the mortgage-money becomes payable must be determined in all cases in accordance with the letter of the contract. The argument when carried to its legical end leads to absurd results. Suppose a deed of mortgage expressly provides that, redemption shall never take place and that the mortgagee, on the other hand, shall not be entitled to recall the mortgage money. It follows that, the mortgage money shall never 'become payable.' It further follows that no suit for redemption will ever lie under section 60. This conclusion is obviously untenable. Instances may be multiplied. The object of section 60 is to legalise the equitable right to redeem and permit redemption even when the right is expressly abandoned or even postponed by the contract of mortgage which is the subject matter of a suit for redemption. This proposition is fully established by the recent decision of the Privy Council in the case of *Mohammad Sher Khan* v. *Raja Seth Swami Dayal* (29).

The mortgage money benomes payable as soon as the mortgagor execrcises his right to redeem or is entitled to redeem. The question as to when a mortgagor is entitled to redeem must be answered with reference to the terms of the contract as a whole, other relevant circumstances, and the rules of law and equity, applicable to the particular case. In interpreting the expression 'where a mortgagor is entitled to redeem' in section 15 of the Conveyancing Act 1881 (44-45 Vict. C. 41). Jessel, M. R. made the following observations:—"So that the words 'where a mortgagor is entitled to redeem really include every mortgagor, except a mortgagor who is precluded by some special term in his mortgage-deed from redeeming within a specified time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years.' *Teevan* v. *Smith* (30), Now in the case before me I have already held that the combined effect of the stipulation preventing the mortgagor from redeeming for the long period of fifty years and other stipulations in the deed of mortgage is to preclude the mortgagor from redeeming altogether I have already shown that such an effect must be negatived and this view is further supported by the dictum of Jessel, M. R just now quoted. It follows that the plaintiff is entitled to redeem at any time consistent with the usufructuary nature of the mortgage in suit on payment of what is due to the mortgagee on the date of redemption. In the case of *Biggs* v. *Hoddinott* (31) the mortgage was for a term of five years. The action was brought by the mortgagee on a covenant contained in the deed of mortgage for an injunction and damages against the mortgagors. The mortgagors took out an originating summons against the mortgagee to compel redemption. Romer, J. dismissed this summons. The grounds of decision were more than one, some of which would clearly fall in line with a case of undue influence under the provisions of section 16 of the Indian Contract Act, 1872, but which the learned Judge held was not made out, as I have already held in the present case. There is one ground, however, which supports the view I am taking here. At the beginning of his judgment, the learned Judge quoted the passage which I have given above from the judgment of Jessel, M. R., in the case of *Teevan* v. *Smith* (30), *i.e.*, 'although the law will not allow a mortgagor to be precluded from redeeming for a fixed period, such as five or seven years' and at the end of his judgment on this point observed as follows:

(29) 66 Ind. Cas. 853; 25 O. C. 8; 44 A. 185; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79 (P. C.).

(30) (1882) 20 Ch. P. 724; 51 L. J. Ch. 621; 47 L. T. 208; 30 W. R. 716.

(31) (1898) 2 Ch. 307; 67 L. J. Ch. 540; 79 L. T. 201; 47 W. R. 84.

'It seems to me, therefore, that looking at the mortgage *as a whole*, there is nothing here which in my opinion, would prevent this proviso precluding the redemption for five years being enforced by the Court. (The italics are mine). When I look at the mortgage before me as a whole I am driven to the conclusion that the covenant precluding the mortgagor from redeeming for fifty years breaks the rule of law with which the judgment of Romer, J. opens, and therefore must not be enforced by the Court. In the case of *Morgan* v. *Jeffreys* (32) the mortgagor was precluded from redeeming for twenty eight years without the consent of the mortgagor, Joice, J., set aside the stipulation as being unreasonable. The exact ground of decision is not much to the point, in the present case, but his reasoning at pp. 626-27 with reference to a large number of precedents amply supports my view in this case. The case of *Genu Tukaran Tapkir* v. *Narayan* (4) was decided on the ground that the existence of the trees on the mortgaged property was the essence of the contract of mortgage and therefore the covenant postponing redemption till the trees existed was not a clog. The learned Chief Justice recognised that certain general principles of English Law relating to the question before him could be applicable to cases in India. He, however, did not state any such principles and decided the case upon the terms of sections 60 and 61 of the Transfer of Property Act 1882, as he interpreted them. The case is no authority, one way or the other, on the lines on which the present judgment proceeds.

It was lastly suggested rather than argued that the relief against the term of fifty years is barred by three years' rule of limitation. The answer to this is given in the decision of their Lordships of the Privy Council in the case of *Jafri Begum* v. *Syed Ali Raza* (33). The present suit is not in spite of the mortgage but under it, one of the covenants of which is void in law.

I therefore allow the appeal, set aside the decree of the lower Court and as the case has been decided on a preliminary point I send it back to the lower Court for decision according to law. The appellant will get his costs hitherto incurred in both the Courts from the respondent, who will bear his own costs.

K. S. D. *Appeal allowed.*

(32) (1910) 1 Ch. 620 ; 79 L. J. Ch. 360 ; 74 J. P. 154 ; 26 P. L. R. 324.

(33) 23 A. 383 ; 5 C. W. N. 585 ; 28 I. A. 111 ; 8 Sar. P. C. J. 27 (P. C.).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NOS. 81 AND 190 OF 1919.

February 18, 1921.

Present :—Mr. Justice Mullick and Mr. Justice Bucknill.

SAIYED MUHAMMAD JAWAD HUSAIN —JUDGMENT-DEBTOR —APPELLANT

versus

MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XXI, r. 90—Execution of decree—Rent decree—Sale of tenure—Auction-Purchaser, whether liable for antecedent arrears of rent—Sale-Proclamation implying such liability—Irregularity—Sale, whether can be set aside.

Where a tenure is sold in execution of a decree for rent, the landlord cannot sue the auction-purchaser for any rent which accrued before the date of his auction-purchase, and the only person liable to pay that rent is the tenant judgment-debtor.

Faez Rahaman v. *Ramsukh Rajpal*, 21 C. 169, 10 Ind. Dec. (N. S.) 746, relied on.

Where a tenure is being sold in execution of a decree for rent, any statement in the sale-proclamation implying that the auction-purchaser would be liable to pay off antecedent arrears of rent is wrong, and the judgment-debtor is entitled to have the sale set aside in such a case, on proof of substantial injury.

Appeal against an order of the Sub-Judge of Gaya, dated the 28th June 1919.

Messrs. *Kulwant Sahay*, *Syed Mahomed Tahir* and *Hasan Jan*, for the Appellant.

Messrs. *Kailaspati*, *Abani Bhusan Mukharji* and *Binoy Bhushan Mukharji*, for the Respondent.

MUHAMMAD JAWAD HUSAIN *v.* KUMAR GOPAL SARAN NARAIN SINGH

JUDGMENT.

Mulick, J.—This is an appeal preferred by Syed Jawad Hussain against an order by the Subordinate Judge of Gaya refusing to set aside a sale held on the 25th April 1919. The application to set aside the sale was made on the 12th May 1919 and was finally disposed of by a judgment dated the 28th June of that year.

The first ground taken before us is, that the sale-proclamation was irregular in so far as it notified a charge of Rs. 2,835-9-1 due under a rent-decree dated the 14th August 1916 on account of previous arrears and also a charge of Rs. 8,492-0-6 on account of rent due from the Bhado kist of the year 1322 to the year 1325 f. s. for which a suit was then pending in the Court of the First Subordinate Judge of Gaya.

It is contended that under the Bengal Tenancy Act the arrears for the years in suit were the only charge for which the tenure could have been brought to sale and that the sale-proclamation was irregular in so far as it suggested that the tenure was liable to satisfy the demands due against it in respect of arrears which had accrued previous to the suit or between the date of the suit and the date of the sale. It is urged that in consequence of this irregularity the price fetched at the sale was considerably below the true value and that the appellant is entitled to a reversal of the sale.

I think it must be admitted that this complaint is well founded. The case of *Faez Rahaman* v. *Ramsukh Bajpai* (1) is authority for the proposition that the landlord cannot sue the auction-purchaser for any rent which accrued before the date of his auction-purchase and that the only person liable to pay that rent is the tenant judgment-debtor. But that case did not decide what would be the equities between the landlord and the auction-purchaser if the latter does in fact buy subject to such a charge. That point came up for decision in a later case namely, *Haradhan Chattoraj* v. *Kartik Chandra* (2), and it was there held that if the auction-purchaser purchases a tenure sold subject to prior charges for rent he cannot in a subsequent suit by the landlord be heard to repudiate the liability created by his act. A question was raised in that case whether it was at all legal to sell the tenure subject to a liability for past arrears but upon that point the learned Judges did not express any opinion and it was not decided whether the judgment-debtor could ask for the reversal of the sale on the ground of material irregularity and substantial loss. Here that ground is now taken by Mr. Kulwant Sahai on behalf of the judgment-debtor.

In my opinion the plea of irregularity must be accepted. The law does not hold the auction-purchaser liable to pay off antecedent arrears of rent and therefore any statement in the sale proclamation implying such a liability was clearly wrong. The judgment-debtor is entitled to have the sale set aside if he can prove that the price fetched at the sale was an adequate price taking into account the charges notified in the proclamation.

Now in this case the value of the property as disclosed by the evidence does not appear to be anything near the sum of Rs. 60,000 which is the figure put upon it by the appellant. The learned Judge in the sale proclamation has after enquiry entered the value at Rs. 33,387. He has also shown in the sale-proclamation the valuation put by the decree-holder which was Rs. 5,000 but in the circumstances I do not think this was an irregularity. The evidence now given before us in support of the valuation at Rs. 60,000 consists of certain *Jamabandi* papers for the years 1323, 1324 and 1325 F. S. and of certain survey *khatians* showing that the *Nakdi* or cash rental of the tenure amounted to Rs. 3,129 per annum. It is contended that the average annual income from the property both from *haoli* and *nakdi* rents amounted to Rs. 4,897, exclusive of the income from three *mauzas* Domia, Sheimbigh and Nima. It is contended that the statement of Amir Hasan in a previous case and the survey *khatian* show that the cash rental from these villages in respect of appellant's share amounts to Rs. 506. Adding this amount to the annual rental mentioned above, the total rental of the tenure would come roughly to Rs. 5,402 and after making deduc-

(1) 21 C. 169 ; 10 Ind. Dec. (N. S.) 746.
(2) 6 C. W. N. 877.

tions for *Mokarrari* rents, cesses and collection charges, it is estimated by the appellant that his net annual income from the property was Rs. 2,698. At 20 years purchase the capitalised value would be Rs. 54,000; and adding to that a sum of Rs. 1,800 which is estimated to be the value of the 72 acres of *bhaoli* lands in *mauza* Nimia, the total valuation of the tenure would come to very nearly Rs. 56,000. In support of this valuation oral evidence is given by the *Patwari* of the appellant and a deposition is also filed which was taken from the present auction-purchaser in a previous case and in which he appears to have made various admissions leading to the inference, that the value of his property was about Rs. 60,000.

Now the learned Subordinate Judge has gone into all the evidence given on the point of valuation and he has recorded his deliberate opinion that the claim is exaggerated. He does not rely upon the *Jamabandis* because they are not the originals, and he thinks that having regard to the fact that the sale was a forced sale and making allowance for the charges notified in the sale proclamation he comes to the conclusion that the sum of Rs. 15,600 which was fetched at the auction was a fair price under the circumstances. It is to be remembered that the auction-purchaser has undertaken liability to discharge the demands for anterior rents amounting to a sum of Rs. 12,000 odd, and if this demand is added to the sale price, the total comes to a little over Rs. 27,000. Having regard to the fact that the sale was held in execution of the Civil Court decree and to the fact that the property is situated at a considerable distance in a jungly tract, I cannot say that the finding of the learned Subordinate Judge is incorrect. Moreover looking at bid sheet it does not appear that there was any paucity of bidders. The sale occupied part of one day and was adjourned till the following day, and excluding the auction-purchaser there were five other bidders who appear to have kept up a spirited contest. Therefore, the appellant fails upon the preliminary condition which it is necessary for him to establish. He has not proved satisfactorily that the purchase price was inadequate.

Then as regards the question of service of notice and sale proclamation which is the other irregularity alleged, the auction-purchaser has examined three witnesses, namely, the Civil Court peon, the identifier and a man who seems to be the servant of the auction purchaser. The sale proclamations had to be served in 19 villages and between the report submitted by the Civil Court peon and the evidence given by him and by the identifier in Court, there are undoubted discrepancies. It is contended that these discrepancies are fatal and point to the inference that no service took place as alleged on the 12th and 13th March, but that a service return was manufactured by the peon after he returned to head quarters and that there has been deliberate fraud by suppression of the necessary notices. The Subordinate Judge, however, records that he was thoroughly satisfied that the peon and the two witnesses, who corroborated him, were witnesses of truth. Having regard to the fact that the witnesses were deposing in regard to matters that took place several months before, the discrepancies in my opinion do not necessarily indicate that the peon has manufactured a false return. He does not appear to have had any interest in deposing falsely in this case and the probabilities are that if it had been the intention of the decree-holder to sell the appellant's tenure by suppressing the necessary proclamations and notices, he would have taken good care to make a more complete and consistent case in Court in regard to this matter. The result, therefore, is that the irregularities complained of in the matter of service of sale notices and proclamations have not been proved.

There was, however, an irregularity in the frame of the sale proclamation, but as substantial loss has not been established the appeal must fail.

It is said that the decree-holders have drawn out a sum of Rs. 3,000 out of the surplus sale proceeds in the hands of the Court in satisfaction of the decree-holders' demands for previous years. It does not, however, seem quite clear from the order sheet whether this is a fact. The auction-purchaser admits that a decree has been passed against him making him liable to pay to the landlord the sum of Rs. 12,000 odd due on account of previous arrears. So far, therefore, as the judgment-debtor-appel-

lant is concerned he is in my opinion relieved from the liability to pay that sum, and if it is a fact that the decree-holder has in addition to the claim under this decree realised a sum of Rs. 3,000 from the surplus sale proceeds which really belongs to the judgment-debtor, then the judgment-debtor is entitled to proceed against the decree-holder for that sum elsewhere. So far as this appeal (M. A. No. 190 of 1919) is concerned, I do not think there is any ground shown for interfering with the orders of the lower Court. The appeal is dismissed with costs which will be payable to the auction-purchaser-respondent only.

As regards appeal No. 81 of 1919, the point taken by the learned Vakil for the appellant, namely, that the Subordinate Judge was wrong in deciding that the decree was a rent decree and that the execution would proceed in accordance with provisions of Chapter XIV of the Tenancy Act has not been pressed. The appeal is, therefore, dismissed without costs.

Bucknill, J.—I entirely agree with what has been said by my learned colleague. I should like, however, to point out that I wish to guard myself from being understood to say that in the present state of authority it has been clearly held that it is illegal to introduce into the conditions of a sale of this character an instruction that the sale takes place in execution of the decree but subject to other encumbrances whether relative to arrears of rent or otherwise. That such a statement may be irregular under certain circumstances when the other charges specified relate to arrears of rent I think there can be little doubt but that it is of such a character that the whole must be regarded as voidable or that it *ipso facto* vitiates the sale is not a proposition to which I must be taken to defer.

As has been pointed out by Mr. Justice Mullick, it may very well be that where the effect of the introduction of the statement of the existence of prior encumbrances is such as to affect adversely the proper position of the judgment-debtor it may be the proper and open course for him to apply to this Court in order that the sale may be set aside.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 382 OF 1919.

May 30, 1921.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

NATHU RAM AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
KANHAIYA LAL—DEFENDANT—
RESPONDENT.

Hindu Law—Joint family—Alienation by father—Necessity, proof of—Bulk of consideration for necessity—Rule applicable.

In cases where a Hindu father has sold ancestral property for the discharge of his debts, if the application of the bulk of the sale proceeds is satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale.

Girdharee Lall v. *Kantoo Lall*, 1 I. A. 321 ; 14 B. L. R. 187 ; 22 W. R. 56 ; 3 Sar. P. C. J. 380 (P. C.), followed.

Each case must, however, be dealt with on its merits in order to decide whether the amount for which legal necessity has not been proved is, with regard to the whole consideration, what may be described as a trifling sum.

A sum of Rs. 500 out of a total consideration of Rs. 3,500 cannot be described as a trifling sum within the meaning of the above rule

Gobind Singh v. *Baldeo Singh*, 25 A. 330 ; A. W. N. (1903) 57; *Ram Dei Kunwar* v. *Abu Jafar*, 27 A. 494 ; A. W. N. (1905) 68, followed.

Appeal against the decree of the Second Additional Judge, Aligarh, dated the 1st February 1919.

Messrs. *N. C. Vaish* and *A. Sanyal*, for the Appellants.

Messrs. *M. L. Agarwala* and *Gulzari Lal*, for the Respondent.

JUDGMENT.—In this case the question we have to decide is whether the suit of the plaintiffs should stand dismissed as ordered by the lower Appellate Court or whether the plaintiffs are entitled to a con-

ditional decree for the setting aside of the sale complained of and for the return of the property.

The plaintiffs are the sons of Dunger Mal who, it is alleged, sold certain joint family property on the 23rd of December 1902 to the first defendant Kanhaiya Lal. The property which was sold consisted of a moiety share in a 6 *biswa* 5 *biswansi* share situated in a village called Daulatpur, entered in the *khewat* as No. 1. Another item which was sold at the same time consisted of a proportionate share in 51 *bighas* odd entered in *khewat* as No. 3 of the same village. This latter item appears to be a share in the "*Shamilat Deh.*"

The suit was brought in the year 1918 by the two plaintiffs one of whom Nathu Ram had just attained majority, the second plaintiff in the case, Shib Shanker, was still a minor at the time the plaint was filed. There were the usual allegations in the plaint to the effect that the sale had been made without any legal necessity and for the purpose of procuring funds for the plaintiffs' father who was addicted to gambling and other vices.

The Court of first instance found that the defendant Kanhaiya Lal had failed to prove that the sale was for legal necessity. It accordingly decreed the plaintiffs' claim. In appeal the finding of the Judge was that the defendant had made a proper enquiry and that there was legal necessity for the sale. The result was that he dismissed the suit of the plaintiffs.

In appeal the judgment of the lower Appellate Court is attacked on the ground that there is no evidence on the record to prove that the entire sum of Rs. 3,500 was given to Dunger Mal for purposes which were legally necessary. On the contrary it is argued that on the finding come to by the learned Judge there was legal necessity for only Rs. 3,000 out of Rs. 3,500.

It appears that prior to the date of the sale Dunger Mal the father of the plaintiffs had executed two promissory-notes in favour of one Kewal Ram and that the property now in dispute was sold for the purpose of discharging those debts. There is evidence to show that at the time the deed was registered Kewal Ram was paid a sum of at least Rs. 3,000. In his evidence given before the Court of first instance the first defendant stated that he also paid in addition another sum of Rs. 40 or Rs. 50. Beyond this there is no other evidence to which we have been referred by either party, and it is, therefore, argued on behalf of the plaintiffs that in these circumstances they are entitled to have the sale set aside on condition of their paying to the defendant-vendee a sum of Rs. 3,000. On the other hand, the argument has been that, inasmuch as the bulk of the purchase-money is found to have been paid for, and applied to, the discharge of debts which were legally binding, the sale ought to stand and the plaintiffs' claim ought to be dismissed.

The appellants' learned Counsel relies on two cases of this Court reported in *Gobind Singh* v. *Baldeo Singh* (1) and *Ram Dei Kunwar* v. *Abu Jafar* (2) and certainly those cases are in favour of this contention.

It is difficult to decide cases of this nature upon any fixed principle. It has been held by their Lordships of the Privy Council that in cases where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds has been satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale *Girdharee Lall* v. *Kantoo Lall.* (3) That principle has been followed in numerous cases. The difficulty always is to ascertain what amount in cases like this is the "bulk" of the purchase-money. In one of the Allahabad cases to which we have been referred it was found that out of the total consideration of Rs. 3,299-8-0 a sum of Rs. 2,923-8-0 represented money which had been applied for purposes of legal necessity and the plaintiffs in that case were given a decree for the recovery of the property upon payment of the latter sum. Similarly in the other Allahabad case where it was found that Rs. 2,550 out of the total consideration of Rs. 2,995 represented money taken for legal necessity, a conditional decree for setting aside the sale was passed on payment of the sum of Rs. 2,550. We have, therefore, to deal with each case on its merits and to decide whether in a particular

(1) 25 A. 330 ; A. W. N. (1903) 57.
(2) 27 A. 494 ; A. W. N. (1905) 68.
(3) 1 I. A. 321; 14 B L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.).

instance, the amount for which the legal necessity has not been proved, is, with regard to the whole consideration, what may be described as a trifling sum. In the present case it is shown that out of Rs. 3,500 only Rs. 3,000 represented money which was taken for legal necessity. We should find it difficult, having regard to the decisions of this Court, to hold that Rs. 500 is in this instance a trifling amount and we think, therefore, that we ought to follow the line which was taken in the two Allahabad cases above referred to.

The result, therefore, is that we allow the appeal and give the plaintiffs a conditional decree by which they will be entitled on payment of Rs. 3,000 within six months from the date of this Court's decree, to have the sale set aside and the property returned by the defendant Kanhaiya Lal. If they fail to deposit this sum of Rs. 3,000 in Court within the period so limited their suit will stand dismissed. Considering the long interval that has elapsed since the date of the sale we think that as regards costs the proper order will be to direct the parties to bear their own costs in all three Courts.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 175 OF 1921.

February 11, 1924.

Present :—Mr. Justice Ramesam and Mr. Justice Jackson.

TADURI RAMACHANDRA JAGANNATHA RAO AND OTHERS– DEFENDANTS— APPELLANTS

versus

VADREVU VISWESAN—PLAINTIFF— RESPONDENT.

Hindu Law—Mitakshara—*Father's debts incurred before partition—Son, whether liable.*

Unnder the *Mitakshara* Law a Hindu son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition (impleading him also) for the father's debts incurred before the partition and not illegal or immoral.

Case-law discussed.

Kurri Venkata Reddi v. *Chelluri Satyanarayanamurthi*, 62 Ind. Cas 980 ; 40 M. L. J. 473 ; 29 M. L. T. 265 ; (1921) M. W N. 261 ; 13 L. W. 516 ; *Peda Venkama* v. *Sreenivasa Deekshatulu*, 43 Ind. Cas. 225; 41 M. 136 ; 22 M. L. T. 334 ; 33 M. L. J. 519 ; 6 L. W. 649 ; (1918) M. W. N. 55, dissented from.

Appa Pillai v. *Ranga Pillai*, 6 M. 71 ; 7 Ind. Jur. 71 ; 2 Ind. Dec. (N. S.) 327; *Girdharee Lall* v. *Kantoo Lall*, 1 I. A. 321; 22 W. R. 56; 14 B. L. R. 187 ; 3 Sar. P. C. J. 380 (P C.); *Hanooman Persaud Panday* v. *Baboo Munraj Koonweree*, 6 M. I. A 393 ; 18 W. R. 81 N. : Sevestre 253 N ; 2 Suth. P. C. J. 29; 1 Sar. P.C. J. 552; 19 E. R. 147; *Muthayan Chetty* v *Sangili Vira Pandia Chinnatambiar, Zamindar of Sivagiri*,6 M 1; 9 I. A. 128 ; 4 Sar. P. C. J. 354 ; 12 C. L R. 169 ; 6 Ind. Jur. 486 ; 5 Shome L. R. 57 ; 2 Ind. Dec. (N. S) 379 (P. C.), *Ponnaappa Pillai* v. *Pappuayyangar*, 4 M.1; 1 Ind Dec. (N.S.) 839, *Ramaswami Nadan* v. *Ulaganatha Goundan*, 22 M. 49 ; 8 M L J. 312 ; 8 Ind. Dec. (N. S.) 36, *Periasami Mudaliar* v. *Seetharama Chettiar*, 27 M. 243 ; 14 M. L. J 84 (F. B); *Lakshmi Chettiar* v. *Govindarajulu Naidu*, 8 Ind. Cas. 131 ; 8 M. L. T. 349 ; (1910) M. W. N. 565; *Rathna Naidu* v. *Aiyanachariar*, 18 M. L. J. 599 ; 4 M. L. T. 277; *Raja Bahadur Raja Brij Narain Rai* v. *Mangala Prasad Rai*, 77 Ind. Cas. 689 ; 46 M. L. J. 23 ; 21 A. L. J. 934 ; 5 P L. T. 1 ; 28 C. W. N. 253 ; (1924) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. & A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 33 M. L. T. 457 ; 46 A. 95 ; 26 Bom. L. R. 500 (P. C.), considered.

Ramachandra Padayachi v. *Kondayya Chetti*, 24 M. 555 ; *Kameswaramma* v. *Venkatasubba Rao*, 24 Ind. Cas. 474; 38 M. 1120; 27 M. L. J. 112; (1914) M. W. N. 742, followed.

Appeal against the decree of the District Court, Godavari at Rajahmundry, in O. S. No. 10 of 1920.

Messrs. *N. Rama Rao* and *T. M. Krishnasawmi Iyer*, for the Appellants.

Messrs. *S. Varadachariar*, *T. S. Raghunatha Rao* and *V. Viyanna*, for the Respondent.

JUDGMENT.

Ramesam, J.—Suit by the plaintiff to recover (1) a sum of Rs. 2,500 deposited with 1st defendant on 6th July 1917 and (2) sum of Rs. 350 payable to plaintiff for money paid for the 1st defendant. The defendants Nos. 2 to 5 are the sons of 1st defendant who formed with him, members of a joint family up to 1918. In that year a suit was filed by the present 2nd defendant against his father and brothers for partition. No written statement was filed and the suit was compromised and a decree was passed in terms of the compromise on

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23rd January 1920. Under the compromise, provision was made for paying off most of the debts contracted by the 1st defendant but not the suit debt. No specific properties were allotted to the 1st defendant and it was arranged that a maintenance of Rs. 30 should be paid to him every month. The present suit was filed on 6th July 1920 and the defendants Nos. 2 to 5 are sought to be made liable with reference to the shares in their hands of what had been prior to 1920, joint family property. The defendants denied the genuineness of the debts. The District Judge found that the debts were true. He had doubts about the *bona fides* of the partition, but on the ground that under the compromise it was agreed that all the debts of the 1st defendant were agreed to be paid by all the defendants, decreed the suit. All the defendants appealed. The 1st defendant died, during the pendency of the appeal. With the construction of the terms of the compromise by the District Judge, we are not able to agree.

The other appellants do not question the correctness of the finding that the debts are true. Nor do they say that the debts are illegal or immoral. They contend that the sons are not liable for the father's debt (not charged on the property) after partition and rely on *Kurri Venkata Reddi* v. *Chelluri Satyanarayanamurthy* (1) following *Peda Venkamma* v. *Srinivasa Dikshatulu* (2). The respondent replies that the partition is not *bona fide* within the meaning of the exception recognised in these cases and if the partition is held *bona fide* he contends that *Kurri Venkata Reddi* v. *Chelluri Satyanarayanamurthi* (1) is incorrectly decided and as to *Vekamma* v. *Sreenivasa Dikshatulu* (2), while conceding that the actual decision is correct, in so far as it rests on any ground other than the ground that the pro-note in that case was renewed by the father after partition, such ground is not correctly decided.

We are of opinion that the partition by the decree of 1920 was *bona fide* in the sense that the intention was to really divide the status of the parties ; it is probably also *bona fide* though the matter has not been fully gone into, in the sense that there has been no unequal allotment of properties if we regard all the debts as debts of 1st defendant only *i. e*, that this share minus all the debts would, have been much less than what he actually got, *viz*, annuity of Rs. 360 and we come to this conclusion in spite of the fact that there has been no division by metes and bounds and the decision in *Appapillai* v. *Rangapillai* (3) is doubtful, if it meant to decide that the family continues joint in cases where there is a relinquishment by the father subject to a maintenance. It is not *bona fide* only in the sense, that provision was not made for all the debts of 1st defendant not illegal or immoral (Ghose's Hindu Law, Vol. 1, p. 438) out of the whole joint family properties from which they would have been recoverable if there had been no partition and debts like the plaintiff's will defeated if it is held that the defendants Nos. 2 to 5 are not liable. As it is doubtful whether the exception mentioned in the cases uses the expression '*bona fide*' in this sense, we had to consider the question of the correctness of the decisions relied on.

It may be that, under the primitive Hindu Law, a son is under a pious duty to discharge his father's debts irrespective of the devolution, on him, of any kind of property. But the decisions have established the principle that a son is not liable unless the self-acquired property of the father or property which had been joint between them has devolved upon the son. For the purposes of this case, it is not necessary to go further behind the case of *Girdharee Lal* v. *Kantoo Lall* (4). At p. 331, their Lordships quote from Knight Bruce, L. J., in *Hanuman Prasad Panday* v. *Musammat Babojee Minraj Koomaru* (5).

" Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

(1) 62 Ind. Cas. 980 ; 40 M. L. J. 473 ; 29 M. L. T. 265 ; (1921) M. W. N. 261 ; 13 L. W. 516.

(2) 43 Ind. Cas. 225 ; 41 M. 136 ; 22 M. L. T. 334 ; 33 M. L. J. 519 ; 6 L. W. 649 ; (1918) M. W. N. 55.

(3) 6 M. 71; 7 Ind. Jur. 71; 2 Ind. Dec. (N S.) 327.

(4) 1 I. A. 321; 22 W. R. 56; 14 B. L. R. 187; 3 Sar. P. C. J. 380 (P. C.).

(5) 6 M. I. A. 393; 18 W. R. 81 N.; Sevestre 258 N.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

and say

"That is an authority to show that ancestral property which descends to a father under the *Mitakshara* Law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts the ancestral property, in which the son as the son of his father acquired an interest by birth, is liable to the father's debts."

Effect was given to these observations, in Muddan Thakoor's case *Girdharee Lall* v. *Kantoo Lal* (4), in favour of a creditor in execution. While the Calcutta High Court gave full effect in a case from Bengal in *Suraj Bansi Koer* v. *Sheo Persaud Singh* (6), the Madras High Court at first did not, on the ground that the decision in *Girdharee Lall* v. *Kantoo Lal* (4) cannot apply to Madras where a member of a joint family has a right to alienate his share (unlike Bengal) and there is no need for the equitable right recognised in favour of the executing creditor in *Girdharee Lall* v. *Kantoo Lal* (4). The creditor carried the case to the Privy Council *Muttayan Chetti* v. *Vira Pandia Chinnatambiar, Zamindar of Sivagiri* (7). Meanwhile a Full Bench of the Madras High Court in *Ponnappa Pillai* v. *Pappu Aiyangar* (8), (Muthusawmy Aiyar, J., who decided the earlier case and Innes, J., dissenting) held that the decision in *Girdharee Lal* v. *Kantoo Lal* (4) applied to Madras equally. The Privy Council in *Muttayan Chetti* v. *Vira Pandia Chinnatambiar Zamindar of Sivagiri* (7), while deciding the case on another point, pointed out that there was no ground for not applying the decision in *Girdharee Lal* v. *Kantoo Lal* (4) to Madras. In *Ramasami Nadan* v. *Ulaganatha Goundan* (9), a Full Bench held that the liability of the father and son was co-extensive and the cause of action against the son arose simultaneously with that against the father though it must be added that the son cannot be sued alone during the father's life. *Periasami Mudaliar* v. *Seetharama Chettiar* (10). In *Krishnasami Konan* v. *Ramasami Aiyar* (11) the question arose whether in execution of a decree obtained against the father alone, the share of the son in the joint family property allotted to him in a partition can be seized in execution. The District Judge (afterwards Miller, J.) held

"When the separation is before the suit as in this case, I think the creditor is bound to make parties all those whose interests he wishes to bind by his decree. The property is, from the date of separation, the son's property in which the father has no interest, and though *the son may be liable to pay the debt*, his liability must be enforced in a suit against himself."

Incidentally it may be observed that the son's share, even after partition may and is spoken of in this and other cases as ancestral property and even joint property (in the sense that it represents what had been joint property). It is, indeed, ancestral property in the hands of the son as against his own sons. The High Court said

"The principle upon which the son cannot object to ancestral property being seized *in execution for an unsecured personal debt* of the father is that the father, under the Hindu Law is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the *property is seized*, it remains the undivided estate of the father and son ..... Ergo, property taken by the son in partition cannot *be seized* on account of such unsecured personal debt of the father even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise, but no such case is made out here."

This is the first case which considered the effect of a partition.

The whole decision and the exception in case of a *Mala fide* partition relate to the

(6) 5 C. 148 ; 6 I. A. 88 ; 4 Sar. P. C. J. 1 ; 3 Suth. P. C. J. 589 ; 4 C. L. R. 226 ; 2 Shome L. R. 242 ; 2 Ind. Dec. (N. S.) 705 (P. C.).

(7) 6 M. 1 ; 9 I. A. 128 ; 4 Sar. P. C. J. 354 ; 12 C. L. R. 169 ; 6 Ind. Jur. 486 ; 5 Shome L. R. 57 ; 2 Ind. Dec. (N. S.) 259 (P. C.).

(8) 4 M. 1 ; 1 Ind. Dec. (E. S.) 839.

(9) 22 M. 49 ; 8 M. L. J. 312 ; 8 Ind. Dec. (N. S.) 36.

(10) 27 M. 243 ; 14 M. L. J. 84 (F. B.).

(11) 22 M. 519 ; 9 M. L. J. 127 ; 8 Ind. Dec. (N. S.) 371.

seizure in execution of a decree to which the son was not a party. In *Ramachandra Padayachi* v. *Kondayya Chetty* (12) the sons were parties to the suit and it was held (Bhashyam Aiyengar, J. being one of the judges) that the son was liable to the extent of the family property which had come to him under the partition. *Krishnasami Konan* v. *Ramasami Aiyar* (11) was thus distinguished at p. 557,

"In that case the suit was brought after partition against the father alone and the point decided was that property taken by a son under a partition effected before the suit *could not be seized in execution of a decree obtained against the father only in such suit.* The case turned on the plaintiff's rights *in execution* not as here on the question whether the plaintiff is entitled to judgment as against the son."

The next case is *Kameswaramma* v. *Venkatasubba Rao* (13) (Wallis, C. J. and Oldfield, J.) In my opinion the reasoning in this case is conclusive against the appellants. The learned Judges say

"I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the *joint family* property which came to his hands at partition (*Ramachandra Padayachi* v. *Kondayya Chetty*) (12)."

They quote the sentence I already quoted from *Krishnasami Konan* v. *Ramasami Aiyar* (11) and say,

"This necessarily implies that at the time the property is attached, it remains the undivided property of the father and son. The same view has been taken under very similar circumstances (Miller and Krishnaswamy Aiyar, JJ., in *Lakshmi Chettiar* v. *Govindarajalu Naidu* (14). See also *Rathna Naidu* v. *Aiyana Chariar* (15)." " ..... At the date of execution the property now in question had ceased to be joint family property and the cases referred to on the other side are cases in which the property remained joint and so subject to alienation by the father in *satisfaction of the* debt."

Incidentally it may be mentioned that the case in *Rathna Naidu* v. *Aiyana Chariar* (15) is one where the father mortgaged his son's share after partition. Obviously he has no such power and the case cannot help the point under discussion. Now comes the case in *Pedda Venkanna* v. *Sreenivasa Deekshatulu* (2). The point elaborately argued in that case and also elaborately discussed is whether *Sahu Ram Chandra* v. *Bhup Singh* (16) effected any change in the law relating to the son's liability, a point which, after giving rise to Full Bench decisions in this Court is set at rest by Lord Dunedin's judgment in *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai* (17) (a judgment of a Full Board of the Privy Council); while deciding that it did not, Wallis, C. J., said

"This Court has held in a series of cases that as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to *bring the son's share to sale* during his life-time at any rate when the partition has not been effected to defeat and delay creditors : *Krishnaswami* v. *Ramasami* (11). *Kameswaramma* v. *Venkatasubba Rao* (13).

Having regard to the expression "to bring the son's share to sale" and to the fact that *Kameswaramma* v. *Venkatasubba Rao* (13) was cited in support of his Lordship's proposition and without any qualification or disapproval, it is impossible to say, solely because, lower down the page his Lordship used the expression "to say nothing of the further ground etc," that his Lordship impliedly intended to overrule his own opinion in *Kameswaramma* v. *Venkatasubba Rao* (13) following *Ramachandra Padayachi* v. *Kondayya Chetti* (12). Kumaraswamy Sastri, J., begins by saying he agrees with the judgment of the Chief Justice on the narrower ground " that a son is not after partition liable to be proceeded *against* in respect of a personal debt incurred by the father before partition." If, "proceeded

(12) 24 M. 555.

(13) 24 Ind. Cas. 474; 27 M. L. J. 112; 38 M. 1120. (1914) M. W. N. 742.

(14) 8 Ind. Cas. 131; 8 M. L. T. 349; (1910) M. W. N. 565.

(15) 18 M. L. J. 599 ; 4 M. L. T. 277.

(16) 39 Ind. Cas. 280 ; 44 I. A. 126 ; 21 C. W. N. 698 ; 1 L. W. 557 ; 15 A. L. J. 437 ; 19 Bom. L. R. 498 ; 26 C. L. J. 1 ; 33 M. L. J. 14 ; (1917) M. W. N. 439 ; 22 M. L. T. 22 ; 6 L. W. 213 ; 39 A. 437 (P. C.).

(17) 77 Ind. Cas. 689 ; 46 M. L. J. 23 ; 21 A. L. J. 934 ; 5 P. L. T. 1 ; 28 C. W. N. 253 ; (1924) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. & A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 38 M. L. T. 457 ; 46 A. 95 ; 26 Bom. L. R. 500 (P. C.)

against" meant "proceeded against in execution" there is no difficulty in accepting the statement, but if it meant as it was intended to mean "proceeded against in suit" it is not justified, I say with great deference to my learned brother, by Wallis, C. J.'s expression "to say nothing of the further ground" and by imputing to it a significance inconsistent with the earlier statement of the law following *Kameswaramma* v. *Venkatasubba Rao* (13). His Lordship then reviews the cases at p. 143. It is difficult to see how it can be said that *Rathna Naidu* v. *Aiyana Chariar* (15) followed *Krishnasami Konan* v. *Ramasami Aiyar* (11). He then distinguishes *Ramachandra Padayachi* v. *Kondayya Chetti* (12) by saying that "that debt sued on arose out of a joint family business carried on by the father and son before partition and the liability of the son rested... ...on contract entered into in respect of a joint family trade to the extent of the joint family assets etc. I am not able to follow the distinction. If the son was a party to the contract, he is liable not as to the joint family property but even as to his self-acquired property and unless he is a minor, he is liable to be arrested, in other words, he is personally liable and there is no question of Hindu Law in the case. If he was not a party, this liability rests only on the Hindu Law relating to son's liability on the contracts of a father or manager. Suppose the family trade is not ancestral trade but a new trade started by the father and cannot, therefore, be said to be for justifiable necessity, can it be said that *Ramachandra Padayachi* v. *Kondayya Chetti* (12), does not apply to such a case? No such distinction was made in *Kameswaramma* v. *Venkatasubba Rao* (13), which is not the case of a family trade. He then refers to the renewal of the note by the father. In my opinion the case in *Peda Venkamma* v. *Sreenivasa Dikshatulu* (2) is correctly decided so far as it rests on the ground that the note sued on was renewed by the father after partition. Wallis, C. J., did not intend to overrule *Kameswaramma* v. *Venkatasubba Rao* (13) and *Ramachandra Padayachi* v. *Kondayya Chetti* (12), or even to distinguish *Krishnasami Konan* v. *Ramasami Aiyar* (11) in the manner suggested by Kumaraswami Sastri, J. In these circumstances, we cannot accept the decision in *Kurri Venkata Reddi* v. *Chelluri Satyanarayanamurthi* (1) as binding on us as it rests solely on the ground that the matter was concluded by *Venkamma* v. *Sreenivasa Dikshatulu* (2). Our brother Oldfield, J., who was also a party to *Kameswaramma* v. *Venkatasubba Rao* (13), made no reference to it in the later case and gave no additional reasons. Abdur Rahim, J., simply said that all the cases were considered in *Venkamma* v. *Sreenivasa Dikshatulu* (2). We are also referred to an unreported decision in A. S. No. 419 of 1918 by Abdur Rahim and Phillips, JJ. It purports to follow *Venkamma* v. *Sreenivasa Dikshatulu*, (2) and concurs with Kumaraswami Sastri, J., in his distinction of *Ramachandra Padayachi* v. *Kondayya Chetti* (12). I have already dealt with this. This case does not add to the other cases. We are of opinion that *Ramachandra Padayachi* v. *Kondayya Chetti* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13) were not overruled and following them, we hold that a son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition (impleading the son also) for the father's debts incurred before the partition and not illegal and immoral (*See also* Stranger's Hindu Law, Vol. 1, p. 191).

We do not think it necessary to refer the question to a Full Bench. On this ground, the appeal is dismissed with costs.

Jackson, J.—I agree.

The point is correctly appreciated in Dr. Gour's Hindu Code, section 118, paragraph 311 with reference to *Ramachandra* v. *Kondayya* (12) and *Kameswaramma* v. *Venkatasubha Rao* (13).

"On separation the son is liable for debts incurred before partition."

But in Trevelyan's Hindu Law, Edition 2, p. 308 the point is not stated so clearly.

"A creditor cannot enforce the payment of the debt of the father against property which has been allotted on partition to the son."

This would be correct if "enforce in execution" is meant and not correct if it also includes 'enforce by suit.'

In Mayne's Hindu Law, 9th Edition, p. 411 it is stated

"Where the son is joined in a suit against the father, this is for the purpose of enabling the Court to exercise the power of the father to sell family property in

discharge of his debts not being illegal and immoral and to prevent the son from questioning the nature of the debt in execution proceedings against the property. After partition, of course, the son holds the share which is allotted to him free from any such liability."

If " any such liability " be taken to mean " attachment in execution proceedings " the passage presents no difficulty but if the words mean " free from any liability for such debts" the statement seems to go too far.

V. N. V. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 863 OF 1921.

March 4, 1924.

Present :—Mr. Coutts Trotter, Chief Justice, and Mr. Justice Ramesam.

GADE LAKSHIMINARASAMMA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NAVUGOTLA PYDANNA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (V of 1908) O. XXI, r. 63—claim petition—Petition not pressed—Dismissal of petition—Order, if against claimant—Proper Order, form of.

A claim petition under O. XXI r 63 of the Civil Procedure Code was withdrawn and the Court endorsed on the petition, "not pressed, dismissed":—

Held, That the order was not one under O. XXI, r. 63 and the claimant was not bound to bring a suit within a year under the procedure laid down under the Code.

In the case of the withdrawal of a petition, it is a mistake to endorse on it that it is dismissed. The proper endorsement to make is that it is withdrawn. (p. 233, col. 2).

Appeal against the decree of the District Court, Vizagapatam, in Appeal Suit No. 152 of 1919 preferred against the decree of the Court of the District Munsif of Razam in O. S. No. 23 of 1918.

Mr. *K. N. Rajagopal Sastri*, for Mr. *R. Narasimham*, for the Appellants.

Mr. *Y. Suryanarayana*, for the Respondent.

JUDGMENT.—The only point open to the appellant is that because the claim petition which the respondent presented in 1914 was marked by the District Munsif as " not pressed ; dismissed " and because no suit was consequently brought under the procedure laid down by the Code, the present suit is incompetent. The learned Judge has taken a broad view of the matter and has disposed of the case by ascertaining what really happened at the time. What took place was that the claimant wished to abandon his claim and to have it treated as if it never had been made. The only argument suggested against that is that where a litigant abandons his claim and withdraws it as if it never had been made and the Judge by endorsement on the papers dismissed it, the litigant is precluded from taking the other course of bringing a suit. This argument appears to be, to say the least, highly technical and in our opinion it would be pernicious not to allow a litigant who has taken what he is satisfied is a mistaken step to correct that step before any thing is done which could enure to the prejudice of the other side. In this case there is nothing of the kind. There was no question of default. It has always been my opinion that in the case of the withdrawal of a petition, it is a mistake of the Judge to endorse on it "dismissed" and that it is quite sufficient to record on it "withdrawn." That is the proper endorsement that ought to have been made in this case. The appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

DHANJI NATHA *v.* DHUMA HIRAJI MALI

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 169 OF 1923.

January 15, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

DHANJI NATHA—DEFENDANT —APPELLANT
versus
DHUMA HIRAJI MALI—PLAINTIFF —RESPONDENT.

Hindu Law—Widow—Joint gift by two widows—Death of donee and one widow, effect of—Other widow, whether can claim whole or half of gifted property.

A joint gift by two Hindu widows is operative during the lifetime of either of the two widows in favour of the donee and his heirs, and on the death of one widow and the donee, the other widow is not entitled to recover the whole or a moiety of the subject-matter of the gift from the heirs of the donee. (p. 234, col. 2).

Case-law discussed.

Appeal from the decision of the Assistant Judge of Khandesh, in Appeal No. 217 of 1920, reversing the decree passed by the First Class Subordinate Judge at Dhulia, in Civil Suit No. 75 of 1919.

Mr. *P. V. Kane*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—The few facts which have given rise to this appeal are these. One Piraji died leaving two widows Deoba and Dhuma. Deoba had a daughter named Chindhi. On April 16, 1911, Deoba and Dhuma made a gift of the property in suit in favour of Chindhi. Deoba died on November 10, 1918, and the next day Chindhi died. The present suit was filed by Dhuma to recover possession of the property which was gifted by her and Deoba to Chindhi. Defendant who is the daughter of Chindhi claims to be entitled to Chindhi's interest. The Trial Court held the gift to be invalid and decreed the plaintiff's claim for possession. The lower Appellate Court decreed possession of a moiety in favour of the plaintiff on the footing that Dhuma was entitled to a moiety of the property in respect of which Deoba had an interest during her life-time, that interest having come to an end on her death. In effect a decree was passed in favour of the plaintiff on the footing that she was the heir after Deoba's death in respect of the share of Deoba in this property.

The defendants have appealed from this decree, and in support of the appeal it is urged that the view taken by the lower Appellate Court is wrong inasmuch as the husband's estate was one estate jointly taken by the two widows, and that the gift would be operative during the life-time of either of the two widows. In other words, it is contended that both the widows being joint owners, on the death of Deoba, the other widow does not take anything as the heir of her co-widow but the estate survives to her. In support of this contention reliance is placed upon the observations in *Bhugwandeen Doobey* v. *Myna Baee* (1) and *Sri Gajapathi Nilamani Patta Maha Devi Garu Sri Gajapathi* v. *Radhamani Patta Maha Devi Garu* (2).

It is clear that the present plaintiff could not claim any interest in the property given by way of gift by her and her co-widow to Chindhi during her life-time. So long as the present plaintiff is alive the interest which Chindhi got under the deed of gift would enure for the benefit of her heir after Chindhi's death. The gift was a joint gift by the two widows and would be operative during the life-time of either of the two widows in favour of the donee. There is no suggestion in the present case that there was any partition of the estate between the two widows, so that the question of inheritance to the co-widow's estate does not arise. Even assuming that such a question could arise or that there could be a severance of interests, it is by no means clear that it would make any difference in the

(1) 11 M. I. A. 487, at pp. 515, 516; 9 W. R. P. C. 23 ; 2 Suth P. C. J. 124; 2 Sar. P. C. J. 327 ; 20 E. R. 184.

(2) 4 I. A. 212 ; 1 M. 290 ; 1 Ind. Jur. 539 ; 1 C. L. R. 97 ; 3 Sar. P. C. J. 753 ; 3 Suth P. C. J. 965 ; 1 Ind. Dec. (N. S.) 193 (P. C.).

result in a case where the original gift is by both the widows. It is however, unnecessary to consider that aspect of the case, as in the present case there is a joint gift and there is no suggestion of any severance of interest between the two co-widows, assuming without admitting that there could be such severance as would defeat the right of survivorship in the co-widow. The present suit for possession of either the whole or a moiety of the property given by way of gift to Chindhi is not sustainable, as the reversion to the husband's estate has not opened yet. The result is that this appeal is allowed, the decree of the lower Appellate Court reversed and the plaintiff's suit dismissed with costs throughout. The cross-objections are dismissed with costs.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 45 OF 1919.

March 27, 1923.

Present :—Mr. Justice Martineau and Mr. Justice Zafar Ali.

SUNDAR SINGH—DEFENDANT—APPELLANT
versus
SHAM SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence — Inadmissible statement — Consent of parties, effect of—Finding based on inadmissible evidence—Second Appeal—Estoppel—Conduct of parties.

Statements which are not admissible in evidence cannot be rendered admissible by consent of parties. (p. 236, col. 1).

Ponnusami Pillai v. *Singaram Pillai*, 46 Ind. Cas. 849 ; 41 M. 731 ; 34 M. L. J. 526 ; (1918) M. W. N. 768, followed.

A finding based on evidence which is legally inadmissible can be challenged in second appeal.

Plaintiffs sued for possession of their share of their collateral *W's* estate alleging that the defendant *S* was only a step-son and, therefore, not entitled to succeed to the property. It appeared that in a previous suit brought on the death of another collateral, both the plaintiffs and *S* were also parties and no objection was taken by them that *S* was not the son of *W* ; in fact *S* was appointed by the plaintiffs and other collaterals as their *Mukhtar* to conduct the case :

Held, that under the circumstances they were even by their conduct estopped from challenging the paternity of *S*. (p. 236, col. 2).

Chuhar v. *Jas Kaur*, 41 Ind. Cas. 927; 69 P. R. 1917; 103 P. W. R. 1917, followed.

Appeal from the decree of the District Judge, Ludhiana, dated the 15th December 1917, affirming that of Senior Sub-Judge, Ludhiana, dated 26th June 1917.

Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondents.

JUDGMENT.—Alazira, a collateral of the plaintiffs Sham Singh and Khazand Singh died in 1890, and his land was mutated in favour of the first defendant Sundar Singh, who was stated to be his son. Wazira's widow *Mt.* Premon, the mother of Sundar Singh died in 1914. The plaintiffs sue for possession of their share of Wazira's estate alleging that Sundar Singh was only a step-son, and not a son of Wazira and was, therefore, not entitled to succeed to the property. The Courts below have given judgments in their favour and Sundar Singh has preferred a second appeal.

Khazan Singh, respondent, died during the pendency of the appeal, and the appellant had *Mt.* Kalu Kaur, whom he stated to be Khazan Singh's widow, impleaded in his place. As Sham Singh denied that *Mt.* Kalu Kaur was Khazan Singh's widow, the case was remanded for an enquiry on the point, and the finding of the Subordinate Judge is in her favour. We are informed that Sham Singh has instituted a suit in which he has disputed *Mt.* Kalu Kaur's right to succeed to the estate of Khazan Singh, and in view of this fact we refrain from deciding whether or not *Mt.* Kalu Kaur is the widow of Khazan Singh. For the purposes of this appeal we have only to determine whether she is the legal representative of Khazan Singh, and we hold that she is, inasmuch as she has intermeddled with his

estate by getting his land mutated in her favour.

The lower Appellate Court's finding as to Sundar Singh, not being the son of Wazira is open to two objections. One is that, although Sundar Singh pruduced a large number of witnesses in support of his contention, the learned District Judge appears to have ignored their evidence. The other is that the learned Judge has relied on statements which were legally inadmisssible, having been made by witnesses in a case which was not *inter partes*. It is true that Counsel on both sides agreed that the depositions of the witnesses in that case should be treated as evidence in the present case; but statements which are not admissible in evidence cannot be rendered admissible by consent of parties. *Ponnusami Pillay* v. *Singaram Pillay* (1).

It is, however, unnecessary to remand the case to the lower Appellate Court for a fresh finding on the evidence, as we think that the appeal must succeed on the ground that the plaintiffs have by their conduct precluded themselves from challenging Sundar Singh's right to succeed to Wazira s estate.

A collateral of the plaintiffs named Nand Singh died leaving a son Chhanga and a step-son Gurditta, and his property passed to them in equal shares in accordance with a will which he had made. On the death of Chhanga his land was mutated in favour of his collaterals. Two suits were then brought, one by Gurditta for the land left by Chhanga, and one by the collaterals for the land which on Nand Singh's death had devolved on Gurditta. Sundar Singh was one of the plaintiffs in the suit brought by the collaterals and one of the defendants in the other suit, and was described as the son of Wazira. Sham Singh and Khazan Singh were also among the parties, and Sundar Singh was appointed by them and the other collaterals as their *Mukhtar* to conduct the cases. In the suit brought by the collaterals Sham Singh and Khazan Singh were first impleaded as defendants, but afterwards on their application they were made plaintiffs Both cases were decided in 1910 against Gurditta, and Sundar Singh as the son of Wazira, succeeded to a share in Nand Singh's property along with the other collaterals. During the pendency of that litigation, Sham Singh and Khazan Singh never alleged that Sundar Singh was not a son on Wazira for objected to his joining in the suit against Gurditta and getting a share in the land, notwithstanding that in their application to be made plaintiffs they disputed the right of Chanda Singh, who was one of the plaintiffs, to succeed to the property on the ground of his having been adopted by one Budhu. The learned District Judge thinks that Sundar Singh was allowed to succeed to Chhanga's estate as the representative of his mother, but this view is quite untenable as *Mt.* Premon would have had no right to succeed to a share in the estate of a collateral of her husband. It is now in consequence of *Mt.* Premon's death more difficult for Sundar Singh to prove that he is the son of Wazira than it would have been before.

Chuha v. *Jas Kaur* (2) which has been cited on behalf of the appellant in support of the contention that the plaintiffs are estopped from disputing his title as the son of Wazira, is in point. In that case certain alienations were challenged and it was held that, as the alienee had been on various occasions recognised by the plaintiffs as the adopted son of the alienor, and had thus been led to imagine that his status was accepted by them, they were estopped from challenging the validity of the adoption.

The plaintiffs in the present case, having allowed Sundar Singh to join with them in the suit against Gurditta and to obtain a decree as the son of Wazira, without objecting that he was the son of Wazira and had no right to sue, are, we consider, now estopped from disputing his paternity.

We accordingly accept the appeal, reverse the decrees of the Courts below, and dismiss the suit. As Khazan Singh's representative, *Mt.* Kalu Kaur, has not disputed the appellant's claim, we direct that Sham Singh alone shall bear the appellant's costs throughout.

K. S. D. *Appeal allowed.*

(1) 46 Ind. Cas. 849; 41 M. 781; 34 M.L. J. 526; (1918) M. W. N. 768.

(2) 41 Ind. Cas. 927; 69 P. R. 1917; 103 P. W. R. 1917.

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION
No. 306 OF 1923.

February 7, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SORABJI RUSTOMJI PARSI—APPLICANT
versus
RAMJI LAL DEVJIBHAI PARDESHI—OPPONENT.

*Civil Procedure Code (Act V of 1908), O. IX, rr. 9, 13—Absence of party—*Ex-parte *proceedings—Appearance of party—Application to set aside* ex parte *proceedings—Procedure.*

Where a party is absent when a suit is called on for hearing but he appears in Court before the Court has risen for the day, then the Court should listen to his application for having his suit restored. If the opponent has left the Court, then the opponent should have notice, but if the opponent is present in Court, then it is the duty of the Judge to dispose of the application at once. The mere fact that a party or his pleader has arrived in Court after the proper hour when the suit has been disposed of *ex parte*, is no reason whatever why the suit should not be restored to the board and the case heard on its merits, the Court imposing such conditions on the defaulting party as might meet the justice of the case. (p. 237, col. 2).

Application from an order of the Judge of the Small Causes Court, Poona, rejecting a Miscellaneous Application praying for setting aside an *ex-parte* decree passed in Small Cause Suit No. 2141 of 1923.

Mr. *K. V. Joshi*, for the Applicant.

JUDGMENT.—The petitioner had filed Suit No. 1991 of 1923 in the Small Cause Court, Poona, against the opponent. Three days after, the opponent filed Suit No. 2141 against the petitioner in the same Court. Both suits were fixed for hearing on July 27, 1923. When the opponent's suit was called on neither the petitioner nor his pleader nor his Gumasta were present, and accordingly an *ex parte* decree was passed. The opponent and his pleader were still in Court to defend the petitioner's suit when the petitioner's Gumasta and his pleader arrived in Court and asked that the *ex parte* decree should be set aside and the suit restored to the file, upon which the Court said that the matter would be considered on a proper written application being made, and the petitioner's suit was adjourned. An application for setting aside the *ex parte* decree was made on July 28, 1923, and the matter was adjourned till August 30, when the Judge dismissed the application. We have more than once laid down that even supposing a party is absent when the suit is called on for hearing, if he appears in Court before the Court has risen for the day, then the Court should listen to his application for having his suit restored. If the opponent has left the Court, then the opponent should have notice, but if the opponent is present in Court, then it is the duty of the Judge to dispose of the application at once. The mere fact that a party or his pleader has arrived in Court after the proper hour when the suit has been disposed of *ex parte*, is no reason whatever why the suit should not be restored to the board and the case heard on its merits, the Court imposing such conditions on the defaulting party as might meet the justice of the case. We must not be taken as in any way encouraging unpunctuality. But in cases like this the dismissal of the suit is a penalty, out of all proportion to the offence.

The rule, therefore, will be made absolute and the case returned to the lower Court for disposal on the merits. No order as to costs of this application. The decree will be set aside and the costs in the lower Court will be costs in the cause.

Z. K. *Rule made absolute.*

U PO SAN *v.* MA NGWE HNIT

RANGOON HIGH COURT.

FIRST MISCELLANEOUS CIVIL APPEAL
NO. 24 OF 1923.

December 18, 1923.

Present :—Mr. Justice Heald and
Mr. Justice Lentaigne.

U PO SAN AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS
versus
MA NGWE HNIT—DECREE-HOLDER—RESPONDENT.

Execution of decree—Arbitration—Award, decree based on—Arbitrator, whether entitled to receive payments of money on behalf of Court.

An arbitrator is appointed to arbitrate on matters in dispute, make his award and file it in Court. He is not such an officer of the Court as is authorised to receive on behalf of the Court deposits of money made by the parties in pursuance of the decree made on the award. Such a payment does not, therefore, amount to a payment into Court so as to satisfy the decree. (p. 238, col. 2).

Appeal from the decision of the District Court, Myaungmya, in Civil Execution No. 37 of 1923.

Mr. *Burjorjee*, for the Appellants.

JUDGMENT.—This is an appeal against an order for the sale of a rice mill in execution of a decree passed in terms of an award of three arbitrators appointed by Court in pending litigation. The decree was passed on the 29th September 1922. The decree-holder, who is the present respondent, applied for its execution on the 24th October 1922. On the 13th February 1923 the 1st appellant judgment-debtor, applied for stay of execution on the sole ground that there was a pending appeal against a mortgage decree on the said rice mill, the result of which appeal would affect the execution proceedings. The lower Court therefore ordered the sale of the mill subject to the mortgage-decree.

There are several grounds set out in the memorandum of appeal, but they fall under only two heads, namely, (1) that the order for the sale subject to the mortgage decree should not have been made while the appeal against the mortgage-decree was still pending and (2) that the judgment-debtors had already paid the decretal amount Rs. 16,000 to one of the arbitrators Mg. Ba Thaw, for payment into Court, and an enquiry should have been held into the matter and Mg. Ba Thaw called upon to deposit the amount in Court.

The appeal against the mortgage-decree has been dismissed, and the mortgage-decree on the mill stands. The first ground, therefore, fails.

The second ground was never raised by the judgment-debtors in the lower Court. It has been raised for the first time in this appeal. It is argued that Mg. Ba Thaw as an arbitrator was an officer of the Court and an enquiry should, therefore, be held into the alleged payment of the decretal amount to him. This payment was according to the appellants' own case made to Mg. Ba Thaw to be deposited in Court and he never did so. It was neither a payment into Court nor could it operate as such. An Arbitrator as such does not appear to be such an officer of the Court as is authorized to receive on behalf of the Court deposits of money made by the parties. He is appointed to arbitrate on matters in dispute, make his award and file it in Court. The affidavit of the first appellant does not show when it was that this payment was made to Mg. Ba Thaw. His learned Counsel Mr. Burjorjee stated in the course of his argument that it was made before the 14th July 1922, *i.e.*, before the decree was passed on the award.

There was no deposit in Court when the decree was passed. The decree is still subsisting and stands unsatisfied. It should be enforced by execution of the decree. No enquiry is, therefore, necessary into the alleged payment.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 208 OF 1923.

February 1, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

CHANBASAPPA NAGAPPA HAVERI —DEFENDANT—APPELLANT

versus

HOLIBASAPPA BASAPPA MOTIBENNUR —PLAINTIFF—RESPONDENT.

***Limitation Act** (IX of 1908), s. 15—Civil Procedure Code (Act V of 1908), O. XXI, r. 53 (1) (b)—Execution of decree—Attachment of decree—Notice to executing Court to stay execution—Limitation, whether suspended.*

Section 15 of the Limitation Act applies only to an absolute stay and not to a limited stay as would be ordered by a notice under O. XXI, r. 53 (1) (*b*) of the Civil Procedure Code. Such an order of stay does not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and does not, therefore, interrupt the running of time against them. (p. 240, col. 1).

Appeal from the decision of the Assistant Judge, Dharwar, in Appeal No. 53 of 1922, confirming the order of the Subordinate Judge, Hubli, in *Darkhast* No. 189 of 1921.

Mr. *S. V. Palekar*, for the Appellant.

Mr. *G. S. Mulgaokar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—This appeal raises an interesting point which does not seem to be covered by any distinct authority. The facts are somewhat confusing. One Basappa Murgeppa filed a suit against Chanbasappa and another in the Haveri Court, in the Dharwar District, in which the High Court passed a decree on April 2, 1914, directing that the plaintiff should recover from the defendant a certain sum of money and costs. That decree was transferred by the Haveri Court to the Hubli Court for execution. A *darkhast* was taken out on September 2, 1914, but before execution proceedings could go any further the decree was attached by a creditor of Murgeppa who had obtained a decree against Basappa in the Haveri Court on April 7, 1916. On August 8, 1916, the *darkhast* in the Haveri Court was disposed of as the plaintiff did not apply for transfer of execution to the Hubli Court as directed. But although the *darkhast* was disposed of the Haveri Court seems to have been of opinion that its attachment on the decree in the previous suit, which was then resting in the Hubli Court, continued.

On July 4, 1917, the Hubli Court wrote to the Haveri Court asking to be informed what had happened to the attachment, and, on July 10, 1917, the Haveri Court wrote to the Hubli Court that the attachment still continued, and that the amount of the decree should be payable to the decree-holder of the Haveri Court. On receipt of this reply the Hubli Court disposed of the *darkhast* on July 13, 1917.

Nothing further was done and the decree remained in the Hubli Court until January 21, 1921, when Murgeppa, the holder of the decree in the Haveri Court, informed the Haveri Court, that his debt was satisfied and his attachment should be removed, and accordingly the Haveri Court removed the attachment on Jaunary 21, 1921 and informed the Hubli Court accordingly.

Then the original decree-holder Basappa applied to the Hubli Court on March 4, 1921, to continue the execution of his decree. The Court informed him on February 5, 1921, that his *darkhast* was already disposed of and asked him to present another *darkhast* giving all the necessary information. Accordingly he filed the present *darkhast* on April 13, 1921.

The question of limitation was raised, but the Subordinate Judge held that the question of limitation did not arise and directed execution to proceed.

In appeal this order was confirmed on the ground that the appellant's contention that the attachment of the decree ceased on August 8, 1916, when *darkhast* No. 23 of the Haveri Court was dismissed cannot be accepted as the Haveri Court expressly kept the attachment alive.

It seems to us that both Courts have failed to realise what happens when a decree is attached. Murgeppa had got a decree against Basappa who before that had obtained a decree against Chanbasappa. So Murgeppa sought by attachment to prevent Basappa reaping the

fruits of his decree against Chanbasappa, and that could only be done under the provisions of the Code of Civil Procedure, and therefore, under O. XXI, r. 53 (1)(*b*). Murgeppa asked the Haveri Court to issue to the Hubli Court a notice requesting the Hubli Court to stay the execution of its decree which would remain effective under the provisions of the rule unless and until :—

(*i*) the Court which passed the decree sought to be executed (that is to say in this case the Haveri Court) cancelled the decree, or

(*ii*) the holder of the decree sought to be executed (that is to say Murgeppa) or his judgment-debtor (that is to say Basappa) applied to the Court receiving such notice (that is to say the Hubli Court) to execute its own decree.

I should mention here that the decree of the Haveri Court when it was transferred to the Hubli Court became for the purposes of the execution a decree of the Hubli Court.

When the notice had been received, the Hubli Court was bound, on the application of the creditor Murgeppa who had attached the decree or his judgment-debtor Basappa, to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

Under sub-rule (3) the holder of the decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

So that the important question here is whether limitation ceased to run against Basappa, the original decree-holder, or his attaching creditor Murgeppa, when the notice was sent to the Hubli Court. If that notice amounted to an order enjoining the Hubli Court from executing the decree, then the time while that injunction was running would be excluded under section 15 of the Indian Limitation Act. But we think that section 15 only applies to an absolute stay, and not to a limited stay as would be ordered by the notice under O. XXI, r. 53 (1) (*b*). The stay does not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and that being the case, time must be taken as running against them. It follows then that nothing was done towards the execution of this decree within the three years before the application was made on March 4, 1921, and consequently, that application was barred by limitation.

From another point of view this must be the necessary result of the proceedings under O. XXI, r. 53 (1) (*b*). Otherwise the proceedings between the original decree-holder and his judgment creditor might continue over an unlimited space of time to the great disadvantage of the original judgment-debtor who might be faced with proceedings in execution many years after the decree had been passed without any intermediate steps being taken in aid of execution.

The appeal must be allowed and the *darkhast* dismissed with costs throughout.

Shah, J.—I entirely agree. I only desire to add that I have not overlooked the possibility of treating the application of March 4, 1921, as an application for the continuation or revival of the original application for execution which was made in September 1914. But in view of the fact that on July 13, 1917, this first application for execution was disposed of, and no steps whatever were taken for execution of the decree until the second application of March 4, 1921, came to be made, I do not think that the first *darkhast* could be treated as pending after it was disposed of in 1917 nor can the second application be held to be an application for the revival of the first *darkhast* to save limitation in favour of the plaintiff.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 50 OF 1923.

November 28, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

A. C. MUKERJI—DEFENDANT—APPELLANT
versus
THE MUNICIPAL BOARD, BENARES—PLAINTIFF—RESPONDENT.

Principal and agent—Negligence—Loss caused to Principal—Damages, suit for—Limitation—Limitation Act (IX of 1908) Sch. I, Art. 90—U P Municipalities Act (II of 1916), s. 326, applicability of, to suit against servant of Municipality.

Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or overconfidence in the honesty of others, such misconduct on the part of the agent is actionable.

Where the accountant of a Municipality was able to embezzle large sums of municipal revenue owing to the disregard by the Executive Officer of the Municipality of the rules and directions laid down by the Municipality for his guidance in such matters and the Municipality sued the accountant and the Executive Officer to recover the amount embezzled;

Held (1) that the suit was governed by Article 90 of Schedule I to the Limitation Act;

(2) that the misconduct of the Executive Officer in disregarding the rules and instructions laid down for his guidance made him liable to the Municipality in respect of items of the receipt of which he had personal notice and the embezzlement of which he failed to prevent, and of items the embezzlement of which would have been prevented by the most ordinary and casual scrutiny of the entries to which the Executive Officer appended his signature by which he certified to their correctness.

Quare:—Whether section 326 of the U. P. Municipalities Act is applicable to a suit by a Municipal Board against one of its own servants.

Appeal from the decree of the District Judge, Benares.

Messrs. *B. E. O'Connor* and *Peary Lal Banerjee*, for the Appellant.

Mr. *Kailas Nath Katju*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was instituted by the Municipal Board of Benares against five defendants, the sons of one Jogesh Chander Banerji, deceased, a man who had been for many years in the service of the said Municipal Board as Head Accountant. The plaint was signed and verified by Rai Bahadur A. C. Mukerji as Executive Officer of the Board. In the written statement filed by the defendants certain pleas were taken which involved the suggestion that, if any liability did attach to the late Jogesh Chander Banerji, that liability was at least shared by certain superior officials in the employment of the Municipal Board, and more particularly by its Executive Officer. Upon this A. C. Mukerji addressed to the Chairman of the Municipal Board a letter, dated August 27, 1922, which is to be found at page 199 of our record. He referred to the allegations made in the written statement of the defendants as allegations against himself, and asked the Board to place him in such a position that "I may appear before the Court to answer any charge that may be levelled against me." The Municipal Board thereupon relieved A. C. Mukerji of his duties as Executive Officer, appointing one Hari Prasad Paladhi in his place, and through this gentleman as officiating Executive Officer they filed an amended plaint, in which A. C. Mukerji was impleaded as defendant No. 6, and allegations were made putting forward a cause of action against him along with the defendants originally impleaded.

The suit was instituted in the Court of the Subordinate Judge of Benares, but the District Judge took it on to his own file and tried it out himself. He has decreed the Board's claim for a large sum of money jointly and severally against all the defendants. The appeal is by Rai Bahadur A.C. Mukerji only, and it may be convenient hereafter to refer to him simply as "the appellant."

In view of this fact, and taking into consideration the pleadings raised by the memorandum of appeal, we are entitled to treat certain facts found by the Trial Court as no longer in controversy.

The claim is on account of money belonging to the plaintiff Board embezzled during the period commencing with the 14th of October 1911 and ending on the 17th of December

1919. These defalcations were committed by the late Jogesh Chander Banerji, whom we may conveniently refer to hereafter by the name of Jogesh Babu, ordinarily applied to to him by the witnesses. The said Jogesh Babu went on leave about the date of the last defalcation, and he died on January 12th, 1920. The embezzlements alleged against him in this suit reached a total of Rs. 65,065-13-7. They were all taken from a single item of Municipal revenue; and it will be convenient to explain at once the nature of this item of revenue and the manner in which the defalcations were committed.

The City of Benares is visited by pilgrims in large numbers from all parts of India. This influx of visitors naturally entails on the Municipal Board of Benares a good deal of expenditure in various directions. It was, therefore, considered just that the Board should be permitted to raise a substantial portion of its income by means of a visitors' tax. This was first imposed in the year 1909. It was realised by means of a small charge superadded by the Railway Companies concerned to the price of every ticket issued to their stations at Benares. There are two Railway administrations concerned, namely, the Oudh and Rohilkhand Railway with its head office at Lucknow, and the Bengal and North-Western Railway with its head office at Gorakhpur. It was incumbent on the Railway administrations to keep proper accounts of the money collected by them as an extra charge on tickets issued to Benares and to remit that money from time to time to the credit of the Municipal Board. The two Railway Companies necessarily adopted different methods for remitting money. There are branches of what is now the Imperial Bank of India, and used to be Bank of Bengal, both at Lucknow and at Benares. The Oudh and Rohilkhand Railway, therefore, was in a position to make its remittances by cheque, and did so. The Bengal and North-Western Railway made the requisite payments either by hand or through the post. When convenient, a servant of the Railway, described as Railway pay clerk, attended in person at the Office of the Municipal Board and paid in the money under the prescribed form of tender and subject to all the procedure which would govern a payment made to the Board by any private individual. The procedure adopted when money was sent through the post needs to be explained in detail. If, for instance, a sum of Rs. 744-12-8 had to be remitted, the bulk of the money, that is to say, Rs. 740 would be sent in the shape of Government currency notes by registered letter, the small balance of Rs. 4-12-8 being remitted by money order. It would seem that the currency notes were sometimes sent entire by registered post, insured, and sometimes the first halves of the notes were sent by registered letter, the second halves following after receipt of the first had been acknowledged. With regard to the currency notes thus received through the post the proper form of procedure was for a Municipal clerk, usually the Head Accountant, to draw up in duplicate a form of tender such as would have been used if the payment had been made by a private individual in person. These forms of tender are known as *chalans*, and one of the *chalans* drawn up in connection with each payment would remain in the Municipal Office for record, while the other, having been signed by an official empowered to sign receipts on behalf of the Board, would be returned to the Railway administration and would serve as a formal receipt for payment made. Every *chalan* was required to have endorsed upon it a serial number, to be reproduced in the daily cash book maintained at the Board's office, which would serve as a means for identifying the particular payment and checking the entry in the cash book by comparison with the file of *chalans*. There was also maintained a register in which the *chalans* were entered by their numbers, presumably with particulars sufficient to identify them. The defalcations committed by Jogesh Babu were practically confined to the misappropriation of money remitted by the Bengal and North-Western Railway through the post in the manner above described. There was one defalcation in connection with a cheque received from the Oudh and Rohilkhand Railway, to which we shall refer again later. There was no embezzlement of any money tendered in person at the Board's Office by a Railway pay clerk from the Bengal and North-Western Railway. The above remark may appear to need some qualification with reference to a sum of one anna, which appears in the schedule appended to the record as having been embezzled out of a remittance of over

Rs. 1,100 made by a Railway pay clerk on the 25th of July, 1912 : but as a matter of fact there is no claim in respect of this item of one anna, and what probably happened was nothing more than a slight clerical error in the accounts. With regard to the embezzlements of money sent through the post office, we propose to examine these presently in considerable detail; but we may explain at once that the *modus operandi* was, broadly speaking, simplicity itself. Having got the currency notes, and as a general rule the small sum remitted by money order as well, into his hands, Jogesh Babu prepared *chalans* in the usual form, but assigned to the said *chalans* wholly fictitious numbers and never recorded them in the register of *chalans* at all. He sent a receipt for the money to the Railway Company over his own signature on the duplicate form of *chalan*, but now and then on a special receipt form sent by the Railway Company itself along with their remittance. He then pocketed the money, making no entry whatsoever in the daily cash book, or in any other Municipal account of its having been received. The Railway filed their receipt and entered the money in their accounts as payments duly made and acknowledged. The auditors who examined the accounts of the Municipal Board were quite helpless against this form of fraud. The *chalans* drawn up by Jogesh Babu had been made away with and were not traceable in any register, and there was no hint to be discovered in the daily cash book, or anywhere else, of such payments having ever been made. In so far as the above remarks are subject to any qualification with regard to particular items, this will be duly noted presently ; but in general outline the above is a correct statement of the nature of the frauds perpetrated on the plaintiff Board.

We have now to consider the nature of the claim preferred by the Municipal Board as against the appellant A. C. Mukerji, with whom alone we are now concerned. The case against him was preferred in the alternative. In the first place, it was alleged that the appellant had knowingly participated in the frauds committed by Jogesh Babu and had presumably shared with him the proceeds of those frauds. In the second place, the case against him is that, if he was not a participant in the frauds committed by Jogesh Babu and cognizant from the first of that gentleman's operations, then he had so facilitated those operations, by negligence in the discharge of his duties and disregard of rules laid down for his guidance, as to make him civilly liable for the consequences of his own negligence and misconduct. The learned District Judge has found that the appellant was from the first cognizant of Jogesh Babu's proceedings and a participator in his acts of embezzlement. He has rightly remarked that, on this view of the case, the question raised in the alternative as to the appellant's liability on the ground of neligence does not really arise ; but he has recorded his opinion that, if he had not held the appellant liable on the ground of active participation in the fraud, he would certainly have found him liable on the ground of negligence. It seems to us that the points for our determination in appeal can best be stated in the form of three issues.

(1) Is the Trial Court right in its finding that the defalcations alleged in the plaint were the result of a conspiracy between the appellant A. C. Mukerji and the late Jogesh Chander Banerji, and that the appellant was throughout cognizant of and a participant in the embezzlements committed ? (2) If this first issue be found in favour of the appellant, then were those embezzlements the result of such negligence and breach of duty on his part as to make him liable to account to the Municipal Board for the money ? (3) If this second issue be found in the affirmative, then is the appellant liable for the whole of the money proved to have been embezzled or for some part only of the same, and if so for what part ?

The whole case has been argued out before us in a thoroughly competent manner by the learned counsel engaged on both sides, and in dealing with the mass of evidence on the record, we have enjoyed one advantage over the learned District Judge. There will be found appended to our record certain schedules, in which the information available from the record itself recording all remittances made by the two Railway companies on account of visitors' tax, and all the embezzlements' committed by Jogesh Babu, are set forth in detail and classified in various ways. There is no information in these schedules which was not before the learned District Judge, and we do not suggest that any particular fact set forth in the schedules was not present to

his mind; but it has been undoubtedly a great advantage to us to have the history of the case under our eyes in this particular form. We think it quite possible that the learned District Judge himself might have modified the conclusions at which he arrived, if he had been able to review the entire case in the manner in which we have done.

It will perhaps be convenient for us to state at once in concise form the conclusions we have arrived at on the three issues. Our reasons for these conclusions will be sufficiently indicated in the comments we propose to make on the evidence in the course of our view of the same.

On issue No. 1 our finding is that it is not proved that the appellant A. C. Mukerji was a participant in, or cognizant of any one of the acts of embezzlement committed by Jogesh Chandar Benerji.

Issue No. 2. The appellant was negligent in the discharge of his duties and did contravene rules laid down for his guidance, which rules must in our opinion be treated for the purposes of this case as instructions given by a principal to an agent. By reason of this negligence and breach of duty, the appellant is, in our opinion, liable to account to the plaintiff for a number of embezzlements, in respect of which it can be held with certainty that the loss of the plaintiff's money is traceable to negligence or breach of duty on his part.

We reserve our precise finding on the third issue as this can only be arrived at in the course of a detailed discussion of the evidence. We may, however, dispose at once of a question of law raised in respect of the second issue. It was of course conceded that, in so far as the action against the appellant was founded upon fraud, the suit was well within limitation; but it was contended that, if once the question of fraud be found in favour of the appellant, then any claim against him based upon misconduct or alleged breach of duty is doubly barred, both under article 2 of the Indian Limitation Act, and also by the special provisions of section 326 of the Municipalities Act, No. 2 of 1916. We find no force in either contention. This branch of the suit is, in our opinion, governed by Article 90 of the Schedule to the Indian Limitation Act, and there is no need even to invoke the provisions of section 18 of that Act in order to make the suit within time. We very much doubt whether the provisions of section 326 of the Municipalities Act apply at all to a suit by a Municipal Board against one of its own servants. But, in any case, any plea as to want of notice was in our opinion definitely and conclusively waived by Mr. Mukerji's letter of the 27th August, 1922, already referred to. It has been sought in argument to represent that letter as meaning nothing more than that the writer desired to be put in the witness box and examined on oath; but this is futile. When that letter was written the appellant's position on the record was virtually that of plaintiff. He could have gone into the witness box in that capacity, and would indeed have been obliged to do so at some stage or other of the hearing. We agree with the learned District Judge that the only possible interpretation of the appellant's letter is to treat it as a request to be impleaded as defendant in the suit.

The first point we have to make is that the visitors' tax was introduced after the appellant's appointment as Secretary of the Municipal Board, that is to say, it was a new thing in his time. The arguments addressed to us, as to his having merely followed a vicious system already in existence at the time when he entered upon his duties, can only be accepted with some reservation when they are applied to this matter of the visitors' tax. Not only was the tax a new one, but it was of a peculiar character. The work of collection was being done by the two Railway Companies, who would necessarily have to maintain proper accounts of their own. The income was of such a nature as to preclude the possibility of maintaining a demand register, which is always a powerful check upon the dishonesty of subordinate officials. One would have expected an officer holding the responsible position of Secretary of the Municipal Board to have been vigilant in a matter of this sort, and to have set himself, not merely to keep a watchful eye over the account as regards this source of income, but even to devise, if possible, additional safeguards. The most obvious of these would of course have been to ask the Railway Companies to submit quarterly returns, showing at least the total sums which they respectively claimed to have

paid into the Municipal Board under this head in the course of the quarter. To us, who are wise after the event, this seems so simple and obvious a precaution that it is difficult to understand why it was never suggested either by the Secretary himself, or by any chairman, or other member of the Municipal Board. The responsibility for the omission must, we think, be shared between the appellant and his employers. We mention the matter chiefly as showing how easy it is to be wise after the event. It may serve as a warning against pressing too far against the appellant any argument based upon the suggestion that it appears incredible that he should have honestly neglected some particular precaution.

* * * * *

From the 5th of January, 1914 we enter upon the record of a series of embezzlements extending right down to the 3rd October of that year It is a record which has caused us serious difficulty and misgiving, before we could arrive at a conclusion favourable to the appellant on the issue of fraudulent conspiracy. It does on the face of it seem most extraordinary that for a period of 9 full months, the appellant should have continued honestly blind to the fact that the daily cash book, signed by him day after day as a correct record of the Municipal Board's receipts, contained no mention of any remittance from the Bengal and North-Western Railway on account of visitors' tax. It is a little in his favour that the first embezzlement of this series, perpetrated on the 5th of January, 1914, was in respect of a registered cover of which delivery was taken by Jogesh Babu, and the same consideration applies to the last two remittances of the 30th of July and 31st of August, 1914 respectively. There were, however, six remittances between January and July, in every one of which the registered cever containing the currency notes came into the appellant's own hands.

We have had to consider very seriously, in connection with part of the evidence, whether the learned District Judge is not right in saying that the decree of negligence involved in the appellant's signing the daily cash book throughout these months, while these embezzlements were going on, is so gross as to be scarcely believable. We can certainly understand why the Trial Court has refused to credit the appellant with having honestly neglected his duties to such an extent and has preferred to draw an unfavourable inference against his honesty. We may go so far as to say that the appellant could scarcely be said to have a valid ground of complaint, if an inference unfavourable to his honesty were founded upon this series of transactions alone. It is only upon a careful review of the case as a whole that we have declined to draw such an inference ourselves. We feel that allowance must be made for the deadening effects of routine and for the confidence which an official gradually and inevitably acquires in a subordinate who has for years been working with apparent honesty under his own immediate orders. We must lay stress once more in this connection on the comments already made upon previous details in the evidence which have satisfied us that Jogesh Babu was taking precautions against possible detection by the appellant. There are some indications, slight no doubt, but in our opinion not without significance, that even during these months of the year 1914 Jogesh Babu was not free from anxiety on this head. On the 11th of August, 1914, that is to say, towards the close of this critical period of 8 months, we find him making an entry in the cash book by which a substantial remittance of almost Rs. 2,000, which had come to hand on account of visitors' tax from the Oudh and Rohilkhand Railway, was misclassified as a receipt from the Bengal and North-Western Railway. It does look as if the man was beginning to wonder how much longer the Secretary could continue to pass without notice the fact that no remittances from this railway were appearing in the cash book. Moreover, we find that on the 3rd of October, 1914, when a sum of Rs. 859-7-7 came to hand from the Bengal and North Western Railway through the post office, and both registered cover and money order actually reached the Secretary, as evidenced by his signatures on the postal acknowledgments, Jogesh Babu refrained from touching this amount and duly credited it in the cash book. We are not entitled to indulge in mere speculation; but Jogesh Babu so rarely refrained from embezzling the Bengal and North-Western Railway Company's remittance through the post that there was probably some special reason why he left this one untouched. One is inclined to suspect that, in passing the registered cover on to his subordinates, the Secretary may have made some casual remark about the arrival of

a substantial remittance from that Company, which convinced the Head Accountant that it would be too dangerous to touch that particular sum of money. It is also perhaps a point, though a small one, in the appellant's favour, that the very next embezzlement, perpetrated on the 5th of November, 1914 of a sum more substantial than Jogesh Babu had ever yet misappropriated at one time, was committed while the appellant was absent on leave and H. P. Paladhi was once more in charge of his office.

The next point of interest which occurs to us is that a remittance of Rs. 640-3-0, received through the post office on the 2nd of December, 1914, was duly credited, and the reason for this is apparent from the fact that the registered cover had somehow come into the hands of H. P. Paladhi, and Jogesh Babu was afraid to touch the money. We do not propose to go in the same detail through the transactions in the year 1915. The embezzlements continued steadily; but their series was broken at various intervals by remittances which came to hand through the Railway pay clerk and were duly credited. In the case of every embezzlement committed during this year, the registered cover containing the currency notes came into the hands of Jogesh Babu. In two instances the money order for the trifling balance was acknowledged by the appellant, but we hesitate to draw the further inference that this circumstance ought to have put him on his guard as to the arrival of a substantial remittance. We note incidently that one of the embezzlements during this year was again committed during the appellant's absence on leave, while H. P. Paladhi was in charge of his office. Passing on to the year 1916, we note, first of all, that there were embezzlements during the month of January, in respect of which again it is not proved that the registered cover, or any other positive intimation of the arrival of the money, ever reached the appellant's hands. On the 21st of February, 1916, and again on the 28th March, 1916, substantial remittances through the post office reached the appellant's hands and were duly credited in the daily cash book. We think the reason why Jogesh Babu refrained from stealing this money is indicated by the learned District Judge, in a passage in his judgment where he points out that during the financial year 1915-1916 the receipts on account of visitors' tax credited in the Municipal accounts failed to reach the amount of the budget estimate. We infer that during February and March, 1916 Jogesh Babu was getting nervous as to the extent of this deficit, and preferred to moderate his operations rather than run the risk of setting on foot enquiries as to the reason for the deficit. Later on in the same year there was an embezzlement which calls for particular notice. On the 26th June 1916 a sum of Rs. 906-13-0 came to hand through the post office in the usual way. The registered letter was acknowledged by the appellant himself and Jogesh Babu felt it necessary to enter this amount in the cash book. He subsequently crossed out that entry, attesting the erasure by his own signature, and embezzled the money. The cash book for that day was attested as a correct record of the day's receipts by the appellant's signature. If that signature was appended after the erasure, it would be difficult indeed to avoid the inference that by this time, at any rate, the appellant was in fraudulent collusion with Jogesh Babu. We cannot help noting in this connection that we could wish that the appellant had been subjected while in the witness box to a more searching and systematic cross-examination. On any possible theory it is difficult to understand how he came to sign the cash book for this 26th of June, 1916. The theory contended for in argument on his behalf is that erasure was made after the accounts for the day had been signed by the appellant, and we are prepared to accept this theory; but we do so with a thorough realization of what its acceptance involves. The total at the end of the day represents the sum of the items recorded, after deducting the item of Rs. 906-13-0. When this book was placed before the Secretary for his signature the total shown at the end of the day was less than the sum of the various entries by this precise amount of Rs. 906-13-0. There was only one other large item on the page, and that was the payment on account of octroi which bulks largely in each day's receipts. It so happens that the sum of these two items alone, namely, the octroi receipt plus Rs. 906-13-0 on account of visitors' tax, considerably exceeds the total for the day. This means that the appellant has understated the case against himself when he admitted that he never added up the total in

the daily cash book before affixing his signature, which certified the whole account as correct. It is to be noted that our record of the appellant's deposition at p. 48 contains misrepresentation: the critical passage should not run "I myself checked the totals" but "I myself did not check the totals." If he had made it a practice even to run his eye in the most casual manner down the page, it seems to us that he must have detected the glaring deficiency in this day's apparent total for the 26th of June 1916, to which we have drawn attention. A month later, that is, on the 25th of July 1916, Jogesh Babu reverted to his older tactics and simply embezzled a sum of Rs. 1,049-13-4, without leaving any trace of it in the day's accounts, even though the registered cover containing the notes had passed through the Secretary's hands. Whether he was getting nervous as to the risk of continuing this procedure or whatever the reason may have been, we find that his next two embezzlements, of the 25th of October 1916, and of the 22nd of November 1916, were effected by entering the remittance in the daily cash book and crossing it out after the Secretary's signature had been obtained. In connection with the second of these two embezzlements there is a curious feature. The sum remitted by the Bengal and North-Western Railway on that day was 951-6-3, and it almost looks as if Jogesh Babu was getting afraid that he was presuming too far on the appellant's slackness. At the beginning of that month, consequent on the passing of the new Act for the regulation of the Municipalities in these Provinces, the post of Secretary had been abolished and the appellant A. C. Mukerji had been appointed the first Executive Officer of the Benares Municipal Board under the new Act. So far as concerns the matters now under consideration, and particularly with reference to the keeping up of the daily cash book the duties and responsibilities of the Executive Officer were the same as those previously incumbent on the Secretary, but it is just possible Jogesh Babu may have been afraid of the appellant's bringing some new sense of responsibility to the performance of the duties of the more dignified post of Executive Officer. At any rate, the appearance of the cash book suggests that he had intended to keep his hands off this sum of Rs. 951-6-3. On the same day, however, an Oudh and Rohilkhand Railway cheque came in for Rs. 2,110-15-10. Jogesh Babu took advantage of this fact to alter the entry he had already made of the remittance from the Bengal and North-Western Railway, substituting for it a record of the Oudh and Rohilkhand Railway's remittance by cheque and working out a daily total loaded with the difference between Rs. 2,110-15-10 and Rs. 951-6-3, that is to say, in excess of the actuals as they stood when the Secretary's signature was taken by a sum of Rs. 1,159-9-7. This fraud remained undetected because of the scant attention paid by the appellant to the entries in the daily cash book and because, apparently, he never thought of taking that important register occasionally into his hands and turning back the pages to see that everything remained in order.

We pass on to the year 1917, and note that the first remittance that came to hand through the post in that year was duly credited. So also was a remittance of the 26th of June, 1917. Between these dates there had been four embezzlements the registered cover having only come into the appellant's hands in connection with the last of these four. In the month of August 1917 a similar remittance, in which the registered cover had been received by the appellant, was duly credited; but Jogesh Babu embezzled the next two as they came to hand during the months of September and October, presuming on the fact that appellant would not be placed on his guard, although in one instance the registered cover containing the entire remittance of currency notes, and in the other the registered letter containing the first halves of the notes, had come into his hands. It does look, however, as if Jogesh Babu continued to be afraid of presuming too far on the appellant's negligence, for in November 1917 and March 1918 we find him crediting the Municipal Board with the entire amount of two remittances received through the post office, which might conceivably have been embezzeled had he chosen boldly to adopt the procedure followed by him in other instances. Between January and October 1918 there were only two embezzlements committed—on the 28th of January and 30th of March of that year—and in the month of October a substantial remittance was duly credited. The reason for this seems to be

that there had been some re-arrangement of duties in the office. One Raghunath Prasad was acting as Head Accountant, and receipt issued to the Railway Company was signed by M. A. Khair. We note that in the month of June 1918 the post of Secretary to the Municipal Board was once more called into existence. We gather that the Secretary thus appointed was not intended to supersede the Executive Officer, but rather to serve as a sort of head assistant, relieving the Executive Officer of a portion of the clerical work. The important point, in our opinion, in connection with this case is that the Executive Officer continued to be responsible for the correctness of the entries in the daily cash book down to the 24th of November 1919, when those duties were made over to the Secretary. From that date the appellant ceased to be directly or personally responsible for the cash book. The record of embezzlements from February 7, 1919 down to the date abovementioned calls for no particular comment. The embezzlements continued, and we have taken separate note of those instances in which the appellant is affected with personal knowledge of the fact of the arrival of the remittance by the appearance of his signature in acknowledgment of registered cover received from the post office. In connection with one item of Rs. 683-13-2, received on the 10th of March 1919, Jogesh Babu seems to have reverted to the procedure which we have noticed as only occasionally followed by him. He entered the entry as correct. We do not pursue this detailed enquiry beyond the 24th of November 1919, for the reason which we have already indicated.

In the course of this review of the evidence, we think we have sufficiently indicated our reasons for finding in favour of the appellant on the issue of fraudulent conspiracy, or wilful connivance in the frauds perpetrated by Jogesh Babu. We are satisfied, on the whole, that active participation in these frauds, or even guilty knowledge of the same, is not brought home to the appellant by that evidence. There is certainly no one proved fact in the case on which the Court can lay its hand and say that this could not have occurred as it did if the appellant had not been in collusion with Jogesh Babu. There are, on the contrary, a number of circumstances which suggest that Jogesh Babu was afraid of detection by the appellant and was taking precautions against such detection. We may note also that there is an entire absence from this record of the sort of evidence which one frequently finds in cases of embezzlement, and which one would expect to find in a case like the present in which the sums embezzled were so considerable. We refer to evidence tending to suggest that the appellant was living beyond his means, or was otherwise accumulating resources in money or in any species of property, not to be accounted for by his ostensible sources of income. Nor when the appellant was in the witness box, was there any cross-examination directed towards making good any such point against him.

Coming to the issue of negligence, it seems to us that we have already given abundant reasons for imputing to the appellant negligence of a very serious character. We need not go over the ground which is sufficiently covered by the judgment under appeal in order to lay stress upon the various rules and regulations by which the appellant was bound. The cardinal point to our minds is his responsibility for the entries in the daily cash book. It was certainly never intended that the signature of the Secretary, and later that of the Executive Officer, appearing at the close of each day's receipt entries in this cash book, should be a mere formality. The Municipal Board relied upon these responsible officers exercising a real and effective supervision over the preparation of this most important register. This fact was emphasised in the rules and regulations laid down for the guidance of these officials, and as against the appellant in this particular case we regard those rules as being of the nature of instructions issued by a principal to his agent as to the manner in which the said agent was to discharge the duties assigned to him. Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. That the appellant is liable to account to the Municipal Board for at least a substantial part of the money embezzled by Jogesh Babu, while

the latter was working under the direct supervision of the appellant, we hold to be quite beyond doubt.

The precise assessment of that responsibility in respect of every item in the Schedule before us is a matter of some delicacy. On behalf of the respondent it was argued that, even on the basis of negligence alone, the appellant was liable for the entire amount of Jogesh Babu's defalcations. We could only accede to this contention on one or other of two alternative views. The first would be that, if the appellant had strictly observed the rules laid down for regulating his discharge of his duties, the frauds committed by Jogesh Babu would have been wholly impossible, or would have been immediately detected. The alternative would be to hold the appellant liable for all defalcations committed after some specified date, on the ground that, but for gross and actionable negligence on his part, the detection of the frauds which were going on must have taken place at least by the date so specified. There is a good deal to be said for both these contentions and more especially for the latter ; but on the whole they fall short of satisfying us. Looking more particularly at the cautious manner in which Jogesh Babu embarked upon his career of fraud, we are not prepared to say that due diligence on the part of the appellant would have precluded him from making the attempt, or would have resulted in his immediate detection. With reference to the second contention, our real difficulty would be to fix any one definite date from which it could be given effect. We are gravely conscious of the responsibility which attaches to us in determining this issue, in view of the large number of Government officials, employees of railways, of corporations, of business concerns of all sorts, on whom it has been laid, frequently as a part only of multifarious duties to bear the responsibility of checking and certifying to the correctness of accounts, the actual maintenance of which is necessarily on the shoulders of lower paid subordinates. We can certainly commit ourselves to no conclusions which would reduce the responsibility of such superior Government servants or other officials, to a mere farce. On the other hand, we feel that a too stringent insistence upon their responsibility in the matter of the observance of all rules and regulations laid down for their guidance might result in making it practically impossible for some of them to carry on the work laid upon their shoulders. In the present case our decision is actually influenced to a considerable extent by the knowledge we have of the multifarious nature of the duties laid upon the appellant as Secretary and afterwards as Executive Officer of the Municipal Board. We have decided to hold him liable in respect of those items only where the evidence affects him with personal notice of the arrival of a remittance, the embezzlement of which he failed to prevent, or where, in our opinion the embezzlement would have been prevented by the most ordinary and casual scrutiny of the entries in the daily cash book before he appended the signature by which he certified to their correctness. On this basis we have drawn up the following schedule, which shows the appellant as liable for the total sum of Rs. 21,439-4-7, shown at the foot of the same.

In the result, therefore, we modify the decree of the Court below as follows: that the decree will stand in its entirety, including the order for costs, as against the defendants other than Rai Bahadur A. C. Mukerji. As against this defendant the decree will provide that he is jointly and severally liable along with the other defendants for the sum decreed, up to a limit of Rs. 21,439-4-7 and that he will bear his own costs in the Trial Court.

Z. K. *Decree modified*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 211 OF 1923.

February 12, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

VITHAL LAXMANNAIK MALGAVKAR—APPELLANT

versus

MAHADEV RAGHUNATH KONDKAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 146, O. XXI, r. 16—Execution of decree—Purchaser of portion of properties covered by decree, position of—Order in execution—Purchaser whether can appeal.

VITHAL *v.* MAHADEV

A person who is not a party to a proceeding in the lower Court cannot appeal from the decree or order passed, unless he can prove that he has such a right under the provisions of the Civil Procedure Code.

A purchaser of property which has been directed by a decree to be given into the possession of the decree-holder cannot rely on the provisions of section 146 of the Civil Procedure Code. He is expressly excluded, from applying for execution of the decree unless he can also prove that he is an assignee of the decree. Nor can such a purchaser appeal from an order passed on the application of the decree-holder.

Hansraj Pal v. *Nukhraji Kunwar*, A. W. N. (1907) 280; 4 A. L. J. 759; 30 A. 28, relied on.

Appeal from the decision of the First Class Subordinate Judge, A. P., at Ratnagiri, in Appeal No. 51 of 1922, confirming the decree of the Subordinate Judge at Malvan, in *Darkhast* No. 186 of 1921.

Mr. *A. G. Desai*, for the Appellant.

Mr. *T. N. Walavalkar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—One Lingo got a decree in Regular Suit No. 183 of 1916, whereby it was ordered that the first defendant and the plaintiff should take possession of various properties from the other defendants. After the decree had been passed Lingo sold his interest in some of the properties of which possession was directed to be given to him to the present appellants. Lingo thereafter made an application for execution of his decree. His purchasers were not parties to that application. An order appears to have been made in execution under O. XXI, r. 35 (1), but the Subordinate Judge held that action ought to have been taken under O. XXI, r. 36, which he directed should be done, and that the possession given under O. XXI, r. 35 (1) should be set aside.

The appellants sought to appeal from that order to the First Class Subordinate Judge, with appellate powers, and an issue was raised whether the appellants had any *locas standi* to appeal. The learned Judge held that they had not, and in my opinion he was right. A person, who is not a party to a proceeding in the lower Court cannot appeal from the decree or order passed, unless he can prove that he has such a right under the provisions of the Code. Reliance was placed by the appellants on sections 47 and 146 of the Civil Procedure Code. Section 47 merely enacts that certain questions arising between the parties to a suit in which a decree has been passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree, and not by a separate suit. That section, therefore, does not touch the point we have to deal with.

Section 146 of the Code says :—

" Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

I do not think that the purchaser of property which has been directed by a decree to be given into the possession of the decree-holder can rely on this section. There are provisions in the Code which provide for the devolution of interest in a decree, and lay down how such devolution shall be made, and how the person on whom the interest devolves shall proceed thereunder. Order XXI, r. 16 provides for the transfer by assignment of a decree by writing or by operation of law :—

" Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interests of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it ; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder : Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution.

The only persons who can execute a decree are the persons mentioned in the rule : see Mulla's Civil Procedure Code, note at p. 561. A purchaser of property mentioned in a decree is expressly excluded from applying for execution unless he can also prove that he is an

assignee of the decree. See also *Hansraj Pal* v. *Nukhraji Kunwar* (1).

Now one can easily imagine what might possibly occur if the contention of the appellants was correct. In this case there were a number of properties mentioned in the decree. to which under the decree Lingo was entitled to possession. He might have sold those properties to a number of purchasers, with the result that there might be a number of persons entitled to execute the decree, and even if Lingo sought to execute the decree, as he did in this case, there might be numerous applications made by his purchasers, to appeal on the ground that they were not satisfied with the orders passed on Lingo's application. It seems to me that such a procedure is not contemplated by the Code. It is only parties to the decree or transferees of the interest of the decree-holders by assignments in writing, or by operation of law who can apply in execution. It seems to me, therefore, that the judgment of the lower Court was right and the appeal should be dismissed with costs.

Shah, J.—I concur in the order proposed by my Lord the Chief Justice. It seems to me that though Lingo has sold a part of the property under the decree to the present appellants the proper procedure provided by O. XXI, r. 16, has not been followed in this case. Without going so far as to say that there could be no transfer of a part of the interest of the decree-holder within the meaning of r. 16, in the present case, on the admitted facts it seems to me that Lingo has throughout remained on the record and the present appellants have not been treated as parties to the proceedings at any stage. The mere fact that on Lingo's application the possession was in fact ordered to be given to the present appellants, instead of to Lingo, in respect of the properties sold by Lingo to the present appellants, is not sufficient to make them parties to the proceedings or to constitute them representatives of the decree-holder within the meaning of section 47 of the Code. Section 146 of the Code, which has been relied upon by the appellants, cannot help them, as the procedure to be followed when there is a transfer by the decree-holder is laid down in r. 16 of O. XXI. The appellants, therefore, cannot appeal against the order which was made as between Lingo and the present respondents, on June 13, 1922, by the Subordinate Judge.

Z. K. *Appeal dismissed.*

(1) A. W. N. (1907) 280; 4 A. L. J. 759; 30 A. 28.

LAHORE HIGH COURT

SECOND CIVIL APPEAL NO. 3105 OF 1918.

April 17, 1923.

Present:—Mr. Justice Martineau and Mr. Zafar Ali.

MOTIRAM AND OTHERS—PLAINTIFFS APPELLANTS

versus

BHANU RAM AND OTHERS—DEFEDNANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 140—Appeal—Court-fees not paid in full—Bona fide mistake—time whether can be extended.

An appeal when filed was not properly stamped and the prescribed period of limitation for filing the same expired long before the deficiency in Court-fees was made up. But it was found that the full Court-fees were not paid in the first instance on account of a *bona fide* mistake, and the deficiency was made up as soon as it was brought to the notice of the appellant.

Held that the appellant was entitled to the benefit of section 149 of the Civil Procedure Code and that the time should be extended.

Lekh Ram v. *Ramji Das*, 57 Ind. Cas. 215; 1 L. 234; *Tikkan Ram* v. *Bosa Ram* 67 Ind Cas. 106; 4 U P. L. R. (L.) 77; *Fatteh Singh* v. *Babu Ram*, 67 Ind Cas. 130; 3 L. L. J. 156; *Amtul Qadir* v *Muhammad Yousaf*, 49 Ind. Cas. 871; 8 P. L. R. 1919; 37 P. W. R. 1919, distinguished.

Appeal from the decree of the District Judge, Mianwali, dated the 23rd May 1918, modifying that of the Senior Sub-Judge, Mianwali, dated the 1st May 1918.

Mr. *Ganpat Rai*, for the Appellants.

Mr. *Jagan Nath*, for the Respondents.

JUDGMENT.—Two seperate suits, both based on book accounts, were brought almost

simultaneously against the brothers, Mul Chand and Gopal Das, one by Sewa Ram to recover Rs. 6,939-14-3 and the other by Fateh Chand for Rs. 2,653-15-0. As the pleadings in both the cases were identical, the cases were tried together, and disposed of by one judgment by the first Court, which decreed the amounts claimed and directed payment of the smaller amount (*i. e.*, Rs. 2,653-15-0) in a lump sum, and of the other by annual instalments of Rs. 1,000 each. Both parties were dissatisfied with this decision. The plaintiffs' prayer in each case for future interst was not even referred to in the judgment and though there was no issue as to instalments, instalments were allowed in the suit of Sewa Ram. The latter, therefore, appealed to this Court, pressing his claim for future interest and seeking to have the order as to instalments cancelled. The defendants appealed to the District Judge in the case of Fateh Chand and the latter filed cross-objections for future interest, but the learned District Judge accepted the defendant's appeal so far as to make the judgment-debt payable by four instalments, and dismissed the cross-objections. Fateh Chand also has come to this Court in second appeal, and, like Sewa Ram, objects to instalments and claims future interest.

Mr. Jagan Nath on behalf of the defendants raised a preliminary objection that both the appeals were barred by time because they were not properly stamped when filed in this Court, and the prescribed period of limitation for filing the same, had expired long before the deficiency in Court-fees, was made up in either case. In support of this objection the learned Counsel cited *Lekh Ram* v. *Ramji Das* (1) *Tikkan Ram* v. *Bosa Ram* (2), *Fateh Singh* v. *Babu Ram* (3) and *Amtul Qadir* v. *Muhammad Yousaf* (4). But none of these rulings is in point because in every one of them it was found that the omission to pay full Court-fees was not due to a *bona fide* mistake, but was deliberate. In (1), (2) and (3) the deficiency had not been made up when the appeal came up for final hearing. In the present case we are satisfied that full Court-fees were not paid in the first instance on account of a *bona fide* mistake. The deficiency was made good by either appellant when the office pointed out that the appeal was not sufficiently stamped. The plaintiffs are, therefore, entitled to the benefit of section 149 of the Civil Procedure Code and we accordingly extend the time.

As regards the two points raised in the grounds of appeal we are of opinion that the orders directing payment by instalments need not be interfered with at this distance of time, when the last instalment in one case fell due in 1921 and five instalments have already been paid in the other. But we consider the claim to future interest to be just and well-founded. The accounts, which date from *Sambat* 1948 show very fair and honest dealings throughout. The plaintiffs made cash advances from time to time at the lowest mercantile rate of interest, *i. e.*, at 6 *per cent. per annum*. Therefore, it is but fair that the defendants should continue to pay interest at that rate on the unpaid balances. They are themselves bankers and it appears that they borrowed money from the plaintiffs at a low rate of interest in order to lend it to others at higher rates. Therefore, they must continue to pay interest till the decretal amounts are realized. We accept the appeals so far as to order that the defendants shall pay interest to the plaintiffs on the sums decreed from the dates of the institution of the suits till payment thereof. On the payment of an instalment, the liability to pay interest on the amount of that instalment shall cease from the date of payment. The defendants shall pay the plaintiffs' costs in this Court.

K. S. D. *Decrees modified.*

(1) 57 Ind. Cas. 215 ; 1 L. 234.
(2) 67 Ind. Cas. 106 ; 4 U. P. L. R. (L.) 77.
(3) 67 Ind. Cas. 180 ; 3 L. L. J. 156.
(4) 49 Ind. Cas. 871 ; 8 P. L. R. 1919 ; 87 P.W.R 1919.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 57 OF 1923.

December 6, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

KALIANMAL TILLOCKCHAND
—PLAINTIFF—APPELLANT
versus
DHARAMSEYJETHA & CO.,—DEFENDANT
—RESPONDENT.

Bombay Rent (War Restrictions,) Act (II of 1908), s. 9—Tenant remaining in possession after termination of tenancy—Rent payable—Standard rent.

There is nothing in the Bombay Rent (War Restrictions) Act which prevents a landlord from charging his late tenant the standard rent under the Act, as soon as he claims protection under section 9 of the Act because the payment of that rent is the sole condition which the Act recognises as enabling a tenant to remain in possession.

There is no analogy between the provisions of the Act which enable a tenant, who has been charged without his congizance a higher rent than the standard rent, to recover according to the terms of the Act the excess by deducting it from the current rent, and the ordinary proposition of law that a person in occupation of premises is bound to pay compensation for the use and occupation after the expiration of the contract between him and his landlord, which equally applies to a person who is allowed by the provisions of the Bombay (War Rent Restrictions) Act, to remain in possession.

Appeal from a decision of Mr. Justice Pratt in Original Civil Suit No. 947 of 1923.

Sir *Chimanlal Setalvad*, with Mr. *Coltman*, for the Appellant.

Mr. *Jinnah*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff in Appeal No.57 of 1923 is the owner of a go-down bearing No. 2 situate at Soni Lane. It was in his possession from 1916 to April 1920. On May 1, 1920, the plaintiff first let the premises to the defendants for seven months at a rental of Rs. 18,000, which was equivalent to Rs. 2,571-6-10 amonth. On December 1, 1920, he let the go-down to the defendants for a year at a rent of Rs. 1,000 per month. At the end of that period the plaintiff filed a suit in the High Court against the defendants to eject them on the ground that he required the premises reasonably and *bona fide* for his own use and occupation. As the defendants filed a written statement, the hearing of the suit was delayed. When the suit came on for hearing, the plaintiff's circumstances had so changed that he no longer required the premises for his own use and occupation, and he gave up that contention, which was a true contention at the time the suit was filed. A settlement was then arrived at, and a consent decree was taken on July 12, 1922. There is a remarkable clause in the consent decree to the effect that the decree was without prejudice to the plaintiff's contention as regards the standard rent of the premises in suit if raised in any other suits filed by or against the plaintiff. I confess I do not understand the meaning of those words. But under the consent decree the defendants became tenants of the premises at a rent of Rs. 1,000 a month.

Six days after the decree had been taken, the plaintiff gave notice to the defendants in the following form :—

You are in occupation of our client's go-down at Colaba being Soni Lane No. 2 as our client's monthly tenant at the monthly rent of Rs. 1,000. You are, however, aware that the standard rent of the said go-down is Rs. 2,571-7-0 per month. Our client several times requested you to agree to pay the said rent as our client is entitled to demand from you but you have refused to do so. We are, therefore, instructed to give you this notice that from the first day of September 1922 our client will charge you rent at the said rate of Rs. 2,571-7-0 per month. If you do not desire to pay any more rent than Rs. 1,000 you can vacate the preminses before the said September 1, 1922.

The defendants sent no reply to that notice.

The plaintiff wrote again on November 21, 1922, pointing out that the defendants had neither vacated the plaintiff's go-down nor paid rent at the rate demanded from September 1, 1922, nor had they paid rent for July and August 1922 at Rs. 1,000 a month. Notice was, therefore, given calling upon the defendants to pay the arrears for July and August at Rs.1,000 a month and pay rent from September 1, at the higher rate.

On december 21, 1922, the defendant's solicitors replied :—

" Our clients deny their liability to the requisitions, made in your letter under acknowledgment. Our clients would have paid your rent at the rate of Rs. 1,000 per month but for the intimation given to them by Mr. N. H. Moos that he has been appointed Receiver in Suit No. 5239 of 1922 of the go-down in question and his demand for rents in arrears and growing rents. Our clients deny that they are liable to vacate as required by yours and also deny your client's right to demand any rent other than at Rs. 1,000 per month under the consent decree between our respective clients.

The plaintiff then filed suit No. 947 of 1923 claiming that the standard rent should be fixed at Rs. 2,571-6-10 and that defendant should be ordered to pay rent at this rate from September 1, 1923, with previous arrears at the rate of Rs. 1,000 a month. In their written statements the defendants pleaded that on a proper construction of the consent decree dated July 12, 1922, they became monthly tenants of the plaintiff at the rate of Rs. 1,000 per month. They further stated that the notices given by the plaintiff were invalid in law and that their tenancy was not duly determined.

No issues were raised at the hearing and it would appear from the judgment that the defendants gave up the point taken in para. 7 of the wtitten statement for Mr. Taleyarkhan contended that although the defendants were entitled to a statutory tenancy, they were only entitled to it, if they paid rent to the full extent allowable by the Act, and I find nothing in the judgment to show that there was any argument on the question whether the defendants were in possession of the premises under their agreement as constituted by the consent decree or whether they were in occupation under the provisions of the statute. The learned Judge said :—

" There was no provision in the Act entitling the landlord to increase the rent without terminating the tenancy simply because the rent he was charging fell short of the standard rent. Sections 3 and 12 of the Bombay Rent (War Restrictions) Act II of 1918 made rent in excess of the standard rent recoverable by the tenant, but the converse proposition that the landlord could recover deficit below the standard rent was nowhere enacted. The claim, therefore, made by the plaintiff in this suit to increase the rent merely because it fell short of the standard rent is altogether unsustainable. The suit for excess rent must fail."

Accordingly a decree was passed against the defendants for the rent for July and August at the rate of Rs. 1,000 per month and for the subsequent months down to May 31, 1923, when the defendants vacated, at the same rate.

It seems to me that the legal position of a tenant whose tenancy has been determined but who is entitled to continue in possession under the provisions of the Rent Act has not been fully appreciated at the hearing. The plaintiff was entitled to terminate under the ordinary rules of law the contract which had been established between him and the defendants' by consent decree, and on August 31, 1922, when the plaintiff's notice expired that tenancy terminated. Had it not been for the Rent Act, the defendants would have been bound to vacate, but under its provisions they might remain in possession, and under section 9 no order for the recovery of possession of the premises could be made so long as they paid or were ready and willing to pay rent to the full extent allowable by the Act, and perform the conditions of the tenancy. I presume that would mean the conditions of the tenancy existing between the parties before the agreement terminated, which would be continued to that extent by virtue of those words if the tenant remained in possession under the Act.

Now the tenancy having terminated, still the plaintiff could not get an order for possession so long as the tenant was paying the rent to the full extent allowable by the Act. We have to turn to section 2 to see what the definition of standard rent, is in order to ascertain what is the rent which can be charged to a person who remains in occupation of the premises under section 9. It seems to me that there is nothing in the Act which prevents a landlord from charging his late tenant, as soon as he claims protection under the Act, the standard rent, because the payment of that rent is the sole condition which the Act recognises as enabling a tenant to remain in possessions. There is no analogy between the provisions of

the Act which enable a tenant, who has been charged without his cognizance a higher rent than the standard rent, to recover according to the terms of the Act the excess by deducting it from the current rent, and the ordinary proposition of law that a person in occupation of premises is bound to pay compensation for the use and occupation after the expiration of the contract between him and his landlord, which equally applies to a person who is allowed by the provisions of the Rent Act to remain in possession.

We think, therefore, that when the tenancy was terminated at the end of August 1922, and the defendants remained in possession and occupation of the premises, they should only have been allowed to do so provided they paid rent to the full extent allowable by the Act, that is to say the standard rent, and as no issue was framed in the Court below as to what was the standard rent, the case will have to go back to the lower Court to ascertain what is the standard rent, and pass a decree accordingly in favour of the plaintiff. The appellant will get his costs of the appeal.

Crump, J.—I entirely agree.

Z. K. *Case remanded.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 228 OF 1922.

December 4, 1923.

Present :—Mr. Justice Heald and
Mr. Justice May Oung.

MG. PO THET AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MG. MIN DIN—PLAINTIFF—RESPONDENT.

Buddhist Law, Burmese—Land occupied by methila, *whether religious—Gift, oral validity of—Trust, private, whether created.*

The predecessor-in-title of the plaintiff, who was a *methila*, held certain land on a squatter tenure on which she had built a small residence for herself. She subsequently gave up her vows and married. Afterwards she made an oral gift of the land to a monk who gifted it to the defendant ;

Held (1) that the land was not religious ;

(2) that the oral gift in favour of the monk was invalid for want of a registered deed ;

(3) that in the absence of a deed it could not be said that a private trust of the land had been created;

(4) that, therefore, the plaintiff's title to the land subsisted and he was entitled to recover it.

Mr. *Chari*, for the Appellants.

Mr. *Halkar*, for the Respondent.

JUDGMENT.

May Oung, J.—The plaintiff (now respondent) sues as the surviving husband and sole legal representative of one Ma E Thi, for possession of a piece of land, which the latter had held on a squatter tenure. When she became the registered occupier, Ma E Thi was a *Methila* or female lay devotee. She put up on the land a small residence for herself ; this is referred to as a *Zayat*, but this word does not here mean a public rest-house or similar building within the precincts of a monastery or cemetery. For the purpose of this case, the building was an ordinary dwelling house and it did not stand on religious land.

Subsequently, Ma E Thi gave up her vows and married. The couple lived for some time in the *Zayat* and then moved to Kemmendine, leaving Ma E Thi's sister, Ma Shwe Ma, in occupation.

Later, it is alleged, Ma E Thi made a gift of the house and site to a monk, who has since left the priesthood, and is now Moung Po Thet, the 1st defendant. Moung Po Thet in his turn, before he became a layman, is alleged to have made a gift of the same to U Kumaya, the 2nd defendant, who is now in occupation. Recently, U Kumaya dismantled the old building and erected a new one. Hence the suit.

Ma E Thi's original title is unchallenged. Moung Po Thet admitted it. And although U Kumaya did not, he claims through Moung Po Thet and urges that Ma E Thi's

gift, though it may be invalid as such, is good as a trust.

It is not contended that the alleged gifts are valid They were obviously not, since no deed was executed

Hence, Ma E Thi's title subsisted, unless it can be shown that she lost it by her own act, or by lapse of time. As to the latter, it is sufficient to note that "adverse possession" was not pleaded, and it is clear that neither Ma E Thi's nor her legal representative's right was barred.

As to the alleged trust set up here again as there was no deed, there could have been no *valid private* trust and there is nothing to show that Ma E Thi at any time intended to effect a *public* trust. The contention of the defendants was that she made a *poggalika* gift, *i.e.*, a gift to an individual who could thereafter dispose of it as he pleased: and it is significant that Maung Po Thet professed to have the right to give the property to U Kumaya.

Had the property been of a religious nature, some question of a trust might conceivably have arisen, but this was not religious property and the question does not, therefore, arise.

I see no reason to disturb the finding of the Trial Court and would, therefore, dismiss the appeal with costs.

Heald, J.—I concur.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION NO. 130 OF 1923.

February 6, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Shah.

LAXMINARAYAN BIJERAM—PLAINTIFF—APPLICANT

versus

G. I. P. RAILWAY CO.—DEFENDANTS—OPPONENTS.

Carriage of goods—Railway Company—Risk-Note Form B—Goods carried by wrong route—Deviation—Loss of goods—Burden of proof.

Where goods consigned to a Railway Company for carriage under Risk-Note Form B are carried to a wrong destination over a route different from that intended by the consignor, and loss or damage is caused, the burden lies on the Railway Company to prove that the loss or damage did not occur during the deviation, and in the absence of such proof, the Railway Company will be liable for the loss or damage irrespective of the terms of the Risk-Note.

Aranachellam Chettiar v. *The Madras Railway Company*, 3 Ind Cas. 931; 33 M. 120; 6 M. L T. 292; *Hales* v. *London and North-Western Railway Company*, (1863) 4 B. & S. 66; 32 L J. Q. B. 292; 8 L. T. 421; 11 W. R. 856; 122 E. R. 384; 129 R. R. 650, distinguished.

Vali Mahomed v *G. I. P. Railway*, 67 Ind. Cas. 366; 24 Bom. L. R. 316; (1922) A. I. R. (B.) 74; 46 B. 830, followed.

Application against the decision of the First Class Subordinate Judge, Dhulia, in Small Cause Suit No. 2218 of 1922.

Mr. *P. B. Shingne*, for the Applicant.

Mr. *Campbell*, instructed by Messrs. *Little, & Co.*, for the Opponents.

JUDGMENT.—The plaintiff delivered seven bags of miscellaneous goods to the defendant Company for carriage from Bombay to *Dulia* via Chalisgaon. He signed Risk-Note in Form B. Six bags were delivered correctly at Dhulai. One bag unfortunately, instead of being taken out at Chalisgaon, was carried on to Jalgaon, and some days afterwards was brought back and delivered to the plaintiff. Plaintiff complained that there was a shortage of nineteen seers in the contents. The defendant Company admitted the shortage. They claimed, however, exemption from liability on the strength of the Risk-Note. We think there was a clear deviation from the route orginally intended when the goods were delivered for transit. In these circumstances, we think that in any event the onus would lie upon the Railway Company, if they claimed exemption under the Risk-Note, to prove that the shortage had not occurred during the deviation. That they never attempted to do. The case we have been referred to, *viz.*, *Arunachellam Chettiar* v. *The Madras Railway Campany* (1), does not assist the Railway Company, because the facts in that case was entirely different. The Court

(1) 3 Ind. Cas. 931; 33 M. 120; 6 M. L. T. 292.

there relied upon the decision in *Hales* v. *London* and *North-Western Railway Company* (2) in which it was held that a customer dealing with a Company is bound not only by the ordinary route, but also by the ordinary train arragements and hours of arrival according to which they profess to carry.

Here it cannot be said that the deviation was due to the ordinary train arrangements, for it was clearly due to a mistake on the part of the Company's servants. We think the case of *Vali Mahomed* v. *G. I. P. Railway* (3) is clearly applicable. In that case it was proved that the loss had occurred during the deviation. But the general principle was laid down that the Company by carrying the goods *via* Kalyan, went outside the terms of the contract and could no longer rely on the protection afforded by the risk-note so as to be absolved from liability for the loss which had occurred.

We must, therefore, make the rule absolute, and pass a decree in favour of the plaintiff for the amount claimed with costs throughout.

N. H. *Rule made absolute.*

(2) (1868) 4 B. &. S. 66; 32 L. J. Q. B. 292; 8 L. T. 421; 11 W. R. 856; 122 E. R. 384; 129 R. R. 650.
(3) 67 Ind. Cas. 366; 24 Bom. L. R. 316; (1922) A. I. R. (Bom.) 74; 46 B. 830.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1295 OF 1921.

July 19, 1923.

Present:—Mr. Justice Rankin and Mr. Justice Ghose.

BANKA BEHARI DAS—PLAINTIFF—APPELLANT
versus
GURU DAS DHAR—DEFENDANT—RESPONDENT.

***Civil Procedure Code** (Act V of 1908), s. 47, O. XXI, r. 91—Execution sale—Judgment-debtor having no saleable interest—Suit for refund of purchase-money, whether maintainable.*

A suit for refund of purchase-money is not maintainable by the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the land.

Appeal against the decree of the District Judge, Murshidabad, dated the 26th April 1921, reversing the decree of the Munsif, Jangipur, dated the 29th November 1919.

Babu *Samatul Chander Dutt* (with him Babu *Durga Charan Mitter*), for the Appellant.

Dr. *Jadunath Kanjilal* (with him Babu *Peari Mohan Chatterjee*), for the Respondent.

JUDGMENT.

B. B. Ghose, J.—The plaintiff, who was the auction-purchaser at a sale in execution of a decree for rent, sued both the decree-holder and the judgment-debtor for refund of the purchase-money and also for compensation on certain allegations made in the plaint. The suit was decreed in the primary Court against both the defendants. On appeal by the decree-holder defendant, the learned Judge dismissed the suit holding that it was not maintainable. The plaintiff appeals to this Court and two questions have been raised on his behalf: (1) Whether a suit for refund of purchase-money is maintainable by the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the land, and (2) whether the suit is maintainable on the ground of fraud of the defendants.

With regard to the first question, the learned Vakil for the appellant has placed before us all the cases decided by the different High Courts with reference to sales held after the Code of Civil Procedure of 1908 came into operation. He admits that the general view is that such suits are not maintainable. It is only necessary to refer to the latest cases, which are *Ram Sarup* v. *Dalpat Rai* (1), *Balvant Raghunath* v. *Bala Malu* (2), *Tirumalaisami Naidu* v. *Subramanian Chettiar* (3) and *Juranu Mahamad* v. *Jathi Mahamad* (4). He, however, relies on two cases in support of his contention that such a suit is maintainable, namely, the cases of *Rustomji Ardeshir Irani*

(1) 58 Ind. Cas 105; 43 A. 60; 18 A. L. J. 905; 2 U. P. L R. (A.) 318.
(2) 67 Ind. Cas. 360; 46 B. 833; 24 Bom. L. R. 308; (1922) A. I. R. (B.) 205.
(3) 45 Ind. Cas. 109; 40 M. 1009.
(4) 46 Ind. Cas. 783; 22 C. W. N. 760.

v. *Vinayak Gangadhar Bhat* (5), and *Prosanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (6). The case of *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (5) was under the Civil Procedure Code of 1882 as pointed out by the learned Chief Justice in *Balvant Raghunath's* case (2). The only case then in which a discordant note was struck is that of *Prosanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (6). That case, however, was based on the decision in *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (5), which is no authority on the question where the sale was held under the Code of 1908. We must, therefore, follow the later case in our Court, *Juranu Mahamad* v. *Jathi Mahamad* (4), which is in agreement with the decision of all the other High Courts, and hold that such a suit is not maintainable.

The learned Vakil for the appellant further contends that there is a difference between the present case and the others, as in the present case the sale was a sale in execution of a rent decree and there is a warranty of title in the case of such a sale. The authority cited in support of this proposition is the decision in *Abdul Sobhan Seikh* v. *Nakbar Mandal* (7). That case, however, does not lay down any such rule, as it decides merely a question of estoppel by representation. That there is no such distinction as regards warranty will be apparent from the fact that the proclamation of sale which has to be published is in the same terms in both classes of cases. The difference in the rights acquired by purchasers in execution of decrees does not affect the question as regards warranty of title.

Before parting with this question, I must observe that the plaintiff does not 'state that the judgment-debtor had no saleable interest, the allegation being to the effect that the plaintiff purchased only the right, title and interest of the judgment-debtor and not the holding free from all encumbrances as in a rent sale. On that allegation, the question discussed does not arise and the plaintiff's suit is not maintainable on any ground whatsoever.

With regard to the second point the matter of fraud was not investigated by the learned Judge on appeal and the appellant asks us for a remand of the case for retrial on that ground. The learned Vakil for the respondent contends that, assuming that such a suit on the ground of fraud is maintainable, there is no such averment of fraud in the plaint by which the plaintiff was induced to purchase the property and that there is nothing to be enquired into; although the words "fraud" and "collusion" have been used several times in the plaint, if those words are struck out, the facts alleged do not disclose any fraud which would entitle the plaintiff to maintain this action nor was any issue raised on that question. Reference has been made in this connection to the case of *Ganga Narain Gupta* v. *Tiluckram Chowdhury* (8), where Lord Watson quoted the well-known dictum of Lord Selborne on that question. The appellant urges that, although no issue was raised, the Trial Court decided the question of fraud and the defendants cannot be said to have been prejudiced or taken by surprise. The Trial Court, however, seems to have decided two points on the facts alleged in the plaint. First, that in the rent suit the defendant No. 2 who was a grandson of the recorded tenant did not represent the entire body of tenants deriving title from the recorded tenant and, secondly, that the enhanced rate of rent claimed by the landlord in his suit was not *bona fide* as the defendant No. 2 had no authority to agree to an enhancement on behalf of all the tenants and this enhancement was made by the landlord in collusion with the defendant No. 2. These findings can hardly be said to be findings of fraud which would entitle the auction-purchaser to have the sale set aside. I have examined the plaint and there is no allegation in it beyond those which have been found by the Munsif. It seems to me clear that these findings were not considered to be findings on any question of fraud by the parties in the lower Appellate Court as it does not appear that the lower Appellate Court was asked to come to any finding on the question of fraud. This ground also, therefore, fails.

The appeal must, therefore, be dismissed with costs.

Rankin, J.—I agree.

N. H. *Appeal dismissed.*

(5) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 728.

(6) 41 Ind. Cas. 924; 36 C. L. J. 205.

(7) 16 Ind. Cas. 632; 17 C. L. J. 652.

(8) 15 I. A. 119; 15 C. 533; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168; 7 Ind. Dec. (N. S.) 989.

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION No. 175 OF 1923.

February 7, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

RAMCHANDRA ADARAM AGARWALI —PLAINTIFF—APPLICANT
versus
LODHA GOURI BHADHRUJI—DEFENDANT —OPPONENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. II, rr. 2, 4—Suit for possession—Mesne-profits *subsequent suit for, whether barred.*

Where a plaintiff sues for possession of immoveable property and obtains a decree for possession and *mesne profits* from the date of the suit, he can bring a separate suit against the same defendant for *mesne profits* prior to the suit.

Ponnammal v. *Ramamirda Aiyar*, 27 Ind. Cas. 679; 38 M. 829; 7 M. L. T. 125; 28 M. L. J. 127; (1915) M. W. N. 130 (F. B.), relied on.

Application from an order of the Judge of the Court of Small Causes, Poona, in Small Cause Suit No. 4356 of 1922.

Mr. *V. D. Limaye*, for the Applicant.

Mr. *P. B. Shingne*, for the Opponent.

JUDGMENT.—In this case the plaintiff purchased a house on March 12, 1921. He did not get possession. Accordingly he had to file a suit on June 17, 1921, for possession, on which he got a decree for possession and rent from the date of the suit. He then filed the present suit in the Small Cause Court to recover rent for the house prior to the date of the suit. The Judge held that the suit was barred by the previous suit, and accordingly dismissed it. It seems to us that he has missed the real point in the case which does not fall under section 11, Explanation IV, of the Civil Procedure Code, but under the provisions of Order II. If the claim for possession and the claim for rent prior to the suit for possession are separate causes of action, there is no obligation on the plaintiff to join these two causes of action in the same suit. It is only under the provisions of O. II, r. 4, that it is possible for seeking possession to join in that suit a claim for mesne profits prior to the suit. In *Ponnammal* v. *Ramamirda Aiyar* (1), the same point arose, and it was held following a series of authorities that :—

"Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for *mesne profits* and damages, it was open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit."

We agree with that decision. Accordingly we must make the rule absolute and remand the suit for trial on the merits. The applicant will be entitled to the costs of the rule. Costs in the lower Court will be costs in the cause.

Z. K. *Rule made absolute.*

(1) 27 Ind. Cas. 679; 38 M. 829; 7 M. L. T. 125; 28 M. L. J. 127; (1915) M. W. N. 130, (F. B.).

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 28 OF 1923.

January 3, 1924.

Present :—Mr. Justice Young.

MAUNG PO GYI—APPELLANT
versus
MAUNG PO SAING AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Pre-emption—Sale of undivided family property—Co-heirs, right of, to pre-empt.

The right of a Buddhist widow to dispose of undivided family property after her husbad's death, *viz.*, that she has an absolute right of disposal over her own share and a life interest in the remainder does not affect, but is subject to the general rule regarding the right of all co-heirs to pre-emption. (p. 260, col. 1).

Mo Thi v. *Tha Kwe*, 4 L. B. R. 128; 14 Bur. L. R. 205, relied on.

Maung Ye Nan O v. *Aung Myat San*, 31 Ind. Cas. 512; 8 L. B. R. 466; 8 Bur. L. T. 167, considered.

Appeal from the decree of the District Court, Tharrawaddy, in C. A. No. 59 of 1922.

SAKALCHAND MOTI *v.* AMBARAM HARIBHAI

Mr. *Maung Lat*, for the Appellant.

Mr. *Thein Maung*, for the Respondents.

JUDGMENT.—This was a suit for a right of pre-emption in respect of a piece of land which originally belonged to the 1st defendant Ma Hmu and her deceased husband Maung Shwe Kye, and was sold by her after his death and the sole question argued before this Court was whether the lower Courts were right in holding that a right of pre-emption existed in favour of Maung Po Saing and Maung Sin U, the sons of Ma Hmu's deceased husband U Shwe Kye by a former marriage.

In *Mo Thi* v. *Tha Kwe* (1) it was held that the rule regarding the right of a Buddhist widow to dispose of family property after her husband's death, *viz.*, that she has an absolute right of disposal over her own share and a life interest in the remainder does not affect, but is subject to the general rule regarding the right of all co-heirs to pre-emption, and that, therefore, Thwa Kwe had a right of pre-emption over the whole property. This case is recited in the head-note to the Full Bench case of *Maung Ye Nan O* v. *Aung Myat San* (2) as having been dissented from and Ormond, J. in his judgment in the latter case states, that the case decided that when a widow after partition sold her share to a stranger, her son had the right of pre emption as to the whole. If this is correct *Ye Nan O's* case certainly overruled that of *Mo Thi's* case so far as the question of the rights to pre-emption *after partition* is concerned, but from the judgment I am unable to see that there was anything about partition in the case, and in any event the case was only overruled so far as concerned the rights to pre-emption after partition and did not touch the authority of the case for the proposition laid down in the head-note and we have not to travel further than *Maung Ye Nan O's case* (2), itself to see that pre-emption in the case of co-heirs is recognised before, though not after partition: Fox, C. J., citing with approval the view of the law laid down in *Sparks' Code* that if a person wish to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs.

(1) 4 L. B. R. 128; 14 Bur. L. R. 205.
(2) 31 Ind. Cas. 512; 8 L. B. R. 466; 8 Bur. L. T. 167.

It is admitted by learned Counsel for the appellants that Maung Po Saing and Maung Sein U are co-heirs and it is not contended that there has been any partition; it follows, therefore, on the authority of *Mo Thi's* case and *Sparks' Code* that Ma Hmu should not have sold the whole or any portion of the undivided family property without offering it first to them and that the appeal must be dismissed.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION NO. 52 OF 1923.

February 15, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SAKALCHAND MOTI—APPLICANT
versus
AMBARAM HARIBHAI—OPPONENT.

Arbitration—Award—Extension of time—Application, whether must be in writing.

An application for extension of the time limited for making an award need not be in writing.

Morji Premji Set v. *Molivakel Koyassan Koya Haji*, 3 M. 59; 4 Ind. Jur. 396; 1 Ind. Dec. (N. S.) 598, distinguished.

Application against the order of the Joint First Class Subordinate Judge, Ahmedabad, in Civil Suit No. 443 of 1921.

Mr. *D. G. Dalvi*, for the Applicant.

Mr. *H. V. Divatia*, for the Opponent.

JUDGMENT.—There were two brothers Sakalchand Moti and Jadav Moti who entered into a partnership to supply bricks to a certain company. A field was purchased in partnership, but the sale-deed was taken in the name of Sakalchand. Disputes arose between the partners, and two suits were filed in which other parties were impleaded. It is not necessary to refer to the detailed pleadings. The suits were referred to the arbitrament of a pleader of the Court by the joint wishes of the parties on January 10, 1922. The arbitrator gave his awards on August 31,

1922. Objections were filed against the awards by both the brothers. The main ground that the applicants relied upon was that the awards were illegal and void as they were not delivered within the time fixed by the Court. There were also allegations that the arbitrator was guilty of misconduct.

It was represented to me when the application for revision was entertained that the time for filing the award as originally fixed in the orders of reference was February 10. Certainly it appears from the judgment that the learned Judge considered that that was the correct time, and consequently he said that it had been urged by the plaintiff's pleader that the arbitrator examined the witnesses between February 10 and 28, 1922, after the time had expired before it was extended, and, therefore, the whole proceedings were vitiated. It was only on that ground that I entertained the application. Now it appears that there was an error in the judgment, and that as a matter of fact the original time was February 28. The only question then would be whether due applications had been made to the Court, and admittedly the *Rojnama* shows that time was extended until August 31 when the awards were made.

It has been argued by the petitioner's pleader that an application to the Court for extending the time should be in writing and *Monji Premji Set* v *Malivakel Koyassan Koya Haji* (1) has been cited in support of that proposition. But all that the learned Judges said in that case was as follows:—

" We must accept the declaration made by the Subordinate Judge that extensions of the period for the submission of the award were from time to time granted, though we may observe that applications for such extensions should ordinarily be in writing, and that most certainly orders thereon should be."

It cannot possibly be deduced from those words that an oral application to the Court is void, and that any order passed thereon, even though in writing, as in this case, was equally void. It must follow that these rules must be discharged with costs. If the true facts had been placed before me, I should not have granted them.

Z. K. *Rules discharged.*

(1) 3 M. 59; 4 Ind. Jur. 396; 1 Ind. Dec. (N.S.) 598.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 26 OF 1923.

January 7, 1924.

Present :—Mr. Justice Heald and Mr. Justice May Oung.

AHMED MOOLLA DAWOOD AND ANOTHER—APPELLANTS

versus

S. R. M. M. C. T. PEREINAN CHETTY FIRM—RESPONDENT.

Banker and Customer—Forged Cheque, payment of, liability for.

Before a banker can debit his customer's account with the amount of a forged cheque he must prove negligence on the part of the customer which was intimately connected with the drawing or encashment of the cheque which was the proximate cause of the loss. (p. 262, col. 1).

Mr. *Cowasjee*, for the Appellants.

Mr. *Leach*, for the Respondents.

JUDGMENT.— Appellants, who are executors of Yacoob Abdul Gunny's estate sued respondents, a firm of Chetty brokers to recover Rs. 3,741-9-9 which they alleged to be the amount standing to Yacoob Abdul Gunny's credit of his account with respondents. They said that a cheque for Rs. 7,500, with which respondents claim to debit the account was a forgery.

Respondents denied that the cheque was a forgery and said that the amount standing to Yacoob Abdul Gunny's credit was only Rs. 241-9-9 which amount they paid into Court.

The learned Judge on the Original Side found that appellant failed to prove that the cheque was a forgery and gave them a decree for Rs. 241-9-9 only, allowing special costs against them.

The appellants appeal on the ground that they succeeded in proving that the cheque was a forgery and that respondents were negligent in cashing it.

On the first of these grounds we may say at once that we are of opinion that the cheque was in fact a forgery, it was torn out together with the counterfoil and apparently also with the next following cheque and counterfoil from the end of appellant's cheque book. We have examined the signature carefully comparing it with the large number of undoubted signatures

of Lodhia which are on the record and we find that it bears all the marks of a forgery. The loop in the middle of the initial " H." the upstroke of the initial "V" the break between the "v" and "I" the break in the upstroke of the letter "d"; the break between that letter and the following letter "h", all these peculiarities distinguish it from the genuine signatures of H. K. Lodhia which are all written with a break from the last stroke of the "h" to the finish of the penultimate" writing " and they are all in our opinion indications of efforts in effecting the forgery. The spelling of the word "hundred" does not occur in any of the genuine cheques and although the body of the cheques may usually have been filled in by a clerk and not by Lodhia himself the difference indicates that the cheque was not written up by the usual clerk, or in the usual manner, renders it probable that the forger was an Indian, since the short "u" sound in English is written by Indians with an "a."

We, therefore, find that the cheque which respondents cashed was a forgery and we have to consider whether they or appellants must bear the loss.

There are divergences of opinion between The House of Lords in *London Joint Stock Bank Ltd. v. Macmillan* and *Arthur* (1) and the Privy Council in *Colonial Bank of Australasia v. Marshall* (2) as to the extent of a customer's duty to his banker, but it seems to be well settled that before a banker can debit his customer's account with the amount of a forged cheque he must prove negligence on the part of his customer which was intimately connected with the drawing or encashment of the cheque which was the proximate cause of the loss.

In the case of the *Kepitigalla Rubber Estaes Limited* v. *The National Bank of India Limited* (3) in which the facts were similar to those of the present case, it was said that in order to make the customer liable for the loss the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss, and it was suggested that there was no authority for the proposition that beyond the care which must be taken in the transaction itself a customer must in the course of carrying on his business take reasonable precautions to prevent his servants from forging his signature.

In the case of the *Punjab National Bank Limited* v. *The Mercantile Bank of India Limited* (4) the manager of the former Bank used to leave the Accountant with blank drafts and blank letters of advice, ready signed by him for use as occasion required and the Accountant filled up these documents fraudulently with the result that the Mercantile Bank cashed certain drafts, it was held that it was not incumbent on the customer to contemplate the perpetration of such a crime as a forgery or theft and that the negligent act of the Manager was not the proximate cause of the draft being cashed, and it was decided that the Mercantile Bank must bear the loss.

In the case of the *Governor and Company of the Bank of Ireland* v. *The Trustees of Evans' Charities in Ireland* (5) the House of Lords says: "If a man who loses his cheque book or neglects to look the desk in which it was kept and a servant or stranger should take it up it is impossible in our opinion to contend the banker paying his forged cheque would be expected to charge his customer with that payment."

We are of opinion that the principle laid down in this case is sufficient for the disposal of this appeal. All that was alleged against appellants on the score of negligence was that they or their agent were negligent in the custody of their cheque book and of their rubber stamps which were used on their cheques. Even if that were proved it would not, on the authorities which we have cited, be sufficient to charge appellants with the loss which resulted from the forgery of a cheque stolen from their cheque book and the fraudulent use of their stamps. There can in our opinion be no doubt that the cheque in this case was so stolen and forged, and as the respondents cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable, they must bear the loss.

We, therefore, set aside the judgment and decree in the suit and give judgment for

(1) (1918) A. C. 777 ; 88 L. J. K. B. 55 ; 119 L. T. 357 ; 23 Com. Cas. 415 ; 62 S. J. 650 ; 34 T. L. R. 509.

(2) (1906) A. C. 559 ; 75 L. J. P. C. 76 ; 95 L. T. 810; 22 T. L. R. 746.

(3) (1909) 2 K. B. 1010 ; 78 L. J. K. B. 964 ; 100 L. T. 516 ; 16 Manson 284 ; 14 Com. Cas. 116; 53 S. J. 377 ; 25 T. L. R. 402.

(4) 12 Ind. Cas. 257; 36 B. 455; 13 Bom. L. R. 835.

(5) (1855) 5 H. L. C. 389; 3 W. R 573; 10 E. R. 950; 101 R. R. 218.

appellants for the amount claimed, namely, Rs. 3,741-9-9 with interest at the Court rate on the full amount up to date and the payment of Rs. 241-0-9 into Court and thereafter on the balance, namely, Rs. 3,500 up to date of payment with costs on Rs. 3,500 for appellants in both Courts.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION NO. 233 OF 1923.

February 1, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

JIVABAI PITAMBERDAS—PLAINTIFF—APPLICANT

versus

TEJA SAMA AND ANOTHER—DEFENDANTS—OPPONENTS.

Costs in the cause, meaning of—Interlocutory order—Decree in favour of one party—Costs, award of.

The words " costs in the cause " in an order made in an interlocutory proceeding do not mean that the costs would inevitably follow the event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs.

Where, however, an order has been made in an interlocutory proceeding that costs will be costs in the cause, and a decree is passed in favour of one side or the other for costs, then those costs must be taken as being included in the final order unless the Judge expressly excludes them.

Application against the order of the Judge of the Court of Small Causes, Ahmedabad, in Darkhast No. 388 of 1923.

Mr. *H. V. Divatia*, for the Applicant.

JUDGMENT.—A suit was filed by the present petitioner-plaintiff in the Small Cause Court at Ahmedabad to recover Rs. 154 on a promissory-note. The Judge awarded only Rs. 45-12-0, calculating the rate of interest at nine per cent. An application was made in revision to this Court which held that the rate of interest was insufficient and sent back the case to the lower Court for disposal having regard to the observations made in the judgment, and further directed that the costs in the High Court were to be costs in the cause. Thereupon the learned Judge raised the amount of interest to eighteen per cent. and passed a decree in favour of the petitioner for Rs. 61-6-6 with proportional costs. These costs would necessarily include the costs incurred in the High Court. The petitioner then filed a *Darkhast* to recover the decretal amount and costs, including therein the costs in the High Court which came to Rs. 37-13-0. That application was wrong to this extent that the plaintiff could only recover proportional amount of the High Court costs under the decree of the Small Cause Court. The Judge in execution disallowed costs incurred in the High Court on the ground apparently that his predecessor who had passed the decree had refused to allow Rs. 37-13-0.

We may refer to the decision in *Templeton* v. *Laurie* (1) where it was held that the words "costs in the cause" in an order made in interlocutory proceeding do not mean that the costs would inevitably follow the event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs. That is perfectly correct. But when an order has been made in an interlocutory proceeding that costs will be costs in the cause, and a decree is passed in favour of one side or the other for costs, then those costs must be taken as being included in the final order unless the Judge expressly excludes them. The plaintiff, therefore, was entitled to have this item of Rs. 37-13-0 included in the total amount of costs when the calculation was made of the proportionate part which was due to him under the decree.

We must, therefore, set aside the order made in the Court below, and direct that costs, a proportionate part of which was awarded to the plaintiff, would include the High Court costs. Rule absolute. No order as to costs of this application.

Z. K. *Rule made absolute.*

(1) 25 B. 230 ; 2 Bom L. R. 244.

DAL SINGH *v.* PLUIMAN

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1452 OF 1918.

April 6, 1923.

Present :—Mr. Justice Campbell and Mr. Justice Moti Sagar.

DAL SINGH AND OTHERS —PLAINTIFFS— APPELLANTS
versus
PLUIMAN AND OTHERS—DEFENDANTS— RESPONDENTS.

Custom—Succession—Ala maliks, *when entitled to rights of reversion—Construction of document, meaning of—Question of fact or law—Evidence misunderstood—Second Appeal.*

It is only in cases where the *ala maliks*, originally the sole proprietors of the soil of a village have called in outsiders and settled them on some or all of the lands that the *ala maliks* are entitled to the right of reversion on the death of the *adna maliks*. (p. 265, col. 1).

The expression 'construction' as applied to a document includes two things: First, the meaning of the words; and secondly, their legal effect. The meaning of the words is in all cases a question of fact The effect of the words is a question of law. (p. 265, col. 2).

Chatenay v. *The Brazilian Submarine Telegraph Co.*, (1891) 1 Q. B. 79; 60 L. J. Q. B. 295; 63 L.T. 739; 39 W. R. 65, followed.

Unless there is a question of the legal effect of a document which may be treated as a document of title or embodies a contract or is the foundation of a suit, a second appeal does not lie.

A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court.

Appeal from the decision of the District Judge, Ludhiana, dated the 31st January 1918.

Mr. *Abdul Aziz*, for the Appellants.

Mr. *Tek Chand*, for the Respondents.

JUDGMENT.—The facts of the cases out of which these three second appeals, Nos. 1452, 1453, and 1454 of 1918, have arisen are stated in ample detail in the judgments of the Courts below, and need not, therefore, be repeated here at length. Briefly stated they are as follows :—

One Raja Badan Singh was the *ala malik* of *mauza* Shahna in the Ludhiana *tahsil* of the same district. There were certain lands in this village which were till recently held by certain *adna maliks* who have now died heirless, and the sole question for determination in these appeals is whether or not on the death of an *adna malik*, who has died heirless, the land held by him reverts to the *ala malik* free of all encumbrances created by the former, if any. In one case, which has given rise to appeal No. 1452, the dispute related to 61 *bighas* 2 *biswas* of land held by *Mt.* Indi, widow of one Bela. *Mt.* Indi died in September 1910, without leaving any heirs. Upon her death, the land was mutated in favour of defendants Nos. 1 to 16 who belonged to the same *Got* as her deceased husband Bela. During his life-time Bela had created certain mortgages in favour of defendants Nos. 9 to 12, 14, 17, 18 and 19, and the plaintiff's case was that he was entitled to possession of this land as *ala malik*, and that the mortgages created by the deceased were not binding upon him.

In the second suit the dispute was in respect of 45 *bighas* 19 *biswas* of land in this very village. One Sadna, who was the *adna malik* of this land, died heirless in May 1915, and on his death the land was mutated in favour of the plaintiff as *ala malik* in June 1916. The defendants were, however, in possession as mortgagees, and the plaintiff brought the suit alleging that the mortgage had been extinguished on the extinction of the *adna malkiyat*, and that he was entitled to get possession free of any encumbrance.

In the third suit one *Mt.* Bhagwani had executed a deed of gift in favour of one Tulsi, defendant No. 2, and the plaintiff brought the suit for a declaration that the gift was invalid and that it would not affect his reversionary rights as *ala malik* after the death of the widow.

The suits were resisted on a variety of grounds, but the main contentions, with which we are now concerned in these appeals, were :—

(1) That the plaintiff was not an *ala malik*.

(2) That he had no right of reversion in respect of these lands.

(3) That in any case the mortgages were binding and that the plaintiff was not entitled

to get possession free of the encumbrances created by the *adna maliks*. Both the Courts below have concurred in holding that the plaintiff is an *ala malik*, but they have also found that he is only entitled to a certain percentage on the revenue by way of quit-rent, and that he has no right of reversion in respect of these lands. In this view of the case all the three suits have been dismissed.

The plaintiff has now come up in second appeal to this Court and it has been contended on his behalf that the finding of the Court below that he was only entitled to a certain amount of percentage on the revenue by way of quit-rent and that he had no right of reversion is erroneous and that in coming to this finding the Court has entirely misread and misconstrued certain documents on the record.

A preliminary objection is raised on behalf of the respondents that the finding of the Court below on the question of plaintiff's status is a finding of fact and that it cannot be attacked in second appeal. In our opinion this contention is well founded and must prevail. In the case of *Hira* v. *Chahnnu* (1), it has been held by a Bench of this Court that there are two ways in which the classes of *ala maliks* and *adna maliks* are created in a village :—First, where the *ala maliks* so called are mere *talukdars* whose ancestors have been farmers of revenue or conquerors who have been content to leave all the management, etc., of the lands to the conquered peasantry and to take quit-rents. Secondly, where the *ala maliks*, originally the sole proprietors of the soil of the village have called in outsiders and settled them on some or all of the lands. It has further been held that it is only in cases of the latter class that an *ala malik* is entitled to the right of reversion and in no other case. The plaintiff's contention is that he is an *ala malik* of the latter class, and in support of this contention he relies upon certain entries in the Revenue records of 1856 and 1882. These entries have been fully considered by the Court below, and the finding is that they are of no value in view of the subsequent orders passed by the Commissioner and the Financial Commissioner. In our opinion, the District Judge was fully entitled to reject a particular piece of evidence and to hold that it did not support the case of the plaintiff. With regard to the conclusion drawn by the learned District Judge from the Revenue papers, it should be borne in mind that there is a distinction between conclusions of fact and conclusions of law. It has been held in *Chatenay* v. *The Brazilian Submarine Telegraph Co.* (2) that the expression 'construction' as applied to a document includes two things : First, the meaning of the word ; and secondly, their legal effect. The meaning of the words is in all cases a question of fact. The effect of the words is a question of law. In the present case there is no question of the legal effect of a document, and unless there is a question of the legal effect of a document which may be treated as a document of title or embodies a contract or is the foundation of a suit, a second appeal does not lie. It is contended by Mr. Abdul Aziz, that the lower Appellate Court has mistaken the meaning of the Revenue records in question. It is, however, clear that a second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court. In our opinion, the decision of the District Judge does not involve any error of law, and there is no ground for a second appeal.

We accordingly dismiss these appeals with costs.

K. S. D. *Appeals dismissed.*

(1) 16 Ind. Cas. 116 ; 129 P. L. R. 1912 ; 99 P. W. R. 1912.

(2) (1891) 1 Q. B. 79 ; 60 L. J. Q. B. 295 ; 63 L. T. 739 ; 39 W. R. 65.

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION NO. 320 OF 1922.

November 20, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

JAGANNATH DEOKARAN MARWADI—PLAINTIFF—APPLICANT

versus

DHONDU ANANDA KUNBI—DEFENDANT—OPPONENT.

Bombay Mamlatdars' Courts Act (II *of* 1906) *s.* 23—*Order of Mamlatdar—Interference by Collector, when justified—Revision—High Court, power of interference of.*

Under section 23 of the Bombay Mamlatdars' Courts Act, a Collector can set aside an order made by a Mamlatdar only if he considers that it is illegal or improper. The mere fact that the Mamlatdar has entered upon complicated questions does not entitle the Collector to set aside his order. However complicated the questions may appear to be the Mamlatdar is entitled to give possession to one party or the other, and there is nothing improper or illegal in such an order.

When a Revenue authority has clearly exceeded the powers granted under the Act, the High Court should interfere in the ends of justice.

Application against an order of the Collector, East Khandesh, setting aside an order of Mamlatdar, Bhusaval, in Vahivat Suit No. 2 of 1922.

Mr. *H. C. Coyajee*, with Mr. *S. G. Desai*, for the Applicant.

Mr. *S. C. Joshi*, with Mr. *P. S. Bakhale* for Mr. *D. C. Virkar*, for the Opponent.

JUDGMENT.—In this case the Collector acting under the powers given under section 23 of the Bombay Mamlatdars' Courts Act (Bom. Act II of 1906) set aside an order made by the Mamlatdar in favour of the plaintiff in Vahivat Suit No. 2 of 1922. The Collector can only set aside such an order, if he considers that it is illegal or improper. The ground on which the Collector set aside the order according to the judgment, was that the Mamlatdar had entered upon complicated questions which were entirely outside the province of the Act, and which ought to have been referred to a

Civil Court. If that decision were to stand, then it practically deprives the Mamlatdars of the power to decide who should be in possession of the disputed property until the questions in dispute have been finally determined by the civil Court. However complicated the questions may appear to be, he is entitled to give possession to one party or the other. That is entirely within his jurisdiction. There is nothing improper or illegal in such an order. We think, therefore, although we are averse to interfere with the decision of the Revenue authorities in a suit of this character, that when they have clearly exceeded the powers granted under the Act, we should interfere in the ends of justice. The rule is made absolute and the order of the Mamlatdar restored with costs.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1942 OF 1918.

April 18, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

RAJINDAR SINGH—DEFENDANT—APPELLANT

versus

TEK CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings—Suit on promissory-note—Decree on previous oral settlement—Plaint not amended—Cause of action, whether can be changed.

In a suit for recovery of money due on a promissory-note the Court found that the promissory-note sued on was a forgery but gave the plaintiff a decree on the basis of the oral settlement made between the parties before the promissory-note was given.

Held, that the suit was based throughout on the promissory-note and this having been found to be a forgery, the claim must necessarily fail. (p. 267, col. 2).

Appeal from the decision of the Senior Sub-Judge, Karnal, dated the 25th March 1918.

Mr. *Gulam Rasul*, for the Appellant.

LAKSHMAN MARUTI JADHAR *v.* MARUTI LAKSHMAN TELI

JUDGMENT.—The plaintiff in this case sued for money on a promissory note, which he alleged had been executed by the defendant in consideration of certain sums due under a mortgage and a bond and a decree. The defendant denied having executed the promissory note. The plaintiff was examined and stated that he could not say on oath whether the promissory note produced by him was the same which the defendant had executed. He said that the defendant after executing the promissory note went inside the house, telling him that he would show the note to his mother to explain the account to her, and that he came out after some minutes and gave him the note. He suggested that the defendant might possibly have substituted a forged promissory note for the one which he had written. The document was sent by the lower Court to the Finger Print Bereau at Allahabad and the opinion received was, that the finger prints on the document did not agree with those of the defendant. The Subordinate Judge has accordingly found that the promissory note in suit is a forgery, and he has come to the conclusion that the defendant substituted it for the one which he had written. He has, however, held that the plaintiff is entitled to sue on the oral settlement made before the promissory note was given, and on the basis of that settlement he has given the plaintiff a decree for the full amount claimed. The defendant has appealed to this Court.

Mr. Rozdon, on behalf of the respondent, has presented an application in which he says that the appeal has been adjusted and the case compromised by the execution of a bond and a mortgage-deed by the appellant, but it appears that all that was settled by the execution of the bond and the mortgage-deed was the matter of the execution of the decree, which had been stayed by the order of this Court conditionally on the appellant furnishing security and there is nothing in those documents to show that the suit or the appeal had been adjusted. It appears that they were executed only for the purpose of satisfying the decree so as to prevent the respondent from putting the appellant's property to sale until his appeal was disposed of and their execution is no bar to the hearing of the appeal.

The appeal has been heard *ex parte* as Mr. Rozdon appeared only in support of the application mentioned above, and in our opinion it must succeed. It is not necessary for us to determine whether the plaintiff would be entitled to sue on the basis of the oral settlement, which he alleges was made before the promissory note was given. The point is that he is not in fact suing on that settlement, and the learned Subordinate Judge is wrong in thinking otherwise. The plaintiff has nowhere stated that he wished to change the basis of his suit and fall back on the oral settlement, nor has he asked to be allowed to amend his plaint. The suit has been based throughout solely on the promissory note, and when it has been found that the promissory note sued upon is a forgery, the claim must necessarily fail. There is consequently no need to go into the merits of the case.

We accept the appeal, reverse the decree of the lower Court, and dismiss the suit with costs throughout.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION
NO. 245 OF 1923.
February 6, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

LAKSHMAN MARUTI JADHAR
AND ANOTHER—PLAINTIFFS—
APPLICANTS
versus
MARUTI LAKSHMAN TELI
AND OTHERS—DEFENDANTS—
OPPONENTS.

Civil Procedure Code (Act V of 1908), S. 115, O. XLVII, r. 4—Review, order refusing to grant—Revision, whether lies.

No revision lies against an order of a lower Court refusing to grant a review of its decision.

Application against the order of the District Judge, Poona, in Miscellaneous Application No. 206 of 1922.

Mr. *S. R. Bakahle*, for the Applicants.

Mr. *P. B. Shingne*, for the Opponents.

RAM LAKHAN *v.* JANKA

JUDGMENT.—This rule must be discharged with costs. Section 115 of the Code does not apply to an order of a Court refusing to grant a review of its decision. The application for review was based on the allegation that the present applicants could bring evidence of Parvati's remarriage. There is no reason, as the Judge finds, why Parvati was not called when the case was decided. The Judge said :—

"I am of opinion that as Parvati's existence was known to plaintiffs, as their heirship to Ganpati was disputed and there was an expression on it, it was their duty to produce evidence of Parvati's remarriage in the lower Court. They produced no evidence. The lower Court found in their favour without sufficient evidence and when the finding was set aside in revision they cannot be allowed to produce the evidence now. Supposing a finding of fact by a lower Court is reversed in appeal the party affected cannot be allowed to produce further evidence, which he might have produced in the lower Court. There was nothing to prevent the plaintiffs' producing Parvati as a witness in the lower Court, as she has been produced here, and if she refused to come, persons who were aware of her remarriage should have been called. But the plaintiffs made no effort to do so. If the lower Court had found against them on the question of heirship on the ground that Parvati's remarriage was not proved they would not have been allowed to produce further evidence on this point in revision."

That is a perfectly correct statement of the law. The Judge having refused to grant a review on the ground that the evidence ought to have been produced in the lower Court, was justified in his decision.

Z. K. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 63 OF 1924.

July 17, 1924.

Present :—Mr. Wazir Hasan, J. C.

RAM LAKHAN—PLAINTIFF—APPLICANT

versus

Mst. JANKA AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 85—Small Cause suit—Transfer of Munsif possessing Small Cause Court powers—Decree by successor not having such powers, validity of.

Where a Munsif possessing Small Cause Court powers is transferred and the decree is made by his *locum tenens* who does not possess such powers, while a Court invested with the jurisdiction of a Small Cause Court exists in the district, the decree is *ultra vires*. (p. 269, col. 1).

Application for revision of the decree of the Additional Sub-Judge, Gonda, dated the 31st January 1924, in Civil Appeal No. 133 of 1923, preferred against the decree of the Munsif, Utraula, dated the 16th March 1923.

Mr. *S. N. Roy*, for the Applicant.

Mr. *H. D. Chandra*, for the Opposite Party.

JUDGMENT.—This is the plaintiff's application arising out of a suit for the recovery of Rs. 69 from the defendants on the basis of a parol transaction of loan. The suit was instituted in the Court of the Munsif of Utraula invested with the jurisdiction of a Court of Small Causes.

The Munsif, however, left the Court on transfer before he could decide the suit. His *locum tenens* had no such jurisdiction but he proceeded with the suit under directions from the District Judge and decided it in favour of the plaintiff. The defendants appealed from the decree of the Munsif and the Subordinate Judge of Gonda, who heard the appeal, allowed it and dismissed the plaintiff's suit. The argument before me is, as it

was in the Court below, that the Court of first instance had no jurisdiction to try the suit under its original civil jurisdiction and that the decree which that Court passed must be deemed to be one of a Small Causes Court and, therefore, was not appealable.

I am of opinion that the contention must be allowed though with different results. When the Munsif, who was invested with the jurisdiction of a Court of Small Causes, was transferred and his successor was not possessed of the same jurisdiction, it is clear to my mind that the provisions of section 35 of the Provincial Small Couse Courts Act (IX of 1887) applied. The suit should, therefore, have been tried by a Court in which it might have been instituted in the absence of the Court in which it was as a matter of fact instituted ; the suit being one which could only be tried by a Court invested with the jurisdiction of a Court of Small Causes could not have beed instituted in the Court of Munsif not invested with that jurisdiction nor could it have been instituted in any other Court than the Court invested with the jurisdiction of a Court of Small Causes if such a Court were in existence having local jurisdiction over the suit. This is the effect of section 16 of the Provincial Small Causes Courts Act (IX of 1887). It is admitted that the Court of the Subordinate Judge of Gonda had such a jurisdiction. The result is, that the decree by the Court of first instance was *ultra vires* and the appeal from that decree was equally incompetent. I ,therefore, allow this application, set aside the decrees of both the Courts below and send the suit to the Court of Subordinate Judge of Gonda, exercising jurisdiction of a Court of Small Causes for disposal according to law. As this application was resisted in this Court by the defendant No. 1, *Mst.* Janka, she must pay the plaintiff's cost here. Other costs hitherto incurred and to be incurred hereafter will abide the event.

G. H. *Application allowed.*

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION NO. 253 OF 1923.

November 20, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

MAHMADBHAI PEERBHAI AND OTHERS—APPLICANTS

versus

BAI HAVABAI AND OTHERS—OPPONENTS.

Succession (Property Protection) Act (XIX of 1841), ss. 3, 4, 5, proceedings under—Procedure—Relief—Administration suit—Receiver, appointment of.

The whole of the proceedings under Act XIX of 1841 are interlocutory depending upon the filing of an application for relief asking the Court to determine who has the right to possession pending the final determination of the rights of the parties in a regular suit. (p. 271, col. 1).

Considering the wide powers that are now given to the Courts to make interlocutory orders in regular suits, an application for relief under Act XIX of 1841 should not now be entertained. The Act is really out of date, and there is no necessity whatever for parties claiming the estate of a deceased person to have recourse to it. The relief which is properly open to them is to file an administration suit, and apply for the appointment of a Receiver, in which case the question will be, who should be given possession until the dispute between the parties has been decided in the suit. Then the Court can by an interlocutory order either appoint a Receiver and so take the property into its own possession, or it can allow any of the disputing parties to have possession on such terms as it may think fit. (p. 270, col. 2).

Application against an order of the District Judge, Broach, in Miscellaneous Application No. 34 of 1922.

Mr. *G. N. Thakor*, with Mr. *R. J. Thakor*, for the Applicants.

Mr. *H. V. Divatia*, for the Opponents.

JUDGMENT.—The original applicants in this case were the widow and three daughters of one Haji Nabi, who died in or about the month of October 1922 at his residence, within the jurisdiction of the District Court of Broach. The application purported to be

made under Act XIX of 1841. It stated that deceased had died leaving a considerable amount of property, that opponent No. 1, who was the nephew of the deceased, together with two daughters by a previous wife of the deceased residing with him, had taken into possession all the property of the deceased with the intention of appropriating it to himself, and prayed that an inventory of the estate and effects of the deceased Haji Nabi Miyaji should be made and some officer of the Court appointed as curator of the property belonging to the deceased. It is true that the applicants prayed for any other relief that might be deemed fit and proper to be granted. But that prayer can only be read in conjunction with the main prayer for the relief which was for the appointment of a curator and the taking of an inventory.

On that application an order for inventory was made after hearing opponent No. 1 on December 18, 1922. On September 6, 1923, an order was made by the District Judge at the applicants' request which runs as follows:—

"Whereas on the application of Bai Havabai widow of Nabi Miyaji danger is apprehended that before the summary suit can be determined there is danger of waste or misappropriation of the property by the opponent No. I, Mahomedbhai Pirbhai, who is alleged to have taken all the property, and though his pleader has made various promises which he has never carried out, I order that the said Mahomedbhai do furnish security to the extent of two lakhs within three days or a Curator will be appointed. This embodies the oral order issued by the Court on Thursday 30th August 1923."

Against this order the original opponent No. 1 has applied to us in revision. It has been contended that the District Judge had no jurisdiction under the Act to make the order, on the ground that the opponent No. 1 was an heir of the deceased, and was entitled to be in possession of the whole, until the question had been decided how the estate should be distributed. There might have been some weight in that argument had it not been that the first opponent had claimed a half share of the property as belonging to himself during the life-time of the deceased. He was, therefore, setting up a claim to at least half the property against the heirs.

But the real objection to the order of the District Judge is that no summary suit has been filed as contemplated by the Act. The Act is really out of date, and there is no necessity whatever for parties claiming the estate of a deceased person to have recourse to it. The relief which is properly open to them is to file an administration suit, and apply for the appointment of a receiver, in which case the question will be, who should be given possession until the dispute between the parties has been decided in the suit. Then the Court can by an interlocutory order either appoint a receiver and so take the property into its own possession, or it can allow any of the disputing parties to have possession on such terms as it may think fit.

Now the scheme of Act XIX of 1841 seems to us to be as follows. First a person must have died possessed of moveable and immoveable property, and the same must have been taken or alleged to have been taken upon some pretended claim of right by gift or succession. Then the Act contemplates that it shall be open to any persons claiming a right by succession to the property of the deceased, to make application to the Judge of the Court of the district where any part of the property is found or situate for relief, and that application for relief must clearly take the nature of a plaint in a summary suit.

Then section 3 states what should be done after a party has applied to a Court for relief. The Judge to whom such application shall be made shall, in the first place, enquire by the solemn declaration of the complainant, and by witnesses and dcoument at his discretion, whether there be strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bona fide*.

Under section 4, the Judge if he is satisfied of the existence of such strong ground for belief, but not otherwise, shall cite the party complained of, and give notice of vacant or disturbed possession by publication, and after the expiration of a reasonable time shall determine summarily the right to possession (subject to a regular suit as thereinafter men-

tioned), and shall deliver possession accordingly. Then the section goes on to give the Judge interlocutory powers pending the summary determination of the right to possession, to appoint an officer who shall take an inventory of the effects, whether he shall have concluded the enquiry necessary for citing a party complained of or not.

Under sec. 5 the Judge can appoint one or more curators whose authority shall in no case continue beyond the determination of the summary suit, and under section 6 the Judge can authorize the curator to take possession of the property generally, or until security be given by the party in possession, or until inventories of the property shall have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession, provided always that it shall be entirely discretionary with the Judge whether he shall allow the party in possession to continue in such possession on giving security, or not.

So that the whole of these proceedings are interlocutory depending upon the filing of an application for relief asking the Court to determine who has the right to possession pending the final determination of the rights of the parties in a regular suit.

There has been in this case no application to the Court for the primary relief which it was intended by the Act the Court should give to a person claiming a right to the estate of a deceased person. The whole of this proceeding, which is of an interlocutory nature, is misconceived, because assuming that this order made by the District Judge directing opponent No. 1 to give security were confirmed, there is nothing further for the Court to do.

There is no application or pleading on which a further order could be made. It is perfectly clear that interlocutory proceedings cannot be filed until the plaint or proceeding on which they depend has first been placed on record. So that, therefore, in our opinion, the learned Judge has misconceived the nature of these proceedings, and had no jurisdiction to make the order in the case. We think, considering the wide powers that are now given to the Courts to make interlocutory orders in regular suits, that an application for relief under the Act should not be entertained, because under section 3 the Judge has to be satisfied that the applicant is really entitled to the property, and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. Now it cannot be said that any person in such a position is likely to be materially prejudiced if he is told to file a regular suit, because if he proceeds with ordinary diligence, he can ask for relief of an interlocutory nature in that suit.

The rule is made absolute and the order of the lower Court set aside. There will be no order as to costs.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 57 OF 1923.

May 13, 1924.

Present :—Mr. Kendall, A. J. C., and Mr. Pullan, A. J. C.

BIKARMAJIT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mst. BANSRAJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886) s. 108, Sub-section, (10) b, Scope of—Jurisdiction of Civil and Revenue Courts—Suit for possession of—Occupancy holding.

Sub-section (10) *b* of section 108 of the Oudh Rent Act is not intended to be limited to suits against the landlord. It extends to every suit for the possession of an occupancy holding which must be brought and decided in the Revenue Court. (p. 273, col. 2).

Per Pullan, A. J. C.—It is doubtful whether sub-section (10) *b* of section 108 of the Oudh Rent Act is intended to apply to suits which are not brought against the landlord. (p. 273, col. 2).

The provisions of the Oudh Rent Act would be rendered nugatory if a party were allowed to let slip the remedy afforded by sub-section (10) of section 108 against the party from whom his relief can be obtained and institute proceedings in Civil Courts against another party who is entirely unconcerned with that relief. (p. 274, col. 1).

BIKARMAJIT SINGH *v.* BANSRAJI

Appeal against the decree of the District Judge, Fyzabad, dated the 13th September 1923, setting aside the decree of the Munsif, Hariali, Fyzabad, dated the 16th July 1923.

Mr. *M. Haider Husain*, for the Appellants.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.

Kendall, A. J. C.—This appeal arises from a suit in which the plaintiffs claimed possession of a certain occupancy tenancy in the following circumstances :—

The whole of the occupancy holding used to belong to one Dirgaj Singh, and it is not now in dispute that the plaintiffs and a non-contesting defendant became entitled to the holding on the death of Dirgaj Singh in the proportion of 3|4 and 1|4. Dirgaj Singh died in 1914. The plaintiffs—appellants, however, only succeeded in obtaining possession of 1|4 of the occupancy holding, while the respondents secured one half, and the remaining 1|4 fell to the share of the non-contesting defendant. The plaintiffs' suit for possession of the one half in the hands of the respondents was met in the first place by the plea that the suit being one for possession of an occupancy holding, should have been brought in the Revenue Court and not in the Civil Court. The first Court disallowed this plea, but the learned District Judge on appeal has upset that finding and dismissed the plaintiff's suit. The appeal has been argued before us solely on the question of jurisdiction.

Dirgaj Singh died in 1914, and the plaintiffs have never been in possession of the property in suit. The learned Judge has pointed out that sub-section 10 (*b*) of section 108 of the Oudh Rent Act.....which came into force with the U. P. Act 4 of 1921.....is apparently intended to cover a suit for occupancy of a holding by a person claiming such occupancy as the heir of the deceased tenant of the holding, whether such suit is brought against the landlord or the tenant. The wording of the section certainly lends force to this view. It is argued on behalf of the appellants, that the section is only intended to apply to suits brought against the landlord. It is suggested that it is to be read in connection with section 48 of the Act, and further that the word "Occupancy" has been loosely used for "possession."

In support of this line of argument, a number of decisions have been referred to with a view to showing that suits between tenants for possession of agricultural holdings should be brought in Civil Court *Kalap Nath* v. *Mata Din* (1), *Ashiq Ali* v. *Ghulam Sarwar* (2) *Lachhmin* v. *Ram Singh* (3) and *Gaya Din, Singh* v. *Chanharja Pande* (4). Several of these are not very much to the point at issue in the present appeal, or are previous in date to the amendment of the Oudh Rent Act by which sub-section 10 (*b*) of section 108 was added. In *Gaya Din* v. *Chanharja Pande* (4), a single Judge of this Court held that a dispute between two parties, both claiming to be tenants of the same land under the same zemindar, where the claimant has never held possession of the land, is within the jurisdiction of the civil and not of the Revenue Court. The learned Judge came to this conclusion reluctantly because he believed the intention of the Legislature to have been that cases of this kind should be decided by a Revenue Court and he referred to *Kalap Nath* v. *Mata Din* (1). He added, "If this were a case in which the plaintiff might by impleading the *Zamindar* have filed a suit in the Revenue Court under section 108, sub-section 10 of the Oudh Rent Act, I might have been inclined to think in spite of that decision that such a suit was his true remedy. In this case, however, the plaintiff has never been ejected, for he has never held possession. It is not suggested that there is another provision of the Oudh Rent Act under which the suit might have been brought." The suit concerned in that appeal was evidently brought before the amendment of the Oudh Rent Act, and it appears that if the present sub-section 10 (*b*) of section 108 had been in force, and could have been applied, the learned Judge's decision would have been different. In *Ashiq Ali* v. *Ghulam Sarwar* (2), it was held by a single

(1) 28 Ind. Cas. 859 ; 18 O. C. 48.
(2) 74 Ind. Cas 553 ; 9 O. & A. L. R. 521 ; 11 O. L. J. 18.
(3) 61 Ind. Cas. 290 ; 24 O. C. 15.
(4) 73 Ind. Cas. 238 ; 10 O. L. J. 178 ; 9 O. & A. L. R. 87 ; (1924) A. I. R. (O.) 14.

BIKARMAJIT SINGH v. BANSRAJJ

Judge of this Court that " Section 108 sub-section 10 (*b*) of the Oudh Rent Act has no application to a suit for the recovery of an occupancy tenure based on title, where the plaintiff has not been in actual occupation or possession of the tenure." That was a suit in which the question of title between the parties was somewhat complicated, and the learned Judge based his decision on *Chandrika Bakhsh Singh* v. *Raghunath Kunwar* (5). In the course of his judgment, however, the learned Judge remarked, " Clause 10 (*b*) has been added to make suits for occupancy of a holding by a person claiming such occupancy as the heir of the deceased tenant of the holding, cognisable by a Revenue Court." He goes on to point out that a Bench of this Court held in *Raghubar Dayal* v. *Chandan* (6) that a person must have been in occupation of the land at the time of the ejectment to give jurisdiction to the Revenue Court to try a suit by him for the recovery of the occupancy of the land, and that a suit for possession by the heirs of an occupancy tenant was triable by the Civil Court, but that the Legislature has now enacted that such a suit should be tried by the Revenue Court.

Much stress has been laid on these two decisions and in connection with the second one it has been pointed out that the defence undoubtedly raised questions of title, which could be more properly contested in a Civil Court than in a Revenue Court. Not only was it denied that the plaintiff was not the nearest reversioner of Dirgaj Singh, but it was alleged that there had been a family arrangement or settlement under which the contesting defendant had succeeded to half the occupancy holding.

Now it is not denied that the plaintiffs would have to sue in the Revenue Court if they had made the landlord a party to the suit, and it appears that they might in 1914, or at any time within a year after Dirgaj Singh's death, have sued him under sub-section (10) of section 108 for the recovery of the occupancy, if the landlord had put in another tenant. The plaintiffs did not attempt to obtain possession of the holding. They simply slept on their rights for nearly 10 years. They could not expect the landlord to allow the land to lie fallow. If the appellant's interpretation of the law is followed to its logical conclusion, it would seem that an heir to an occupancy tenant may sleep on his rights for a period limited only by Article 144 of the Limitation Act, and at any time within that period sue in the Civil Court for the ejectment of any tenant whom the landlord has put in to cultivate the holding, in which the plaintiff claims an occupancy right. It is difficult to see what would happen to the tenant's statutory right in such circumstances. It is argued that the landlord has not been impleaded, because no relief is claimed as against him, but it is impossible to hold that the landlord is not affected. We have heard the learned Counsel for the appellants at considerable length, and have been impressed by some of his arguments, but the conclusion that we have arrived at is that sub-section 10 (*b*) of section 108 was not intended to be limited to suits against a landlord, and that a suit for possession of an occupancy holding is intended to be brought under that section and to be decided in the Revenue Courts. We, therefore, dismiss the appeal with costs.

Phullan, A. J. C.—I am in general agreement with the reasoning of my learned brother and in the order which he proposes, but I am not convinced that sub-section 10 (*b*) of section 108 of the Oudh Rent Act is intended to apply to suits which are not brought against the landlord, nor do I consider that a decision on this point is necessary in the case before us.

It is established law, that rival tenants must fight out their cases in the Civil and not in the Revenue Courts, but the present suit is not one between rival tenants. It is a suit in which the plaintiff wishes to show that he is the heir of the deceased occupancy tenant and entitled to inherit his occupancy holding. This is essentially a suit between the plaintiff and the landlord, for it is only between the landlord and the tenant that the question of occupancy rights can arise. The plaintiff in this suit describes the defendant as a trespasser on the land which he, the plaintiff, has inherited by virtue of a right of occupancy. But this is not his real case. The defendant is merely a figurehead whom he has substituted for the landlord against

(5) 18 Ind. Cas. 284 ; 16 O. C. 105.
(6) 10 O. C. 23.

whom his real relief lies. Whether he has or has not inherited occupancy rights is not a matter which concerns the defendant but the landlord, through whom the defendant must be held to cultivate the holding. In my opinion, the plaintiff's suit is not bad because he could have brought a suit against this defendant under sub-section 10 (*b*) of section 108 of the Oudh Rent Act but because his real remedy was under that section, or for that matter under clause 10 of the Act before it was amended, against the landlord, and that at no period has he been able to establish a claim for any relief against the present defendant. The provisions of the Oudh Rent Act would be rendered nugatory if a party were allowed to let slip the remedy afforded by the Act against that party from whom his relief can be obtained, and institute proceedings in the Civil Courts against another party who is entirely unconcerned with that relief. The present plaintiff's claim for possession against the present defendant could only arise when he had established his right of inheritance against the landlord.

For these reasons in addition to those stated by my learned brother, I am of opinion that the plaintiff was debarred from proceeding against the defendant in the Civil Court and that the appeal was rightly decreed by the lower Appellate Court.

G. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 36 OF 1922.

November 27, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

SHRIPATHI LAXMAN KSHIRSAGAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALVANTRAO KRISHNA CHITNIS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Dekkhan Agriculturists' Relief Act (*XVII of* 1879) *ss.* 57, 59, 63*A*—*Registration Act* (*XVI of* 1908) *ss.* 32, 35, 58 *to* 61—*Document executed by agriculturist*—*Registration*—*Procedure.*

Section 57 of the Dekkhan Agriculturists' Relief Act does not require the party in whose favour a document is executed to appear at the time of execution before the Registrar, and his absence does not, therefore, invalidate the registration. Section 63A of the Dekkhan Agriculturists' Relief Act provides that after the Sub-Registrar has followed the procedure prescribed for a village-registrar, he shall then register the instrument according to the provisions of the Registration Act This means that he shall register the document as directed in sections 58 to 61 of the Registration Act, but all the necessary preliminaries have to be taken under sections 57 and 59 of the Dekkhan Agriculturists' Relief Act; whereas in the case of any other document, which has to be registered under the Registration Act, the prior formalities required are prescribed by sections 32 and 35 of that Act. (p. 275, col. 1).

Appeal from an order of the Assistant Judge, Satara, in Appeal No. 490 of 1920, reversing the decree of the Subordinate Judge, Karad, in Civil Suit No. 732 of 1919.

Mr. *K. N. Koyajee*, for the Appellants.

Mr. *S. R. Bakhale*, for the Respondents.

JUDGMENT.—The question raised in these appeals is a very technical one. The document which required to be registered under section 17 of the Indian Registration Act, as one the parties was an agriculturist, was written and executed before the Sub-Registrar according to the provisions under section 63A of the Dekkhan Agriculturists' Relief Act. The parties in whose favour the document was taken were described as Balvantrao, Shankarrao and Ganpatrao Chitnis, residing at Nigdi, by their Vahivatdar Rango Vishnu Aphale. He signed the declaration required by rule 23 of the rules made under section 61 of the Dekkhan Agriculturists' Relief Act, as the Vahivatdar of those persons in his own handwriting. Objection was taken at the hearing of the suit, which was filed on this document, that it had not been proved that it had been properly registered.

The suit was accordingly dismissed in the Trial Court. But by the Appellate Court an order was passed that the decree dismissing the suit should be set aside and the case remanded for trial.

We think the whole question turns upon whether section 57 of the Dekkhan Agriculturists' Relief Act requires that the party in whose favour a document is executed is bound

to appear at the time of execution before the Registrar, and that if he does not appear, the document cannot be be considered as capable of being properly registered. Whatever was intended by the provisions of section 57 and 59 of the Dekkhan Agriculturists' Relief Act, which are incorporated in section 53A, the only persons who are bound to appear before the Registrar are the persons who intend to execute any instrument to which the provisions of the Act are applicable. Though the 3rd para of section 57 of the Act provides that "every executant of any such instrument shall appear in person before theVillage-registrar;but every other party thereto may appear either in person or by any agent, being his relative, servant or dependent, whom he has duly furnished with a power of attorney," if such other party is not bound to be present under the 1st para of the section, then it cannot be said that the document is not duly registered according to the provisions of the Indian Registration Act, if he does not appear. It may be that that was not the intention of the framers of the Act. But we can only read the Act as it stands. We cannot read into it words, which are not there, merely by implication, or because we think it advisable that those words should be included.

It has been urged that the document after it had been written out before the Sub-Registrar, or by him, and executed and attested according to the Act could not be said to be duly registered until it had been presented by the person claiming under it under the provisions of section 32 of the Indian Registration Act. But section 63A of the Dekkhan Agriculturists' Relief Act provides that after the Sub-Registrar has followed the procedure prescribed for a Village-registrar, he shall then register the instrument according to the provisions of the Indian Registration Act, and that means that he shall register the document as directed in sections 58 to 61 inclusive of the Indian Registration Act. All the necessary preliminaries had to be taken under sections 57 and 59 of the Dekkhan Agriculturists' Relief Act, whereas in the case of any other document which has to be registered under the Indian Registration Act prior formalities required are prescribed by sections 32 and 35 of the Indian Registration Act.

We think, therefore, there is no substance in this point raised by the appellant, and that the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 9 OF 1924.

February 25, 1924.

Present :—Sir Lancelot Sanderson, Chief Justice, and Mr. Justice Richardson.

IN THE MATTER OF AN APPLICATION OF AVIS MARY KATHLEEN GOULDING.

Civil Procedure Code (Act V of 1908), O XLI, r. 10, —Application of—Original side appeal—Security from appellant—High Court, jurisdiction of.

Order XLI, r. 10 of the Civil Procedure Code is applicable to an appeal from the Judgment of a Judge sitting on the Original Side of the High Court, in the absence of any rule framed by the Court in the exercise of the power to regulate its own procedure in its Original Civil Procedure. (p. 276, col. 1).

Sabitri Thakurain v. *Savi*, 60 Ind. Cas. 274 ; 48 I. A. 76 ; 48 C. 481 ; 25 C. W. N. 557 ; 40 M. L. J. 308 ; (1921) M. W. N. 159 ; 19 A. L. J. 281 ; 33 C. L. J. 307 ; 23 Bom. L. R. 681 ; 14 L. W. 362 ; 3 U. P. L. R. (P. C.) 57, followed.

Nawab Behramjang v. *Haji Sultan Ali Shustry*, 17 Ind. Cas. 739 ; 37 B. 572 ; 14 Bom. L. R. 1106 ; *In re Goberdhone Seal*, 32 Ind. Cas. 3 ; 20 C. W. N. 140 ; 23 C. L J. 24 ; 43 C. 243, referred to.

Sesha Ayyar v. *Nagarathna Lal*, 27 M. 121 ; 13 M. L. J. 362, not followed.

Appeal against a judgment of the Original Side.

Mr. *C. Bagram*, for the Appellant.

Mr. *A. Avetoom*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an application by the respondent, Avis Mary Kathleen Goulding, who is the wife of the Appellant, that the Appellant do furnish security for

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the costs of the appeal to the satisfaction of the Registrar of this Court and that until such security is furnished all proceedings in this appeal be stayed.

It appears that an order was made by a learned Judge sitting on the Original Side of this Court that Mrs. Goulding should be the guardiain of her infant daughter Lydia Barbara Goulding who is aged about 6½ years. The Appellant, the father of the infant, has appealed to this Court against that decision.

The petition, which has been filed by the Respondent, states that the Appellant resides in England, and is outside the jurisdiction of this Court and that he has no immoveable or other property in British India. No affidavit has been filed in reply and the learned Counsel, who has appeared for the Appellant, has stated that he is not in a position to deny the allegations to which I have referred.

The learned Counsel for the Appellant however, has taken the point that this Court has no jurisdiction to make the order. His argument was to the effect that O. XLI, r. 10, Civil Procedure Code, does not apply in the case of an appeal from a learned Judge sitting on the Original Side of this Court but that its operation is confined to appeals from Courts outside Calcutta to this Court in its Appellate Jurisdiction ;and, secondly, that even though this Court might have inherent jurisdiction to make the order, which has been asked for, it could not exercise such jurisdiction until a rule somewhat similar to that which appears to obtiain in the Bombay High Court has been passed by this Court.

In my judgment O. XLI, r. 10, Civil Procedure Code does apply to an appeal from the judgment of a learned Judge sitting on the Original Civil Side, in the absence of any rule of this Court framed in the exercise of the power to regulate its own procedure in its Original Civil Procedure. The only authority which was cited as being contrary to that view is the case of *Sesha Ayyar* v. *Nagarathna Lala* (1) which was the decision of a learned Judge of the Madras High Court sitting alone.

Our attention was drawn to the case of *Nawab Behram Jung* v. *Haji Sultan Ali Shustry* (2), and from that case it appears that the Bombay High Court has a rule which prescribes that in an appeal from the judgment of a learned Judge on the Original Side the Appellant is required to deposit with the memorandum of appeal a sum of Rs 500 as security for the costs of the Respondent in the appeal or, if more than one, for the costs of each Respondent having different interests. In that case the learned Chief Justice and the other learned Judge, who was sitting with him, came to the conclusion that, inasmuch as the Appellant had complied with the rule as regards the deposit of Rs. 500 and inasmuch as the Respondent had abstained from applying for security of the costs of the original hearing, as he might have done, there was no reason why they should exercise their discretion by ordering that the Appellant should give further security either for the cost of the original hearing and for the costs of the appeal : and the learned Chief Justice concluded his judgment by saying : "We have been referred to no reported case in which such an order has been made, and we do not think (although we do not doubt our power if it were necessary in the interests of justice to make such an order) that a case has been made out for such an order at present."

It seems to me that that case is an authority against the contention which has been put forward by the learned Counsel for the Appellant. That case, as I read it, is not an authority that O. XLI, r. 10. Civil Procedure Code does not apply to such a case as that which we are now considering. It is an authority for the proposition that the rule which was made by the High Court for depositing Rs. 500 was inconsistent with O. XLI, r. 10 ; but in my judgment, it is not necessary for us to consider the matter at any length, because, in my opinion, there is a decision of this Court which covers this matter.

Our attention was drawn at the end of the argument to the case of *In re Goberdhone Seal* (3) which was a decision of Mr. Justice Woodroffe, Mr. Justice Mookerjee and myself and the judgment which was appealed from was delivered by Mr. Justice Chowdhury sitting on the Original Side. The learned Judge held

(1) 27 M. 121 ; 13 M. L. J. 362.
(2) 17 Ind. Cas. 739 ; 37 B. 572 ; 14 Bom. L. R. 1106.
(3) 32 Ind. Cas. 3 ; 20 C. W. N. 140 ; 23 C. L. J. 24 ; 43 C. 248.

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that the sale, which was the subject of the enquiry, by the insolvent to his wife was a fictitious sale and he also held that the transfer by Sorbasundari in the name of Lakhypriya, the appellant, was a fictitious one; and he held that both the transfers were void as against the Official Assignee. Against that Lakhypriya preferred an appeal. My learned brother Mr. Justice Woodroffe delivered the judgment of the Court. An application was made for security for the costs of the appeal and in that case the learned Counsel, who appeared to oppose the application, relied upon the case of the Madras Court on which the learned Counsel in this case relied and Mr. Justice Woodroffe said as follows:—"The application is opposed both on grounds of law and fact. As regards the first question the point is whether O. XLI, r. 10 applies to the case of an appeal from an order passed by a Judge in insolvency under Act III of 1909. Section 8 (*b*) of that Act states that an appeal shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the ordinary Original Civil Jurisdiction. The question then is, does the order apply to the latter case? No doubt the case of *Sesha Aiyar* v. *Nagarathna* (1) answers this question in the negative. This case was decided prior to the present Code and has not been referred to nor followed so far as we are aware in this Court where the previous practice has been to entertain such applications. Under section 117 of the Code its provisions apply to the High Courts save as provided in parts IX and X. I am of opinion, therefore that we have power to entertain and adjudicate this application under section 117 and O. XLI, r. 10 of the Code. This conclusion is in conformity with the previous practice under which such applications have been adjudicated. It cannot be reasonably held that this Court when sitting in appeal from a decision of the Original Side is deprived of powers necessary to an effective jurisdiction admittedly existent on the Appellate Side of the same Court. For if O. XLI, r. 10 does not apply, there is no other provision applicable and in such a case it would be necessary to invoke the provisions of section 151."

The learned Judge concluded by saying that on the facts of that case security should be required.

In view of these decisions, especially in view of the case to which I have referred *In re Goberdhone Seal* (3) I have no doubt that this Court has jurisdiction to entertain this application and, if it thinks fit, to make an order in respect of it.

We direct that security to the extent of Rs. 500 for costs of the appeal be furnished by the Appellant on or before the 1st June 1924 to the satisfaction of the Registrar. The appeal will not be heard until the security is furnished; and if the security is not furnished by the 1st June the appeal will stand dismissed with costs.

The Appellant must pay the Respondent's costs of this application.

Since the delivery of judgment, my attention has been drawn to the case of *Sabitri Thakurain* v. *Savi* (4), which is a decision of the Judicial Committee of the Privy Council and which confirms the opinion which I have already expressed.

Richardson, J.—I agree.

The question is, in my opinion, one of procedure; and even if the view were taken that O. XLI, r. 10, Civil Procedure Code, does not of its own accord apply to appeals from the Original Side and even in the absence of any rule on the subject made by this Court, under the powers conferred by section 129 of the Civil Procedure Code, I should have been disposed to say that a Court having the general powers of this Court would have ample jurisdiction to demand in proper cases security from an appellant for the costs of the appeal. It appears, however, that it has been decided by this Court in the case to which the learned Chief Justice has just referred that O. XLI, r. 10 does apply to appeals from the Original Side; and, that being so, there is nothing further to be said in the matter. Since judgment was delivered our attention has been called to the decision of their Lordships of the Privy Council in *Sabitri* v. *Savi* (4) which puts the question beyond doubt.

N. H. *Order accordingly.*

(4) 60 Ind. Cas. 274; 48 I. A. 76; 48 C. 481; 25 C. W. N. 557; 40 M. L. J. 303; (1921) M. W. N. 159; 19 A. L. J. 281; 33 C. L. J. 307; 23 Bom. L. R. 681; 14 L. W. 362; 3 U. P. L. R. (P. C.) 57 (P. C.).

SOMASUNDARA BHATTAR *v.* MUTHU THEVAR

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 587 OF 1923.

February 28, 1924.

Present :—Mr. Justice Jackson.

SOMASUNDARA BHATTAR—
PLAINTIFF—PETITIONER
versus
MUTHU THEVAR AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*V of* 1908), *s.* 115, *O. VI, r.* 17 —*Plaint, amendment of—Variation of original cause of action—Refusal to allow amendment—Material irregularity—Revision.*

A plaintiff sued to set aside a sale alleging that defendants took advantage of his youth and defrauded him. He then applied to amplify and amend the plaint by stating that he was a minor on the date of the sale. The amendment was disallowed as not coming under O. VI, r. 17 of the Civil Procedure Code on revision to the High Court :—

Held (1) that the amendment was not such a variation of the original cause of action as to preclude permission to amend under O. VI, r. 17 of the Civil Procedure Code.

Venkatarama Row v. *Venkatalingama Nayanim Bahadur Varu*, 68 Ind. Cas. 703 ; 42 M. L. J. 43; 15 L. W. 72; (1922) M. W. N. 42; 30 M. L. T. 204; (1922) A. I. R. (M) 49, relied on.

Ma Shawe Mya v. *Maung Mo Hmaung*, 63 Ind. Cas. 914; 48 C. 532; (1921) M W.N. 296 ; 4 U. B. R. (1921) 30; 30 M. L. T. 28; 24 Bom. L. R. 682; (1922) A. I. R. (P. C.) 249 (P. C.), distinguished.

(2) that the refusal by the Court to exercise its lawful power so as to deprive the plaintiff of what appeared to be a vital plea amounted to material irregularity and would justify interference in Revision under section 115 of the Civil Procedure Code. (p. 279, col. 1).

There is no objection to amendments which amplify and develop the original cause of action, so long as they do not vary it. (p. 278, col. 2).

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 11th April 1923, of the Court of the Second Additional Subordinate Judge, Madura, in I. A. No. 103 of 1923 in O. S. No. 85 of 1922.

Messrs. *K. V. Krishnasami Iyer* and *S. R. Muthuswami Iyer*, for the Petitioner.

Messrs. *K. Bhashyam Iyengar* and *K. V. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—The petitioner is plaintiff in O. S. No. 129 of 1922 Madura, Sub-Court. He sued to set aside a sale-deed alleging *inter alia* that 2nd defendant took advantage of his youth.

> "The plaintiff has just attained his majority and the defendants have in collusion cheated him."

After filing this plaint, he had reason to believe that he was a minor at the time of the sale, and applied for leave to amend his plaint accordingly.

Leave has been refused by the Additional Subordinate Judge in the order appealed against dated 11th April 1923 on the grounds that the application was not *bona fide* and that amendment could not be allowed under O. VI, r. 17 of the Code of Civil Procedure, 1908. There was two months delay between plaintiff's learning his age and making this application, but I do not think that this interval suggests want of good faith.

The real question is, whether the amendment is such a variation of the original cause of action as to preclude a permission to amend under O. VI, r. 17 of the Code of Civil Procedure. The terms of the rule are very wide and permit the Court to allow a party to amend his pleadings in such manner and on such terms as may be just. It is well recognised as unjust if the defendant is confronted by way of amendment with contentions foreign to the other contentions in the plaint (*Venkata rama Rao* v. *Venkatalingama Nayanim Bahadur Varu* (1). But in the present case a plea of minority can scarcely be said to be foreign to the plea of the plaintiff being unable to defend his interests because "he had just attained majority." No doubt the new plea is much stronger (if established) but that is not the point. There is no objection to amendments which justly develop the original

(1) 68 Ind. Cas. 703 ; 42 M. L. J. 43;15 L. W. 72; (1922) M. W. N. 42; 30 M. L. T. 204; (1922) A. I. R. (M.) 49.

cause of action so long as they do not vary it, and there is little variation between

"they imposed on me because I was just out of my minority."

and

"they imposed on me because I was a minor."

It so happens that a minor is presumed, so to speak, to be imposed upon from the bare fact of his minority and if plaintiff proves the fact, there will be no need to go into the specific allegation of fraud. But nevertheless the essential character of the plea that plaintiff was led into this sale owing to his youth remains unaltered.

I may remark that if this amendment is refused, plaintiff can still obtain leave to withdraw his suit and bring a fresh one on the plea of minority ; so the defendants are not much affected by this decision.

The ruling quoted by the learned Subordinate Judge (*Ma Shawe Mya* v. *Maung Mo Hnaung*)(2), hardly seems upon all fours with the present case. There a contract of 1912 was set up and negatived, and the Court was held to have acted irregularly in permitting the plaintiff to set up another contract of 1903. But in that very ruling it is laid down that

"full powers of amendment must be enjoyed and should always be liberally exercised" p. 835.

It is also argued that the Court committed no material irregularity. But I think a refusal to exercise its lawful power so as to deprive the plaintiff of what appears to be a vital plea amounts to material irregularity, and I certainly find no proof that the petition to amend was *mala fide*.

Accordingly I allow the revision petition and order the lower Court to permit plaintiff to amend his plaint as prayed. The counter-petitioners may have their costs (one set).

V. N. V. *Revision allowed.*

(2) 63 Ind. Cas. 914 ; 48 C. 532 ; (1921) M. W. N. 296 ; 4 U. B. R. (1921) 30 ; 30 M. L. T. 28 ; 24 Bom. L. R. 682 ; (1922) A. I. R. (P. C.) 249 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 369 OF 1921.

February 13, 1923.

Present :—Mr. Justice Chatterjea and Mr. Justice Cuming.

LAKSHMI NARAIN BAIJINATH
--PLAINTIFF—APPELLANT
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 72—Contract Act (IX of 1872), ss. 151, 152, 168—Responsibility of Railway, nature of—Second Appeal—Finding of fact—Inference from finding whether may be questioned.

Under section 72 of the Railways Act, the responsibility of a Railway Administration for the loss of goods delivered to it to be carried by railway is that of a bailee under sections 151, 152 and 168 of the Contract Act. (p. 280, col. 1).

A finding of fact cannot be questioned in second appeal but it is open to a Court of second appeal to see whether the inference drawn from the facts found is correct. (p. 281, col. 2).

Appeal against the decree of the Subordinate Judge, Third Court, Twenty-four Perganahs, dated the 10th December 1920, reversing the decree of the Munsif, Second Court, Sealdah, dated the 24th February 1919.

Babus *Ram Chandra Mozumdar* and *Bijan Kumar Mukherjee*, for the Appellant.

Babus *D. N. Chakravarty* and *Surendra Nath Guha*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought against the Secretary of State for India in Council for damages for loss sustained by the plaintiff with respect to sixty-eight bales of jute booked by the Eastern Bengal Railway, and consigned to the National Jute Mills. The Plaintiff alleged that he contracted to sell jute to the National Jute Mills and made over sixty-eight bales of jute to the Eastern Bengal Railway at the Khalulbali Station for carriage to the jute mills at

Rajgunge and that in the course of transit the jute got damaged in consequence of which the jute mills refused to take the same and the plaintiff had to sell it (after notice to the Railway Administration) at a loss. The loss suffered by the plaintiff has been found to be Rs. 1,822-7-3.

The defendant did not deny that the goods were damaged but the defence shortly stated was that they were damaged by an act of God in a severe cyclone during transit and that he was consequently not liable for damages.

The Court of first instance decreed the suit holding that the defendant did not take proper care of the goods during transit, and that the consequences of the act of God would be avoided had proper care been taken. On appeal that decree was reversed, and the plaintiff has appealed to this Court.

The facts are not in dispute. The goods after arrival at Chitpur Ghat were transhipped into a boat of the Calcutta Shipping & Landing Company by 10 A. M. on the 20th September 1916 and the boat was detained at the ghat for the day. On the night of the 21st September there was a severe cyclone and the boat sprang leaks as it bumped against the other boats and the jetty to which it was securely fastened during the cyclone. On the 22nd September the leaky boat was towed to Rajgunj where the goods were delivered to the National Jute Mills on the 23rd September. The goods were damaged by water which entered the boat through the leaks, and as stated above they were rejected by the Jute Mills with the consequence that they had to be sold by the plaintiff at a loss.

Under section 72 of the Indian Railways Act IX of 1890, the responsiblity of a Railway Administration for the loss of goods delivered to it to be carried by railway is that of a bailee under sections 151, 152 and 162 of the Indian Contract Act, 1872. Section 151 of the Contract Act lays down that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed and section 152 provides that in the absence of any special contract, the bailee is not responsible for the loss of the things bailed if he has taken the amount of care of it described in section 151.

It is contended before us on behalf of the appellant that the defendant failed to take care of the goods which he was required by law to take. The first ground is that the boat should not have been detained at Chitpur Ghat on the 20th September but should have been despatched at once to Rajgunj as on the morning of the 20th September, intimation was received of an expected storm with in thirty-six hours. It is urged that the 20th September was a fair day, there was only one shower of rain in the afternoon and the distance from Chitpur Ghat to Rajgunj Ghat being about twenty miles the boat could have reached its destination long before the cyclone. But as the learned Subordinate Judge rightly points out the storm was expected within and not after thirty-six hours, the defendant's agents could not know when the storm would come and the storm signal was given evidently to detain the boats at the ghat. It would have been imprudent to start the boat in these circumstances at once, because it might have been overtaken on its way to Rajgunj by the storm which was expected every moment. We are accordingly of opinion that the Defendant could not be liable on this ground.

The second ground urged is that the bales of jute ought to have been unloaded from the boat and stored in the goods shed, at any rate upon the open pontoon with tarpaulins spread over them, and should not have been left in the boat when a cyclone was expected. It appears that after the storm signal was hoisted on the morning of the 22nd September the boat was fastened with the jetty like other boats. The Court of first instance pointed out that coolies were available for the purpose of unloading the boat, and that the goods could have been stored in the goods shed, at any rate placed on the open pontoons, with tarpaulins spread over them which would have saved them from being damaged to any very great extent. But it is found by the Court of Appeal below that in the ordinary course of business boats are not unloaded when the storm signal is hoisted. That being so, this ground also fails.

The third ground is that the defendant in sending the bales of jute in a leaky boat from

the Chitpur Ghat to Rajgunj did not act as a man of ordinary prudence would have done under similar circumstances with his own goods.

It is found that the boat while fastened to the jetty at Chitpur Ghat during the cyclone had bumped against the jetty and other boats and had sprung 20 to 30 leaks of 1 or 1½ inches in length. Although the leaks had been caused by bumping due to the cyclone which was beyond the control of the defendant, the defendant as a bailee was bound to use all reasonable care, skill and diligence to avoid the consequences of an act of God, and if there was any damage which is attributable to this breach of duty he is liable for damages. A man of ordinary prudence would not have sent the bales of jute in boat with 20 to 30 leaks of 1 or 1½ inches in length. The Court of first instance found that "the boat was kept afloat by continuous pumping of the water that got into the hold." When the leaks were on the sides, the water would naturally pass over the bales lying about them and no amount of pumping out the water could save them from being wetted. The goods as a matter of fact remained in that condition for thirty hours, and from the letter, Ex. III, addressed by the Mills to Messrs. Ducat and Co., the brokers, we got it that some of the bales when received appear to have been lying in the water. That the goods would be further damaged if sent in such a boat struck even the *manji*, and he asked for orders for unloading it, but the Agent of the Calcutta Landing and Shipping Co. did not permit him to do so. On the contrary, he sent for a launch and ordered the boat with the cargo to be towed to its destination. That it was a very rash act none possessed with a sense of fitness of things could doubt for one moment. The facts found by the Court of first instance have practically been accepted by the Court of Appeal below. The learned Subordinate Judge observed :—"It appears that the boat was kept afloat by continuous pumping and the goods were delivered to the consignee not long after the storm subsided. No doubt the bales were about thirty hours within the hold of the boat, but that fact does not show that the defendant's agents did not take care of them. As the boat sprang leaks it would have sunk if the pumping was not going on. In these circumstances it cannot be argued that the defendant's agents did not take steps for the protection of the goods. I find that they took steps for the protection of the goods as well as for their speedy delivery to the consignee."

The degree of the care required of a carrier in dealing with goods depends upon and varies with the nature and condition of the thing carried. Had the goods been of such a nature that they would not have been damaged even if carried in a leaky boat, and left in the hold of the boat for thirty hours, the pumping out of the water would be sufficient to show that reasonable care was exercised, because in that case the only thing necessary was to see that the boat was not sunk. But bales of jute would be wetted and damaged by water entering the boat; the defendant's agent must have been perfectly aware of the same. A man of ordinary prudence would not have sent his own jute in a boat with twenty or thirty leaks of 1 or 1½ inches in length and kept the jute in the hold of the boat for thirty hours. The pumping out of the water no doubt saved the boat from being sunk, but it is clear that the goods were damaged by their being despatched in such a leaky boat, as the learned Subordinate Judge himself finds that they were damaged by water which entered the boat through the holes. It was not, and could not, be suggested that a good boat was not available at the Chitpur Ghat, and we think the learned Subordinate Judge upon the facts found should have come to the conclusion that the defendant by despatching the sixty-eight bales of jute in a boat with 20 to 30 leaks, 1 or 1½ inches in length, on its sides and allowing the jute to remain in the hold of the boat for 30 hours did not take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value.

It is contended by the learned Pleader for the respondent that the finding arrived at by the Court of Appeal below is a finding of fact which cannot be interfered with in second appeal. We are, however, not questioning the facts found, indeed the facts are not in dispute in this case. We are differing as to the inference which the Court below drew from those facts and as to the legal standard of reasonable care set up by it. We think it is open to us to see whether the Court below was right in holding that the defendant in despatching

In re RAJA GOKALDAS MILLS, LTD.

baled jute in a boat with 20 or 30 leaks, 1 or 1½ inches in length, through which water entered into the boat, the jute being left in the hold of the boat for thirty hours, complied with the requirements of section 151 of the Contract Act, merely because there was continuous pumping out of the water which had only the effect of saving the boat.

We are of opinion that the decree of the lower Appellate Court should be set aside and that of the Court of first instance restored with costs here and below, and we direct accordingly.

W. C. A. *Decree set aside.*

BOMBAY HIGH COURT.

CIVIL REFERENCE NO. 15 OF 1923.

January 25, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

In re THE RAJA GOKALDAS MILLS, LTD.

Income-Tax Act (*XI of* 1922) *ss.* 3, 10 (2) (*VII*)—*Assessment for* 1922-23—*Value of discarded machinery, exclusion of.*

For the purposes of the income-tax assessments for the years 1921-22 and 1922-23, the petitioner Company submitted a printed copy of its audited Balance Sheet and Profit and Loss Account for the year ending 30th June 1921. That would form the basis of its final assessment for the year 1921-22 under the Income-Tax Act of 1918, and for the year 1922-23 under section 3 of the Income-Tax Act of 1922. In calculating the profits and gains for the year 1922-23, the Company claimed to deduct a certain sum under section 10 (2) (VII) of the Income-Tax Act of 1922 as representing the value of machinery which had been sold as having become obsolete.

The Commissioner of Income-Tax was of opinion that the profits and gains for the year ending June 30, 1921, for the purposes of the assessment for 1922–23, should be calculated without making that allowance on the ground that that allowance had already been made in computing the income for the year ending June 30, 1921, when making an adjustment for the financial year 1921-22 of the actual income earned by the Company for that year under the provisions of Act VII of 1918 :

Held (1) that under section 3 of the Income-Tax Act of 1922, the assessment for the year 1922-23 must be based on the income, profits and gains of the Company for the previous year, that is to say, the year ending 30th June 1921, and these profits etc. must be calculated according to the provisions of the Act of 1922 ; (p. 283, col. 1).

(2) that, therefore, the Company was entitled to make the deduction under section 10 (2) (VII) of the Act and the fact that under the previous Income-Tax Act the profits and gains for the then current year formed the basis of the assessment for that year, was irrelevant. (p. 283, col. 1).

Reference of Commissioner of Income-Tax, Bombay Presidency, under section 66 (2) of the Indian Income-Tax Act, 1922.

Mr. *Kanga*, with Mr. *A. Kirke Smith*, in support of the Reference.

Mr. *G. N. Thakor*, instructed by Messrs. *Thakoredas & Daru*, for the Company.

JUDGMENT.—This is a reference under section 66 (2) of the Indian Income-Tax Act XI of 1922 at the instance of the Secretaries, Treasurers and Agents of the Raja Gokaldas Mills, Limited. For the purposes of the income-tax and super-tax assessments for the years 1921-22 and 1922-23 the Company submitted a printed copy of its audited Balance Sheet and Profit and Loss Account for the year ending June 30, 1921, and that would form the basis of its final assessment for the year 1921-22 under the Indian Income-Tax Act VII of 1918 and the Super-Tax Act XIX of 1920, and of its assessment for 1922-23 under the Indian Income-Tax Act XI of 1922. We are not concerned in this reference with the assessment for the year 1921-22. We are only concerned to see on what basis the assessment for 1922-23 has to be levied under the Indian Income-Tax Act XI of 1922.

Under section 3 of the Act :—

" Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, company, firm and Hindu undivided family."

The term " previous year " is defined by section (2) (11), and it is not disputed that for the assessment of the year 1922-23 the

" previous year" within the meaning of section 3 was the year ending June 30, 1921. For the purposes of that assessment the income, profits and gains of the Company were to be ascertained for the year ending June 30, 1921.

Section 10 provides how the profits and gains are to be computed and under sub-section (2) the deduction of certain allowances is permitted. Under sub-section (2), sub-clause (*vii*), allowance could be made in respect of any machinery or plant which, in consequence of its having become obsolete, had been sold or discarded.

It is admitted that the year ending June 30, 1921, the Company had discarded obsolete machinery to the extent of Rs. 72,460-0-0. Therefore in calculating the profits and gains for that year the allowance was permissible, the result was that the profits and gains for that year amounted to Rs. 2,70,223-3-2. The Commissioner of Income-Tax was of opinion that the profits and gains for the year ending June 30, 1921, for the purposes of the assessment for 1922—23, shall be calculated without making that allowance on the ground that that allowance had already been made in computing the income for the year ending June 30, 1921, when making an adjustment for the financial year 1921—22 of the actual income earned by the Company for that year under the provisions of Act VII of 1918. We do not think that the Commissioner of Income-Tax was entitled to take that view. He was only concerned with the assessment for 1922—23 and that assessment was to be based on the income, profits and gains of the Company for the previous year, which, as we have said, was the year ending June 30, 1921. He was bound to calculate the profits and gains according to the provisions of Act XI of 1922, and as the Company were entitled to make that allowance for obsolescence under that Act, the Commissioner was bound to accept their estimate of their profits and gains for that particular year, and the fact that under the previous Income Tax Act the profits and gains for the then current year formed the basis of the assessment for that year, was irrelevant when considering how the Company had to be assessed for the years 1922-23 under Act XI of 1922. Assuming for the moment that the Company had earned a profit in the year ending June 30, 1921, which was non-recurring, and in the nature of a wind-fall, undoubtedly the Commissioner would have had no hesitation in taxing it twice over, once under the Act of 1918 and secondly under Act XI of 1922.

The first question is :—

" Whether having regard to section 10 (2) (*vi*) (*c*) of Act of 1922 the Income tax Officer was not bound to allow the Company to deduct the sum of Rs. 72,460 for obsolescence in computing the taxable income of the Company for the assessment of 1922-23 ?"

It is difficult to understand this question. Section 10 (2) (*vi*) (*c*) deals with depreciation of plant and buildings, not with obsolescence.

The second question is also unintelligible and unnecessary. It will be simpler for us to state our answer to the reference in the following form :—

This Court is of opinion that the Company were entitled in making their returns for the years 1922—23 on the basis of their income, profits and gains for the year ending June 30, 1921, to deduct an allowance for obsolescence under section 10 (2) (*vii*).

The Company will be entitled to their costs of the reference.

Costs to be taxed as on the Original Side scale.

Z. K. *Answer accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 565 OF 1922.

April 29, 1924.

Present :—Mr. Hallifax, A. J. C.

SHANKAR RAO AND ANOTHER—DEFENDANTS NOS. 5 AND 6—APPELLANTS

versus

GANPATRAO—DEFENDANT NO. 4—RESPONDENT.

Transfer of Property Act Act (IV of 1882), s. 74—Civil Procedure Code (Act V of 1908)—App.D, Form 6, Suit by prior mortgagee—Subsequent mortgagee made party—Decree fixing period of payment—Payment made by subsequent mortgagee—Final decree, whether can be passed in his favour in same proceedings.

SHANKAR RAO *v.* GANPAT RAO

-If in a mortgage suit to which a subsequent mortgagee is a party a preliminary decree is passed in Form 6 prescribed by the Civil Procedure Code, fixing successive periods of payment of the decretal amount by the mortgagor and the subsequent mortgagee, and if the latter makes payment under such a decree, he acquires under section 74 of the Transfer of Property Act all the powers of the decree-holder prior mortgagee in respect of that mortgage, including the right to continue the suit, which does not terminate till a final decree is passed, and is entitled to be transferred to the plaintiff side and a final decree passed in his favour in the same proceeding. (p. 285, col. 1).

Digambar v. *Ganpat*, 33 Ind. Cas. 496 ; 12 N. L. R. 50, followed.

Gopi Narain Khauna v. *Babu Bansidhar*, 27 A. 325; 9 C. W. N. 577; 2 A. L. J. 336; 2 C. L. J. 173 ; 7 Bom. L. R. 427; 15 M. L. J. 191; 32 I. A. 123; 8 Sar. P. C. J. 799 (P. C.), distinguished.

Sundra Reddiar v. *Subbiah Koundan*, 18 Ind. Cas. 610; 24 M. L. J. 28; 13 M. L. T. 266; (1913) M. W. N. 369; not followed.

Appeal against the decree of the District Judge, Nagpur, dated the 31st August 1922, in Civil Appeal No. 64 of 1922.

Mr. *Atmaram Bhagwant*, for the Appellants.

Mr. *R. N. Padhye*, for the Respondent.

JUDGMENT.—One Vithal Rao filed a suit for foreclosure on a mortgage on the 8th of December 1920. The property mortgaged consisted of a four-pie share in each of the two villages of Digras and Isassari and two houses in Bigras. The respondent Ganpat Rao was impleaded in that suit as the fourth defendant, as he had subsequently purchased the two houses mortgaged. The two appellants, who are brothers, were also impleaded as the fifth and sixth defendants, being subsequent mortgagees. Their mortgage covered both the village shares and another house, also in Digras but not one of the two mortgaged to Vithal Rao and subsequently sold to the respondent Ganpat Rao.

On the 28th of June 1921 a preliminary decree for foreclosure in Form No. 3 of Appendix D of the Civil Procedure Code was passed against all the defendants and time was allowed for payment up to the 28th of December 1921.

The appellants paid the whole amount into Court on the 21st of December 1921 and it was subsequently withdrawn by the decree-holder. Thereafter on the 15th of March 1922 they applied to be made plaintiffs in the suit and to have a final decree for foreclosure passed in their favour, on the ground that section 74 of the Transfer of Property Act had invested them with all the rights of the original mortgagee including the right to a final decree.

This application was opposed by the respondent Ganpat Rao alone, who not only owned a part of the mortgaged property but also had purchased the preliminary decree and been brought on the record as decree-holder, though he preferred to do these things in the name of his son Bhaskar Rao who is joint with him. The reasons for this tortuous course are not clear, but we are not concerned with the matter. The appellants succeeded in the first Court and were given the final decree for which they prayed, but on appeal by Ganpat Rao to the Court of the District Judge this decree was set aside, and they have now come in Second Appeal to this Court.

The learned District Judge has followed the ruling of the Privy Council in *Gopi Narain Khauna* v. *Babu Bansidhar* (1) mentioning also that of the Madras High Court in *Sundara Reddiar* v. *Subbiah Koundan* (2) and of the Calcutta High Court in *Sarat Chandra Roy* v. *Nahapiet* (3). The judgment of the Privy Council which was delivered in 1905 was based mainly on the consideration that thepayment of the decree bythe *puisne* mortgagee extinguished it and left him nothing to execute. But whatever the state of things may have been before 1908, since then "it is no longer open to any sort of doubt", as Drake-Brockman, J. C., said in *Digambar* v. *Ganpat* (4), "that a mortgage suit is pending at any rate till a final decree is passsd". The consideration that influenced the Privy Council has, therefore, no longer any force. Their Lordships also adverted to the impossibility in that suit of working out the respective rights of the different mortgagees without additions to the decree, which was in what is now called Form 3, and recommended for use in such cases what

(1) 27 A. 325; 9 C, W. N. 577 ; 2 A. L. J. 336; 2 C. L. J. 173; 7 Bom. L. R. 427; 15 M. L. J. 191 ; 32 I. A. 123 ; 8 Sar P. C. J. 799 (P.C.).
(2) 18 Ind. Cas. 610 ; 24 M L. J. 28 ; 13 M. L. T. 266 (1913) M. W. N. 369.
(3) 8 Ind. Cas. 1142; 37 C. 907.
(4) 33 Ind. Cas. 496 ; 12 N. L. R. 50.

has since been prescribed as Form 6. But here there is no question of that. The appellants do not wish to enforce their rights under their own mortgage.

In the Madras case mentioned this ruling of the Privy Council was followed without any mention of the change in procedure which had by that time made it obsolete. It is to be noted that the ruling has not been published in the official Indian Law Reports. Between the Calcutta case and the present case I am unable to find any connection. It seems clear then that there is nothing in the Privy Council case to prevent the appellants being made plaintiffs in the suit for the purpose of carrying it on; it was there held that they could not be made decree-holders for the purpose of executing the decree.

The transposition of parties is authorised by r. 10 of O. I of the Civil ProcedureCode, as was explained in *Brojendra Kumar Das* v. *Govinda Mohan Das* (5) and under section 74 of the Transfer of Property A t the appellants by their payment of the money due on the mortgage acquired "all the rights and powers" of Vithal Rao in respect of that mortgage, which undoubtedly include the right to carry on the then pending suit on it. For these reasons the decree of the lower Appellate Court will be set aside and the final decree for foreclosure passed by the first Court will be restored. The respondent will pay all the costs.

G. R. D. *Decree set aside.*

(5) 34 Ind. Cas. 186 ; 20 C. W. N. 752.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 169 OF 1923.

July 21, 1924.

Present :—Mr. Pullan, A. J. C.

INDARPAL SINGH—DEFENDANT—APPELLANT
versus
Babu RAMESHWAR BAKSH SINGH—PLAINTIFF AND SANKATHA SINGH—DEFENDANT—RESPONDENTS.

Vendor and purchaser—Sale by person out of possession—Sale for consideration of costs of litigation to recover property—Champerty—Validity of sale—Vendor refusing to join as plaintiff—Suit by vendee, joining vendor as defendant, whether competent.

In India there is no law of Champerty and a transaction by which an indigent person out of possession makes over his property to some other person who is prepared to recover it by paying the costs of the litigation, though involving a claim of a speculative nature, is not invalid in law. (p. 286, col. 1).

Kazim Husain Khan v. *Achal Ram*, 20 C. 149 : *Achal Ram* v. *Kazim Husain Khan*, 27 A. 271 ; 15 M. L J. 197 ; 8 Sar. P. C. J. 774 ; 9 C. W. N. 477 ; 8 O. C. 155. 32 I. A. 118 (P. C.), relied upon.

Where a vendor backs out of his agreement with the vendee to join with the latter as co-plaintiff in recovering possession of the subject-matter of the sale, then is no alternative for the vendee but to sue alone and implead the vendor as a defendant and the suit cannot be said to be defective on that ground. (p. 286, col. 1).

Appeal against the decree, dated the 17th February 1923, in an Appeal No. 19 of 1922, preferred against the decree of the Munsif, Musafirkhana, District Sultanpur, dated the 21st March 1922, in Original Suit No. 255 of 1921.

Mr. *A. P. Sen*, for the Appellant.

Mr. *Niamatullah*, for the Respondents.

JUDGMENT.—The transactions out of which this appeal arose are as follows : Chandka Singh, Dwarka Singh and Sheo Dayal Singh were brothers. Chandka Singh left certain property which was held by his widow for her life-time. On her death mutation was effected in the names of Chandka Singh's

two nephews Sankata Singh and Indarpal Singh. The latter, however, obtained an alteration of the papers in his own name by setting up a will in his favour. Sankata Singh retaliated by selling half of his share in the property to the present plaintiff for a nominal sum of Rs. 1,000 which would cover the cost of the litigation necessary to recover half of the whole property from the hands of Indarpal Singh. When, however, the plaintiff prepared to bring the proposed suit, Sankata Singh refused to join him and was very evidently won over by his cousin Indarpal Singh. Consequently the plaintiff made Sankata Singh a co-defendant, and he has obtained a decree in his favour for one-fourth of the whole property less a certain sum of money found by the Court of first instance to be due to Sankata Singh as balance of the sale consideration. In appeal only two points have been raised, (1) that the whole transaction was *ab initio* void as being a sale of a share in litigation and (2) that the plaintiff according to the terms of his agreement could only bring the suit in conjunction with the vendor. The second plea is of little force for it is impossible to make any person join as plaintiff in a suit and all that any plaintiff can do is to implead such a person as co-defendant. This has been done in the present case and the suit is not defective on that ground. It is admitted that under section 6 of the Transfer of Property Act a mere right to sue cannot be sold. In India, however, there is no law of champerty and there have been countless cases in which indigent persons have made over property to which they lay claim to some other person who is prepared to pay the costs of litigation. Such is the case reported in *Kazim Hussain Khan* v. *Achal Ram* (1) and which was ultimately decided by the Privy Council in the ruling reported in *Achal Ram* v. *Kazim Hussain Khan* (2). The present case is similar in character and certainly involves a transfer of property and does not convey a mere right to bring a suit. The rulings cited by the learned Counsel for the appellant deal with cases of pre-emption in Oudh which are governed by a special law, and they have no direct bearing on the present suit. Undoubtedly the plaintiff's claim is in a sense a case of speculation in litigation but it is not of such a nature as to be rendered invalid in law. The transactions out of which the suit arose are no more creditable to the defendants than to the plaintiff, and I am not prepared to interfere with the concurrent findings of the two lower Courts. I, therefore, dismiss the appeal with costs.

G. H. *Appeal dismissed.*

(1) 2 O. C. 149.
(2) 27 A. 271; 15 M. L. J. 197; 8 Sar. P. C. J. 772; 9 C. W. N. 477; 8 O. C. 155; 32 I. A. 113 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 284-B OF 1923.

April 30, 1924.

Present :—Mr. Kinkhede, A. J. C.

VENKAT BHAT—PLAINTIFF—APPELLANT
versus
Mt. YAMUNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. II, r. 2, scope of—"Cause of action", meaning of—Different properties—Different acts of ouster—Separate suits whether barred—Limitation Act (Act IX of 1908) s. 14—Plaint returned for want of jurisdiction—Exclusion of time occupied.

A cause of action refers entirely to grounds set forth in the plaint and has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. (p. 288, col. 2).

A cause of action must be antecedent to the institution of the suit. If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred under O. II, r. 2 of the Civil Procedure Code. (p. 288, col. 2).

Order II, r. 2 of the Civil Procedure Code will have no application where properties are different and plaintiff's rights are infringed at different times by different acts of ouster, because the object of this rule is to give effect to the maxim *interest reipublicae ut sit finis litium*.

Where a Court returns a plaint for want of jurisdiction the time occupied in that Court counts towards limitation and saves it under section 14 of the Limitation Act.

Appeal against the decree of the District Judge, Amraoti, dated the 30th June 1923, in Civil Appeal No. 32 of 1923.

VENKAT BHAT *v.* YAMUNA

Mr. *B. R. Pendharkar*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—The sole question is whether the present suit is barred by O. II, r. 2 of the Civil Procedure Code. It has been dismissed by both the Courts below on that ground. One Gopibhat had two sons-Narayanbhat and Venkatbhat (plaintiff). Narayanbhat died in 1911. His son Ganpati had predeceased him leaving a widow *Mt.* Saraswati. Yamunabai (defendant No. 1) is the daughter of Narayanbhat and wife of Kesheobhat (defendant No. 2). The present defendant No. 1 Yamunabai filed Civil Suit No. 187 of 1913 against the said Saraswatibai and the present plaintiff Venkatbhat for possession of the fields Survey Nos. 23 and 29 of *mouza* Mangrul and a house of *mouza* Wun besides other properties on the ground that she succeeded to the estate as heir of her father Narayanbhat. She also claimed damages for loss of crops of the fields. The suit was dismissed by the Sub-Judge Yeotmal on 13th November 1914 on the ground that the property was not proved to be the separate property of Narayanbhat and could not, therefore, devolve on his daughter Yamunabai. Both Saraswatibai and Venkatbhat had contended in that suit that Narayanbhat with the advice of Venkatbhat gave to Saraswatibai in 1906 the Mangrul fields for her maintenance and the Wun house for her residence, and that she was in possession of the said property in virtue of that arrangement. Venkatbhat resisted the claim on the ground that the property was vested in him by right of survivorship. The Court came to the conclusion that no partition was proved and, therefore, the property being joint Venkatbhat took it by survivorship to the exclusion of Yamunabai defendant No. 1. Yamunabai's claim thus stood dismissed in 1914 (See Ex. P-3). The fields and the house thus remained in the possession of Saraswatibai till her death. It appears her death took place either on the 3rd or 4th of March 1918.

On 11th May 1918 the present plaintiff Venkatbhat instituted Suit No. 196 of 1918 in the Court of Munsif, Kelapur for possession of Wun House against the present defendants Nos.1 and 2 alleging that it belonged to him and that the defendants wrongfully took possession of a part of the house on 4th March 1918 and of the other part on 23rd March 1918. The defendants disputed the valuation of the house as made in the plaint in that suit and a preliminary inquiry was held on that point. The Court came to the conclusion that the value of the house was Rs. 1,200 and that it was beyond the limits of the pecuniary jurisdiction of that Court and, therefore, returned the plaint for presentation to the Court of higher jurisdiction of 19th December 1918. Nothing was done after that till 14th July 1920. On 21st July 1920 that plaint was presented to the Court of Sub Judge, Yeotmal along with a petition drawn up under date 14th July 1920 Ex. P-4 which contains the following important allegations which have a great bearing on the question whether O. II, r. 2 of the Civil Procedure Code applies to the present suit. That suit is Civil Suit No. 102 of 1920 of Sub-Judge's Court.

> "After the institution of the suit in the Court of Munsif, Kelapur namely in the month of June 1918 plaintiff was dispossessed by defendants Nos. 1 and 2 of two fields.
>
> | Survey No. | Area. | Assessment. |
> |---|---|---|
> | 28 | 28-16 | 22 |
> | 29 | 20-28 | 13 |
>
> situate at Mangrul Mardi.
>
> The plaintiff's title to these fields and the house in suit has been the subject-matter of the previous litigation and has been once adjudicated upon and there would be common question of law and fact with respect of this property. Plaintiff, therefore, prays that he should be allowed to *add this cause of action* and the relief about possession of these fields in the suit presented to-day as *both these causes of action* against the same defendant can be conveniently tried in this case and as this course will avoid multiplicity of suit." (The italics are mine.)

Apparently no orders were passed on this application by the Sub-Judge. The suit was, however, decreed against Yamunabai on her admission that the question of Venkatbhat's title to the property was *res judicata* by reason of the decision in the former suit No. 187 of 1912 but the claim was decreed against her husband also in ignorance of the fact that he had put no appearance and made no such admission. This was on 10th January 1921. Taking advantage of this Kesheobhat appealed

to the District Judge urging that the plaintiff could not succeed as against him as he was not bound by the decision in Suit No. 187 of 1913 to which he was not a party. This appeal No. 79 of 1921 was filed on 2nd March 1921 and the case was remanded on 29th September 1921 to permit the defendant Kesheobhat to contest the suit on the merits. After remand the defendant Kesheobhat raised pleas of partition and nuncupative will by Narainbhat in his favour but they failed and the claim was decreed on the merits as against him, on 25th March 1922. Defendant Kesheobhat preferred appeal against the said decree dated 25th March 1922 but without success. The Appellate Court's judgment is dated 17th November 1922.

After the disposal of the suit on 10th January 1921 but during the pendency of the appeal No. 79 of 1921 by Kesheobhat which reopened it the present suit for possession and *mesne* profits of the fields for three years was instituted by plaintiff against both the defendants on 5th April 1921, in the Court of Munsif, Kelapur. The plaintiff alleged that the fields were in the possession of Saraswatibai for maintenance and that on Saraswatibai's death the plaintiff's right to possession accrued but that as he was dispossessed from the fields by the defendants on 25th June 1918 the defendants were liable to be ejected as trespassers and to pay *mesne* profits to plaintiff. The defendants amongst other defences pleaded the bar of O. II, r. 2, of the Civil Procedure Code alleging that the cause of action in the previous suit No. 196|18 and in the present suit was illegal dispossession by defendants Nos. 1 and 2 at the time of Saraswatibai's death, and that the plaintiff could not legally split up his claim. The plaintiff alleged that the causes of action were different and that in any case he was not aware of the existence of his cause of action at the time he filed his former suit No. 196 of 1918. This gave rise to issue No. 1 which ran as follows :—

> " Whether the suit is barred by O. II, r. 2? Whether plaintiff got possession of the fields and house on the death of Saraswati and was plaintiff subsequently dispossessed by defendants as alleged by plaintiff?

The first Court found the issue in plaintiff's favour and held that his cause of action was different and arose on 25th June 1918 *i.e.*, after the suit was filed in the Munsif's Court, when he was dispossessed of the fields. That Court disbelieved the evidence adduced by the defendants to show that plaintiff was not dispossessed. The cause of action in the previous suit No. 196 of 1918 related to the house at Wun from which he was ousted on 4th and 23rd March 1918 while the present suit related to the fields at Mangrul from which the plaintiff was dispossessed on 25th June 1918. A cause of action is defined as constituting every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It refers entirely to grounds set forth in the plaint as the cause of action and has no relation whatever to the defence which may be set up by the defendant; nor does it depend upon the character of the relief prayed for by the plaintiff. In other words it refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. A cause of action must be antecedent to the institution of the suit. See *Gobind Ramanju Das* v. *Debendrabala* (1). If the cause of action in the subsequont suit is different from that in the first suit the subsequent suit is not barred. See *Mullick Kefait Hossain* v. *Sheo Pershad Singh* (2). It has been held that two separate suits by the plaintiff against the same defendant for possession of two houses acquired under one sale-deed are not barred where his ouster from the two houses on different occasions gave rise to two separate causes of action which he was not bound to join in the former suit, there being nothing in the Civil Procedure Code to compel him to do so. The words subjects in dispute used in O. II, r. 1 must mean in relation to the former suit the house in Wun only, while the same words in relation to the present suit must mean the fields in Mangrul. I have already stated above that the ouster of plaintiff from the Mangrul house was stated to have taken place partly on 4th March 1918 and partly on 23rd March 1918, whereas his ouster from the fields of Mangrul took place as found by the Court of first instance on 25th June 1918. Each of these ousters furnished a separate

(1) 52 Ind. Cas. 231; 14 P. L. J. 387 at p. 393.

(2) 23 C. 521 at p. 825; 12 Ind. Dec. (N. S.) 545.

cause of action to the plaintiff and he was under no obligation to join his several causes of action together. Cf. *Riayatulla Khan* v. *Nasir Khan* (3) and *Jardine Skinner and Co.*, v. *Rance Shama Soondaree Debia*, (4) and *Ram Soonder Saha* v. *J. P. Delanney* (5) and *Narayan* v. *Shamrao* (6). The infringment by the defendant of the plaintiff's right plays an important part in giving rise to a cause of action and consequently plaintiff could have had no cause of action to sue the defendants for fields until they illegally dispossessed him from them. The result is that until 25th June 1918 plaintiff could not fancy that simply because the defendants took possession of the house at Wun illegally, they dispossessed or must have dispossessed him also from the fields of Mangrul, and include, in the former suit for the house, his claim in respect of the fields also, on the mere ground that his title to both the items of property was common. Where, therefore, properties are different and plaintiff's rights are infringed at different times by different acts of ouster, as in the present case, O. II, r. 2 of the Civil Procedure Code, will have no application, because the object of this rule is to give effect to the maxim *interest reipublicae ut sit finis litium*. In *Brunsden* v. *Humphrey* (7), it was held that damage to goods and injury to person although they have been occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action. This clearly shows that where there is some discrepancy in the two causes of action they are different, and they need not be the subject of one suit. The rule merely requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action on which the suit is founded, and not that every suit shall include every claim on every cause of action which the plaintiff may have against the defendants in respect of the subject-matter of the suit. As observed by Their Lordships of the Privy Council in *Saminathan Chetty* v. *Palaniappa Chetty* (8), the rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction."

In the plaintiff's application dated 14th July 1920, filed along with the plaint presented on 21st July 1920, plaintiff distinctly stated that the cause of action in respect of the fields was a different cause of action, which arose only by reason of the ouster dated 25th June 1918, and he prayed for permission to *add* the new cause of action. He was under no obligation to add it, but in his application he has signified clearly that even then, he looked upon his ouster from the house, and his ouster from the fields, as constituting different or separate causes of action. It will thus be seen that the present suit in respect of the fields of Mangrul based as it is upon his ouster therefrom on 25th June 1918, is not barred by O. II, r. 2.

It is, however, argued that if the date of the institution of the suit be taken to be 21st July and not 11th May 1920 the plaintiff's cause of action in respect of the fields was also anterior to the institution of the former suit. I am not, however, prepared to accept this contention as correct. Where a Court returns a plaint for want of jurisdiction the time occupied in that Court counts towards limitation and saves it under section 14 of the Indian Limitation Act from being barred. I, therefore, regard the date of the initial institution of the suit as the date of its institution even for the purposes of the operation of the bar of O. II, r. 2, Civil Procedure Code.

For all these reasons I am of opinion that the suit has been wrongly thrown out as barred by O. II, r. 2. The case is, therefore, remanded to the Court of first instance for disposal on the merits according to law. The Court-fee paid on the memorandum of appeal to this Court as also to the District Judge's Court, will be refunded to the appellant. Other costs in this and the lower Appellate Court will be paid by the respondents. Costs in the first Court will abide the result.

G. R. D. *Case remanded.*

(3) 6 A. 616 ; A. W. N. (1884) 185 ; 4 Ind. Dec. (N. S.) 218.

(4) 18 W. R. 196.

(5) 20 W. R. 103.

(6) 27 B. 379 at p. 385 ; 5 Bom. L. R. 233.

(7) (1885) 14 Q. B. D. 141 ; 53 L. J. Q. B. 476 ; 51 L. T. 529 ; 32 W. R. 944 ; 49 J. P. 4.

(8) 26 Ind Cas. 228; 41 I. A. 142 at p. 148; 18 C. W. N. 617 ; 17 New Law Reports 56 ; 83 L. J. P. C. 131 ; (1914) A. C. 618 ; 110 L. T. 913 (P. C).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2064 OF 1921.

April 10, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Graham.

HARIRAM MAHATA—PLAINTIFF—APPELLANT
versus
MAHESH CHANDRA MAHATA—DEFENDANT--RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 100—*Second appeal—Finding of fact.*

A finding of fact cannot be interfered with in second appeal unless it can be shown that there is no evidence to support it or that it has been influenced by an erroneous view of the law. (p. 290, col. 2).

Appeal against the decree of the District Judge, Midnapore, dated the 11th August 1921, affirming the decree of the Munsif, Second Court, Midnapore, dated the 26th May 1920.

Babu *Panchanan Ghosh* (with him Babu *Karnamoy Bose*), for the Appellant.

Babu *Santosh Kumar Pal*, for the Respondent.

JUDGMENT. — This is an appeal by the plaintiff against the judgment and decree of the District Judge of Midnapore reversing the judgment and decree of the Munsif, 2nd Court, Midnapore, and arises out of a suit for the recovery of the money in lieu of paddy on a mortgage-bond. The defendant (now respondent) admitted execution of the mortgage-bond but pleaded that it had been satisfied by the execution of a subsequent bond (Exhibit A,) on the 30th *Bisakh* 1323 corresponding to the 13th May 1916. The Trial Court disbelieved the story of payment. On appeal the District Judge held that the bond in suit had been satisfied and discharged by the execution of the second bond and accordingly allowed the appeal and dismissed the suit with costs.

The plaintiff has now filed this second appeal. In our opinion the matter is concluded by the finding of fact arrived at by the first Appellate Court. The learned District Judge has found that the bond in suit was satisfied and discharged by the second bond. That is a finding of fact with which we cannot interfere unless it can be shown that there is no evidence to support it or that it has been influenced by an erroneous view of the law. It is clear that there is evidence on which such a finding could be arrived at and the learned District Judge has given reasons for his conclusion. Whether these reasons are good reasons or bad reasons it is not necessary for us to consider. If we did we should be virtually hearing an appeal on the facts. The learned Vakil for the appellant has argued that the second bond was cumulative and not substitutionary and that the original obligation, the mortgage-bond, was not destroyed thereby unless it has been distinctly found that that was the intention of the parties. It seems to us that that is in effect the finding of the District Judge. He has also found that there was a satisfactory explanation of the omission on the part of the plaintiff to return the first bond.

In the result we find that no case has been made out for our interference in second appeal. Nor do we see any reason to suppose that substantial justice has not been done. The appeal is accordingly dismissed with costs and the decree of the lower Appellate Court is affirmed.

M. B. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 90 OF 1922.

March 11, 1924.

Present :—Mr. Justice Jackson.

PAVANI SUBBAMMA—PETITIONER—APPELLANT
versus
MUNGAMUR VENKATAKRISHNA ROW AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Hindu Law—Widow's income from husband's estate—Sridhanam *or accretion—Presumption.*

PAVANI SUBBAMMA *v.* MUNGAMUR VENKATAKRISHNA ROW

The general presumption is that the income of a Hindu widow from her husband's estate is an accretion to the corpus and not her *stridhanam*, unless it is shown to have been dealt with by her as her own.

***Nabakishore Mandal* v. *Upendrakishore Mandal*, 65 Ind. Cas. 305 : 42 M. L. J. 253 ; 20 A L J. 22 ; (1922) M W. N. 95 ; 26 C. W. N. 322 ; 35 C. L. J. 116 ; 24 Bom. L. R. 346 ; 15 L. W. 417 ; 30 M. L. T. 234 ; 3 P. L. T. 311 ; (1922) A. I. R. (P. C.) 39 (P. C.), followed.**

***Akkanna* v. *Venkayya*, 25 M. 351 ; 12 M. L. J. 5; *Subramanian Chetti* v. *Arunachalam Chetti*, 28 M. 1 (F. B.), not followed.**

***Raja of Ramnad* v. *Sundaram Pandayasami Tevar*, 49 Ind. Cas. 704 ; 42 M. 581 ; 17 A. L. J. 153 ; 36 M. L. J. 164 ; 23 C. W. N. 549 ; 29 C. L. J. 551 ; 25 M. L. T. 400 ; 21 Bom. L. R. 885 ; (1919) M. W. N. 511 ; 10 L. W. 322 (P. C.), considered.**

The bare fact that the widow had obtained a decree for arrears of rent is not proof sufficient to rebut the presumption. (p. 291, col. 2).

Appeal against the order of the Court of the Subordinate Judge, Nellore, in Appeal Suit No. 35 of 1921 (Appeal Suit No. 17 of 1921, on the file of the District Court, Nellore) preferred against the order of the Court of the District Munsif, Kavali, in E. P. No. 1547 of 1919, in O. S. No. 463 of 1914.

Mr. *T. V. Ramanatha Iyer*, for the Appellant.

JUDGMENT.—Respondents are absent and this appeal is heard *ex parte*. A widow obtained a decree in Original Suit No. 463 of 1914 on the file of the Court of the District Munsif of Kavali for arrears of rent and died before executing it. Her son's daughter claimed to execute it as succeeding to the estate of the widow's husband under a Will. Her daughter's daughter claimed to execute it as heir to her private estate arguing that the money if collected would be part of the income and the widow could treat it as her *stridhanam*. The District Munsif accepted this plea, and the son's daughter appeals. In *Nabakishore Mandal* v. *Upendrakishore Mandal* (1) it has been held by the Privy Council that if the *stridhanam* was due to accumulated savings from the income of the property received from her husband's estate, the widow might so deal with it that it would remain her own, yet it must be shown to have been so dealt with. It was held in Madras that the onus lay the other way ; *Akkanna* v. *Venkayya* (2) and this ruling was upheld in *Subramanian Chetti* v. *Arunachelam Chetti* (3) where the ruling in *Nabhakishore Mandal* v. *Upendrakishore Mandal* (1) seems to have been overlooked. In *Raja of Ramnad* v. *Sundaram Pandyasamy Tevar* (4) occurs this passage at page 588.

> " a widow may so deal with the income of her husband's estate as to make it an accretion to the *corpus*. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined if there is any dispute whether a widow has or has not so dealt with her property."

I do not think that this last ruling detracts from the clear ruling in *Nabhakishore Mandal* v. *Upendrakishore Mandal* (1) and so it is held in Mayne's Hindu Law, page 915, 9th Edition.

> " This view (*Akkanna* v. *Venkayya* (2) and *Subramania Chetty* v. *Arunachalam Chetti*) (3) is no longer tenable."

The bare fact that a widow has obtained a decree for arrears of rent is not proof that she so dealt with the property as to make it remain her own.

Accordingly the appeal is allowed with costs and the order of the lower Court is reversed.

V. N. V. *Appeal allowed.*

(1) 65 Ind. Cas. 305; 42 M. L. J. 253; 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322 ; 35 C. L. J. 116; 24 Bom. L. R. 846; 15 L. W. 417 ; 30 M. L. T. 234 ; 3 P. L. T. 311 ; (1922) A. I. R. (P.C.) 39 (P.C.).

(2) 25 M. 351 ; 12 M. L. J. 5.

(3) 28 M. 1 (F. B.).

(4) 49 Ind. Cas. 704 ; 42 M. 581 ; 17 A. L. J. 153 ; 36 M. L. J. 164 ; 23 C. W. N. 549 ; 29 C. L. J. 551 ; 25 M. L. T. 400 ; 21 Bom. L. R. 885 ; (1919) M. W. N. 511 ; 10 L. W. 322 (P.C.).

RAJ CHANDRA BANIK *v.* ISWAR CHANDRA BANIK

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 208 OF 1923.

April 4, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

RAJ CHANDRA BANIK AND OTHERS—DEFENDANTS—APPELLANTS

versus

ISWAR CHANDRA BANIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Local inspection—Judgment, whether can be founded on inspection—Record of inspection, whether necessary.

Though the Civil Procedure Code empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of such inspection the foundation of its judgment which must be based upon evidence adduced by the parties. It does not entitle the Judge to put his view obtained by means of such inspection in place of evidence. (p. 292, col. 2).

There is nothing, however, in the Code to make it obligatory on the Court when holding a local investigation to leave a note of the same on the record and no such provision should be read into it. (p. 293, col. 1).

Appeal against the order of the Sub-Judge, Second Court, Tipperah, dated the 2nd February 1923, reversing the order of the Munsif First Court, Brahmanbissa, dated the 1st May 1922.

Babu *Gopal Chandra Das*, for the Appellants.

Babu *Sasadhar Roy*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This is an appeal from an order of the Subordinate Judge of Tipperah remanding the case to the Court of the Munsif for re-trial. The suit was brought by the plaintiff for declaration of his right over a pathway. The learned Munsif held a local investigation and after recording the evidence dismissed the plaintiffs' suit. There was an appeal and the learned Subordinate Judge without going into the evidence or merits of the case, remanded it for re-trial by the first Court on the ground that the Munsif had made use of his knowledge of what he saw in the locality, without making any note of the result of his inspection. Reliance has been placed by the Court below on the case of *Rai Kishori Ghose* v. *Kumudini Kanta Ghose* (1). That case was decided under section 392 of the repealed Code of 1882. In the new Code there has been some alteration in that section as well as in the rule regarding the inspection of the locale by the Court. Section 392 of Act XIV of 1882 has been enacted word per word in O. XXVI, r. 9 with the exception of the words—" and the same cannot be conveniently conducted by the Judge in person ". These words have been left out in view of the new provisions introduced in the present Code by O. XVIII, r. 18 which invests the Court with power to inspect a property at any stage of the suit. Although there has been this alteration in the law the law as it stood before has not been materially changed. Though the present Code empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of such inspection the foundation of its judgment which must be based upon evidence adduced by the parties. It does not entitle the Judge to put his view obtained by means of such inspection in place of evidence. The Judge is to hold such inspection for the purpose of better following and understanding the evidence adduced before him or to test its accuracy.

In the present case what the learned Munsif did is this. It was a part of the plaintiffs' case that the pathway extended beyond the house of the defendants up to the District Board road. The learned Munsif found on inspection of the locality that the broad pathway extended up to the house of defendants Nos. 5 and 9 and beyond that there were merely footpaths in several directions. He further observes in one portion of his judgment " I had been to the locality being accompanied by parties and am convinced that the disputed pathway which is broad enough for use for all purposes is a passage common to the members of the house of defendants and though a single foot pathway can be traced from house to house

(1) 14 Ind. Cas. 377 ; 15 C. L. J. 138.

beyond the house of defendants Nos. 5-9 or beyond the eastern bank of the tank up to the Municipal road mentioned above as in any other direction it can in no case be said that the disputed pathway has extended further east beyond the houses of the defendants." The learned Vakil for the respondent has argued that the learned Munsif has correctly stated the facts as they appeared at the time of the inspection but not the facts when the obstruction occurred *i.e*, more than a year ago. That may be so and it is a matter of evidence. The learned Munsif accepted all the evidence the parties chose to adduce. He did not shut out any evidence. It is, however, argued that as the learned Munsif left no note on the record of the result of his inspection, it was not possible for the plaintiff to foresee the points that struck the Munsif most and to adduce evidence to explain it. I do not desire to be a party to laying down any such proposition as has been done in some of the cases, that it is the duty of the Court when holding a local inspection to leave a note of the same. There is nothing in the statue to make it obligatory on the Court and no such provision should be read into it. The only limitation that has been placed on the right of the Court to make such local inspection is that the Judge should not make it the basis of his judgment irrespective of the evidence adduced by the parties. In this particular case the learned Munsif has not made his observation of the locality the foundation of his judgment. He has considered the plaintiff's case as placed before him and attempted to be proved before him by evidence. He observes that the plaintiff has based his claim on prescription and finds that the plaintiff came into occupation of the alleged dominant tenement within 20 years and that before his occupation the whole locality was jungle. From these facts he has come to the conclusion that the plaintiff has not acquired any right of prescription by user. He has further examined the evidence and came to the conclusion that the plaintiff did not aquire any right of way over the disputed property either by prescription or as a way of necessity. The evidence on this point has been dealt with fully in a lengthy judgment. In my opinion the view taken by the Subordinate Judge that as the Munsif did not keep a note of the result of his inspection his judgment is to be set aside and the case has to be retried is not correct.

The result is that the order of the Court of appeal below is set aside and the case remitted to it for hearing of the appeal on merits and according to law. Costs will abide the result. The hearing fee is assessed at one gold mohur.

Graham, J.—I agree. The Trial Court clearly had power under O. VIII, r. 18 of the Code of Civil Procedure to make the local inspection. This provision appears to have been overlooked by the first Appellate Court. Two main points have been urged on behalf of the appellants firstly—and this is the main contention—that the learned Munsif was not entitled to base his judgment on what he found at the time of local inspection ; and secondly that if he made such local inspection he ought to have placed on record a note of what he observed at the time so as to make the parties explain any matter that might arise therefrom and to cross-examine if necessary. With regard to the first point it is to be seen whether the Munsif has in fact based his decision on what he observed at the time of the local inspection; on a careful consideration of the matter it appears to me that the Munsif cannot be said to have based his judgment on the result of his local inspection. On the contrary, he has dealt with the evidence at some length and it cannot, I think be said that his judgment is based entirely on what he observed when he went to the locality.

We have been referred to the case of *Ahmed Sahib Shuhari* v. *The Magnesite Syndicate Ltd.*, (2) but that case is clearly distinguishable as the decision there was found to be based solely on the result of the local inspection. As regards the second contention it is to be observed that the Civil Procedure Code nowhere lays down that the result of a local enquiry must be placed on record and I do not think that we ought to read into the rule something which has not been stated therein. If it had been the intention of the Legislature that this should be done it could easily have said so in plain language.

For the reasons given I agree that the appeal must be allowed and the case sent back to the Court below to be disposed of in accordance with law.

M. B. *Appeal allowed.*

(2) 29 Ind. Cas. 60 ; 39 M. 501 ; 2 L. W. 460 ; 17 M. L. T. 387 ; 28 M. L. J. 598.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2322 OF 1922.

July 12, 1923.

Present:—Mr. Justice Rankin and Mr. Justice Ghose.

SAHU BIBI—DEFENDANT—APPELLANT
versus
ISMAIL SHEIK—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower debt, nature of—Husband's estate, possession of—Consent of heirs.

The widow of a Muhammadan of the Sunni School has for her dower the rights of an ordinary creditor and can be given, only by the consent of her husband or his heirs a right to possession of the estate until by the rents and profits the debt is liquidated. (p. 295, col. 2).

Hamira Bibi v. *Zubaida Bibi*, 36 Ind. Cas. 87 ; 38 A. 581; 21 C. W. N. 1 ; 14 A. L. J. 1055 ; 18 Bom. L. R. 999 ; 31 M. L. J. 799 ; 20 M. L. T. 505 ; 4 L. W. 602 ; (1916) 2 M. W. N. 551 ; 1 P. L. W. 57 ; 25 C. L. J. 517 ; 43 I. A. 294 (P. C.), followed.

Beeju Bi v. *Moorthiya Sahib*, 53 Ind. Cas. 905 ; 43 M. 214 ; 37 M. L. J. 627 ; 26 M. L. T. 419 ; 11 L. W. 150 ; (1920) M. W. N 26, not followed.

Appeal against the decree of the District Judge, Murshidabad, dated the 8th June 1922, affirming the decree of the Munsif, Barhampur, dated the 31st March 1921.

Babus *Durga Charan Mittra* and *Rupendra Kumar Mitter*, for the Appellant.

Babu *Atindra Kumar Mukherjee*, for the Respondent.

JUDGMENT.

Rankin, J.—One Satkari Seikh, a Mussalman of the Sunni School, died leaving him surviving one widow, one daughter and two sisters. The plaintiff acquired by purchase the shares of the two sisters and, on attempting to obtain possession of the land, was resisted by the widow and the daughter. At the trial, the widow claimed that a sum of Rs. 925 being due to her for deferred dower and she being in possession of her husband's estate she was entitled to retain such possession until the sum due to her had been paid out of the rents and profits by reason of the widow's lien for dower recognised by the Mussalman law. To that defence it was answered that the widow had not obtained possession by any consent, express or implied, of her husband or his other heirs. The learned Munsif found as a fact that no consent was obtained and he followed the decision of the Judicial Committee in *Hamira Bibi* v. *Zubaida Bibi* (1) and rejected the widow's defence of lien for dower. The learned District Judge, on appeal, has accepted this finding of the Munsif, has agreed with his view of law and has dismissed the appeal.

On this appeal, the first question for consideration is whether the judgments of the Courts below can rightly be subjected to any valid criticism on the ground that the question of implied consent has not been found upon. In my judgment, there can be no doubt that the learned Munsif had before him the question of implied consent and, on the facts of this case, he found and meant to find that there was no consent at all. The learned Vakil who appeared for the widow, the appellant before us, contended that though the decision of the Judicial Committee in *Hamira Bibi's* case (1) contained a statement to the effect that consent was necessary to give validity to such a defence, such statement was only *obiter* and he pointed out that a Full Bench of the Madras High Court in the case of *Beeju Bee* v. *Syed Moorthiya Sahib* (2) had adopted this view and had held, contrary to the dictum of the Judicial Committee, that such consent was not necessary. In these circumstances, he asked us to follow the Madras decision, to treat what is said in *Hamira Bibi's* case (1) as not binding upon us and to allow this appeal.

Now, it is quite true—and I am glad to know that it is recognised—that, in appreciating decisions of Court, it is necessary to remember that a case is only an authority for the *ratio decidendi*. This prin-

(1) 36 Ind. Cas. 87 ; 38 A. 581 ; 21 C. W. N. 1 ; 14 A. L. J. 1055 ; 18 Bom. L. R. 999 ; 31 M. L. J. 799 ; 20 M. L. T. 505; 4 L. W. 602 ; (1916) 2 M. W. N. 551; 1 P. L. W. 57 ; 25 C. L. J. 517 ; 43 I. A. 294 (P. C).
(2) 53 Ind. Cas. 905 ; 43 M. 214 ; 37 M. L. J. 627; 26 M. L. T. 419 ; 11 L. W. 150 ; (1920) M. W. N. 26

ciple is in constant exercise when dealing with the decisions of Courts wherein each Judge gives or may give his individual opinion. It is, however, particularly difficult to apply to decisions of the Judicial Committee and every lawyer in India knows that the Judicial Committee, in giving its reasons, has always a very scrupulous regard to the inconvenience that may be caused by *obiter dicta*. In the present case, the argument on behalf of the appellant is that the case before the Judicial Committee involved only the question whether or not interest should be allowed to the widow in the accounts. The case was one in which undoubtedly the widow had obtained possession by the consent of her husband or his heirs. In these circumstances, it is said that the observations were unnecessary for the decision, that the decision is contrary to a series of decisions in India and that it ought not to be followed.

The first question is as to whether or not the observations of the Privy Council are merely intended to apply to a case where, in fact, consent has been obtained. In my judgment, it is not possible so to read the decision. The question whether interest should or should not be allowed was argued on behalf of the appellant on the view that the widow's claim for dower was a creation of the Mahomedan law, that interest was in general obnoxious to the Mahomedan law and that the ordinary principles of English equity should not, therefore, be applied to a right which was entirely defined by a different law altogether. Accordingly, one of the questions stated in the report as a main point for determination was the question whether the dower payable by a Mahomedan husband to his wife in consideration of marriage was in the nature of an ordinary debt. The members of the Board were Lord Atkinson, Lord Parker, Sir John Edge and Mr. Ameer Ali. It is impossible not to notice, as indeed was noticed by one of the Judges in the Madras case, that two of the members of the Board must have been well-acquainted with the conflict of authorities on the present point that has been exhibited in the Indian decisions. In these circumstances, the actual decision of the Board was prefaced by a statement of the nature of the widow's right to dower and of the extent to which under the Mahomedan law she had a security therefor. The statement is as follows:—"Dower is an essential incident under the Mussulman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one which is called *prompt* payable before the wife can be called upon to enter the conjugal domicil; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally, the idea of payment of interest on the *deferred* portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt and the wife is entitled along with other creditors to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that, of any other unsecured creditor, except that, if she lawfully with the express or implied consent of the husband or his other heirs obtains possession of the whole or part of his estate to satisfy her claim with the rent and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board." That statement of law is a statement, first of all, in an intentional form or restriction. The statement is that the widow's right is no greater than that of any other unsecured creditor except as there defined. That this decision is contrary to the view taken by the Full Bench of Madras in the case referred to above and the view pressed upon us on this appeal admits of no doubt whatsoever. The contrary view, if I may take its expression from the judgment of the Officiating Chief Justice in that case which will be found at p. 233, is as follows:—"All the authorities suggest that the Mahomedan widow's lien for dower on property of which she is in possession arises not by virtue of any agreement with her husband or his heirs but by the provisions of Mahomedan law relating to the administration of a deceased person's estate. That is why it stands on the same footing as any other creditor's lien. If a widow or any other creditor of a deceased

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Mahomedan acquired the rights of a pledgee or pawnee by reason of being placed in possession of the deceased person's property by the consent of his heirs, then she or he would have a preferential right relatively to the rights of other creditors of the deceased. If it is not as a pledgee properly so-called that a widow having a claim for dower has a lien over property in her possession, then there can be no necessity under the Mahomedan law that she should have obtained possession with the consent of the heirs. What is called a widow's lien in this connection is founded on the rule of Mahomedan law as to the administration of a deceased person's estate, namely, that a creditor who has obtained possession of the property of the deceased debtor should be allowed to continue in possession until the debt is satisfied."

Coming to the next point, it is not in my opinion, a sound comment on the decision of the Board in *Hamira Bibi's* case (1) to say that their exposition of the nature of the widow's lien for dower had no connection with their decision on the point about interest. Having set forth that her lien was to take its origin with the express or implied consent of the husband or his heirs, the Judicial Committee on that basis addressed themselves to the question whether on ordinary equitable principles she ought to be allowed interest as a consideration for her forbearance in enforcing her debt against her husband's estate. It seems to me that it would be both unnecessary and presumptuous to say that, if the Board had taken a different view of the nature of the widow's lein their decision on the point of interest would necessarily have been different. But that their Lordships considered the application of equitable principles to be dependent on their general view of the nature and origin of the widow's lien for dower is to my mind fairly clear. It was for that reason and for that reason only that the question arose whether the dower was in the nature of an ordinary debt, whether it could only be given the incidents which particular provisions of the Mahomedan law had already attached. It is to be observed that one decision wherein interest was allowed but wherein a different view of the widow's lien had been adopted was laid before the Judicial Committee in that case. I refer to the decision in *Sahebjan Bewa* v. *Ansaruddin* (3). It was suggested in the Madras Full Bench case already referred to that there was a preponderance of opinion in India to the effect that consent of the heirs was not necessary and that accordingly it must not be supposed that the Judicial Committee intended to settle the question which had been agitating in Indian Courts for some time. In my judgment, it is impossible to think that the Board gave the definition of the widow's right to dower which is to be found in the judgment of Lord Parker without knowing very well that in so doing they were passing upon a matter as to which difference of opinion had prevailed. It is a difficult question and one upon which I think it unnecessary to pronounce whether the preponderance in the previous decisions was very great in favour of one view or the other. That is and must remain a matter of opinion ; but it is undoubted that, at all events, ever since 1870, there has been authority in the case law for the view that consent of the husband or his heirs is necessary to ground the widow's right to lien. That view will be found stated in the case of *Wahaidenessa* v. *Shubrattam* (4). It was a main point of the decision to which Sir John Edge was a party in the cases of *Amantannessa* v. *Basirunnessa* (5) and *Mahammad Karimullah Khan* v. *Amani Begum* (6). It was followed in this Court in 1910 in the case of *Bibi Tasliman* v. *Bibi Kaseman* (7) and although in the following year in a case already cited a different view was taken, it seems unnecessary in view of the recent decision of the Judicial Committee to address oneself to the question as to the preponderance being in favour of one view or the other. Much depends upon whether one confines oneself to a review of the cases in which the present point was exactly raised. To take a particular instance, the language used by Mahmood, J. in the case of *Azizulla Khan* v. *Ahmad Ali Khan* (8) must be controlled by the consideration that

(3) 9 Ind. Cas. 1031 ; 38 C. 475 ; 13 C. L. J. 427.
(4) 14 W. R. 239 ; 6 B. L. R 54.
(5) 17 A. 77; A. W. N. (1895) 7 ; 8 Ind. Dec. (N.S.) 374.
(6) 17 A. 93; A.W.N. (1895) 16; 8 Ind. Dec. (N.S.) 38.
(7) 6 Ind. Cas. 44 ; 12 C. L J. 584.
(8) 7 A. 353; A. W. N. (1885) 584; 4 Ind. Dec.(N.S.) 574.

he was there dealing with a second appeal in which the consent of the heirs has been found as a fact. For all these reasons, it is, in my opinion, the duty of this Court to follow the decision in *Hamira Bibi's* case (1). It may be observed that under this decision the widow has for her dower all the rights of an ordinary creditor and may be given by the consent of the husband or his heirs, a right to possession of the estate until by the rents and profits the debt has been liquidated. That means a position of great privilege. I can see no reason why that privilege as defined by the highest tribunal should not be taken as settled. For these reasons, this appeal must, in my opinion, fail and be dismissed with costs.

Ghose, J.—I entirely agree. I only desire to add that the rule of Mahomedan law with regard to this matter was laid down by the Privy Council in the Case of *Bibee Bachun* v. *Hamid Hossein* (9) where it was said that where a widow obtained possession lawfully without force or fraud, she had a lien on the property for her dower. This expression has been interpreted in some of the cases as possession peacefully obtained without force or fraud. It seems to me that peaceful possession cannot always be said to be lawful possession and the case of *Hamira Bibi* v. *Zubidia Bibi* (1) only reiterates the law laid down by the Privy Council, and explains the expression "lawful" by adding the words "with the express or implied consent of the husband or his other heirs." This interpretation we are bound to accept as a correct statement of the law.

W. C. A. *Appeal dismissed.*

(9) 14 M. I. A. 377 ; 17 W. R. 113 ; 10 B. L. R. 45 ; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39 ; 20 E. R. 828.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 1627 and 1628 to 1636 OF 1920.

June 23, 1922.

Present :—Mr. Justice Sulaiman.

JUGAL KISHORE—PLAINTIFF—APPELLANT

versus

RAM NARAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 100—Mortgage of moveable property not in existence, validity of—Contract Act (IX of 1872), s 74—Sale of goods—Damages, assessment of—Liquidated damages—Appeal, second—Damages—Finding of fact—Arbitrary finding.

A mortgage of moveable property which was not in existence at the time when the contract of mortgage was entered into is valid and is enforceable as against a transferee of the property with notice of the mortgage. (p. 298, col. 2).

Bansidhar v. *Sant Lal*, 10 A. 133; A. W. N. (1888) 35; 6 Ind. Dec. (N. S.) 90, followed.

The method of assessing damages in case of a breach of a contract to deliver sugar-cane juice produced out of a certain area of land would be to ascertain the quantity of juice which could be produced out of the stipulated area, to ascertain the price at which it might have been fairly sold in the market during the season to which the contract related, deducting from such price the ordinary charges of producing and selling the quantity of juice in question. The amount so awarded should not, however, in any case exceed the amount of liquidated damages fixed by the parties. (p. 299, col. 2).

Nait Ram v. *Shib Dat*, 5 A. 238 ; A. W. N. (1883) 2; 3 Ind. Dec. (N. S.) 209, followed.

Ordinarily the question as to the amount of damages to which a party is entitled is a question of fact and a finding as to the amount of damages arrived at by the first Appellate Court would be binding on the High Court in second appeal; but where the finding is an arbitrary done the High Court is entitled to interfere with it. (p. 299, col. 1).

Appeal from the decision of the Additional Sub-Judge, Moradabad, dated the 26th June 1920.

JUGAL KISHORE *v.* RAM NARAIN

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of damages for breach of a contract to supply sugar-cane juice. This and other remaining appeals are connected and in all of them practically the same point arises for determination. I propose to take up Second Appeal No. 1627 of 1920 as the principal case. In this case there was a contract between the plaintiff, on the one hand, and defendant No. 1 on the other, entered into on the 21st of February 1919 under which Rs. 40 were paid by the plaintiff as an advance and it was agreed that the defendant No. 1 would supply to the plaintiff the sugar-cane juice which would be the product of the 8 *bighas* of land mentioned in the contract and that this juice would be supplied at the rate of Rs. 34 per *karda* each *karda* being equivalent to 50 maunds. There was a provision in the deed that, if the juice supplied was not in value equal to the amount advanced then the plaintiff would be entitled to recover the balance together with interest at the rate of 2 per cent. per mensem. It contained an undertaking that defendant No. 1 would not sell the juice to any one else and would not enter into a contract for the supply of this juice with any third party, that in case he did so and broke the contract the plaintiff would be entitled to recover damages at Rs. 10 per *bigha*. The amount advanced was made a charge on the future produce of the land. On the findings of both the Courts below it is clear that defendant No. 2, with a full knowledge of the existence of this contract, purchased the juice from defendant No. 1 and appropriated it and thereby assisted defendant No. 1 in breaking his contract with the plaintiff.

The plaintiff had claimed damages at the rate mentioned in the written contract both as against defendant No 1, and his transferee defendant No. 2. On behalf of the transferee it was pleaded that he himself was not liable inasmuch as he was a purchaser without notice. Both the Courts below have found it, as a fact, that defendant No. 2, had full notice of the previous contract and was liable equally with defendant No. 1.

The Court of first instance decreed the amount claimed in full but that amount has been reduced by the lower Appellate Court. The plaintiff has come up in second appeal from the decree of the lower Appellate Court and asks for the whole amount claimed. The defendant transferee has filed cross-objections denying his liability to pay anything at all. I propose to take up the cross-objections first, because, if those objections are allowed, defendant No. 2, would have to be exempted completely. On his behalf it is strongly contended that the mortgage of moveable property which was not in existence at the time when the contract was made was invalid and that in any case the plaintiff is not entitled to any relief against the defendant transferee. In my opinion, this point is concluded by the case of *Bansidhar* v. *Sant Lal* (1) which I am unable to distinguish. In that case a contract was entered into by one Deoki Prasad with the plaintiff for supplying indigo produce for the years subsequent to 1292 *Fasli* and the said produce was agreed upon to remain hypothecated in lieu of the amount from Deoki Prasad and attached the indigo produce in the hands of Bansidhar the latter objected on the ground that the property had been previously sold to him. On a suit brought by the plaintiff against Deoki Prasad as well as Bansidhar it was held that in effect a valid charge had been created on the indigo produce even though that produce was not actually in existence at the time when the contract was entered into and further that Bansidhar having wrongfully converted the security created by the bond was liable to the plaintiff for damages sustained by him. The decision was based on the general principles of equity and the claim was held to be enforceable as against the transferee of the produce with notice of the equitable interest. This case does not seem to have been dissented from in any subsequent case. On the other hand, the principle laid down therein has been followed in the case of *Navajee* v. *The Administrator General of Madras* (2). The facts of the former case are parallel to the facts of the case before me and I am unable to distinguish the two cases and as a single Judge I am bound to follow the ruling in *Bansidhar* v. *Sant Lal* (1). In my opinion, therefore, the objections raised by the defendant-transferee that he is not liable at all are without force and must be dismissed.

(1) 10 A. 133 ; A. W. N. (1888) 35 ; 6 Ind Dec. (N. S.) 90.
(2) 22 I. C. 566 ; 38 M. 500.

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Coming to the question raised in appeal, I am of opinion that it is necessary to have a clear finding on the amount of damages claimed by the plaintiff before disposing of the appeal finally. Ordinarily the question as to theamount of damages to which the plaintiff is entitled is a question of fact and the finding as to the amount of damages arrived at by the lower Appellate Court would be binding on this Court. In the present case, however, the learned Additional Subordinate Judge has fixed the amount of damages obviously in a most arbitrary manner. He says "I think the plaintiff should have been awarded reasonable damages and they should not have influenced the fact that the plaintiff would have made large profits, if the juice had been delivered to him. I think damages equal in amount to the sum advanced would be sufficient and reasonable in each case." It is noteworthy that the amount advanced was really in the nature of an earnest-money and did not by any means, represent the greater part of the amount which would ultimately have to be paid by the plaintiff for the quantity of juice actually supplied. To fix the damages at an amount equal to the earnest-money advanced in all the cases without exception is obviously arbitrary. Furthermore the lower Appellate Court has professedly ignored the fact that, if the contract had been carried out the plaintiff would have made huge profits and it was of opinion that that circumstance should on no account be taken into consideration. Under these circumstances, I am of opinion, that the amount fixed by him arbitrarily cannot be taken as an amount arrived at on a finding which is binding on this Court.

In my opinion, when a contract like the present was broken the plaintiff was entitled to a reasonable compensation not exceeding the amount which was actually fixed by the parties. The amount of damages fixed by the parties was at the rate of Rs. 10 per *bigha*. If there was anything to show that this amount was excessive it would be open to the Court to reduce it to a reasonable amount. Under section 74 of the Indian Contract Act the Court now is not bound to award the same amount of damages which is mentioned in the contract as the amount to be payable in case of such a breach of contract and that amount is to be taken only as a maximum amount and the Court has power to reduce it to a sum which it considers reasonable. In the case of *Nait Ram* v. *Shib Dat* (3) which also on facts was a case somewhat similar to the present one, it was said that the method of assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related deducting, of course, from such price the ordinary charges of producing and selling the quantity of indigo in question and that in no case the amount so awarded should exceed the amount of liquidated damages fixed by the parties. In the present case the plaintiff actually led evidence to show that about the time when delivery of the sugar-cane juice should have taken place the price had gone up unusually high and the difference in the correct rate and the market rate even exceeded considerably the rate which had been fixed by the parties as the basis for liquidated damages. Whether this in fact was so or not is a matter which I do not propose to determine just now. The fact remains that there was an agreement between the parties to pay damages at a fixed rate, and the lower Appellate Court has not come to any finding that calculating on the difference between the market rate and the contract rate the amount of damages to which the plaintiff would have been entitled was much lower than the amount agreed upon. His finding is, therefore, defective, and I feel that I cannot dispose of this appeal without having a clear finding on the amount of damages to which the plaintiff is entitled. I accordingly send down the following issues for determination by the lower Appellate Court:—

(1) Was the rate at which damages were to be assessed as mentioned in the contract excessive ?

(2) If so, what is the reasonable compensation (not exceeding that amount) to which the plaintiff is entitled on account of the breach committed by the defendants ?

On return of the findings the usual ten days will be allowed for cross-objections.

Z. K. *Case remanded.*

(3) 5 A. 233 ; A. W. N. (1883) 2 ; 3 Ind. Dec. (N.S.) 209.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 95 OF 1923.

July 11, 1923.

Present :—Mr. Justice Rankin and Mr. Justice B. B. Ghose.

SADEK ALI—DEFENDANT—APPELLANT
versus
SAMED ALI—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 6—Attachment of immoveable property before Judgment—Provincial Small Cause Court, jurisdiction of.

A Provincial Small Cause Court has no jurisdiction to attach immoveable property before judgment and to adjudicate on claims which such attachment may produce. (p. 302, col. 2).

Appeal against the order of the District Judge, 24 Parganas, dated the 2nd February 1923, reversing an order of the Munsif, Alipur, dated the 28th July 1922.

Babus *Santosh Kumar Basu* and *Pravat Ch. Dutta*, for the Appellant..

Babu *Sitaram Banerjee*, for the Respondent.

JUDGMENT.

Rankin, J.—This is an appeal by the Defendant in an ejectment suit. The Defendant's defence was a denial of the Plaintiff's title. The Plaintiff claimed title as purchaser at an execution sale against one Majammil Mea under a Small Cause Court decree for money obtained under the Provincial Small Cause Courts Act. It appears that in the Small Cause Court at Sealdah he obtained an attachment of the land now in suit before judgment, that there was an investigation of claim held under O. XXI, r. 63, Civil Procedure Code, that the claimant succeeded and that the plaintiff then brought a suit to establish the right of his judgment-debtor, but that suit was withdrawn. Later, the decree was transferred to the ordinary Civil Court; the property was attached and sold to him ignoring the previous claim case.

The Munsif held that the Small Cause Court had power to attach immoveables before judgment and to decide the claim case. Accordingly he dismissed the plaintiff's suit holding that the plaintiff had no title. The learned District Judge held that the Small Cause Court had no such power and that the proceedings which purported to have been taken under O. XXI, r. 63, Civil Procedure Code, were *ultra vires*. Accordingly, he remitted the suit for retrial to the first Court on the other issues. The only point made by the learned Vakil for the defendant-appellant is that, under the Code of 1908, a Provincial Small Cause Court has power to attach immoveable property before judgment and to decide a claim case thereon. This matter has been elaborately argued before us. It is quite clear that the proper method is first to examine this matter on the face of the Code and of the Provincial Small Cause Courts Act (IX of 1887). So far as the latter Act is concerned, it is only necessary to note that by the second schedule great care has been taken to exclude from the cognizance of the Small Cause Court all suits in respect of immoveable property whether for possession or declaration or partition or otherwise howsoever, with small exceptions as regards certain classes of rent suits. In effect, rights to, or interests in, immoveable property are elaborately excluded; but as questions of this character may arise incidentally in suits, for example, for money, a facultative provision is made by section 23 enabling the Small Cause Courts to send the matter to the ordinary Civil Court but not obliging it to do so. Section 17 of this Act deals with procedure. It is the only section applying anything in the Code to Small Cause Courts. The provisions in the Code itself are directed entirely to excluding certain powers of the Court from application to Small Cause Courts. The provisions of the Code of 1882 specified in its second schedule "so far as those chapters and sections are applicable" were made to obtain in the Small Cause Court by virtue of section 17. They include Chaps. XIX and XXXIV "Execution" and "Arrest and Attachment before judgment." In each case the words "except as regards immoveable property" are inserted

as a qualification in the second schedule itself. In form section 17 is entirely inapposite now. Since 1908 it must be taken by virtue of section 158 of the Code to refer to section 7 and O. L of the Code of 1908. By section 7 of the present Code so much of the body of the Code as relates to certain things is declared not to extend Small Cause Courts, namely, suits excepted from their cognizance, execution of decrees in such suits and the execution of decrees against immoveable property. Also certain sections are made inappplicable, including sections 94 and 95 so far as they relate to injunctions and interlocutory orders. This provision is badly drafted. Section 94 appears to refer entirely to interlocutory orders and even to call them so, but the parts of this section intended to be excluded are apparently cls. (*c*) and (*e*). Cl. (*b*) is not excluded by the words of section 7 [*Kumud Behary Pal* v. *Hari Charan Mandal* (1)] and it can certainly take effect as regards moveables. The actual words of the clause, however, are "order the attachment of any property." Still section 94 only confers powers of any sort "if it is so prescribed" which means that unless the power is given by the orders in the first schedule, it is not in existence. It is fairly clear that we must, therefore, go to the schedule which by O. L declares that certain provisions of the schedule shall not extend to Provincial Small Cause Courts. This repeats the matters mentioned in the first half of section 7 and adds two new matters. It then mentions certain rules and orders specifically and declares them also to be inapplicable to Small Cause Courts. It may be noticed that whereas by sections 7 and 94 a Provincial Small Cause Court cannot grant a temporary injunction, O. XXXIX, r. 1 is not expressly mentioned in O. L. Order L. is not, it would appear, drafted either on the principle of repeating every exclusion made by section 7 or of not repeating any such exclusion. Further in O. XVI, r. 10 the power of compelling the attendance of a witness by attachment of his property is qualified by the proviso "that no Court of Small Causes shall make an order for the attachment of immoveable property." In these circumstances, the question seems to turn on the exact implication of the exclusion from the Small Cause Court powers of "the execution of decrees against immoveable property" in section 7 and O. L. There can be no doubt that in O. XXXVIII attachment before judgment is contrasted with and distinguished from "attachment of property in execution of a decree." Nor can it be doubted that there is an important difference between these two things [see *Tasiram Malo* v. *Kalyani Debi* (2)] though it may be doubted whether the difference is really fundamental since attachment in execution is a step taken to crystallise the creditors' rights and prevent loss of the property prior to sale: attachment before judgment is also for the purposes of preservation so far as the plaintiff is concerned.

Two views have been taken. The District Judge has adopted the view stated in Woodroffe on the Civil Procedure Code. That is, in effect, the principle applied in Madras to the Code of 1859 under Act XI of 1865 that "a Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it" [*Marthamma* v. *Kittu Sheregara* (3)].

The other view was adopted in *Kanchedi* v *Kanchedi* (4) by the Judicial Commissioner at Nagpur. He regarded the express exception in O. XVI, r. 10 as in favour of this construction and he did not think that r. 7 of O. XXXVIII was against it. He pointed out that the exclusion of this power was express and clear in the Code of 1882 and that it is not repeated in the present Code.

O. XXXVIII, r. 7 lays down: "The attachment shall be made in the manner provided for the attachment of property in execution of a decree." Rule 8 applies in like manner to the provisions as to the method of investigation of claims.

This not only refers *inter alia* to O. XXI, r. 54 but also to the provisions for investigation of claims (rr. 58 to 62) and further to r. 63 which makes the order in a claim case conclusive subject only to a suit. If there is power to attach before judgment, then whether it be limited to moveables or not, r. 63 must be intended to apply [*Sri Malikharjuna Prasada Naidu* v. *Matapalli Virayya* (5).

(1) 53 Ind. Cas. 814 ; 46 C. 717 ; 31 C. L. J. 179.

(2) 10 Ind. Cas. 305 ; 38 C. 448 ; 15 C. W. N. 795.
(3) 6 M. H C R. 91
(4) 43 Ind. Cas. 123 ; 14 N. L. R. 1.
(5) 47 Ind. Cas. 1000 ; 41 M. 849 ; 24 M. L. T. 134 ; 35 M. L. J. 231 ; 8 L. W. 197 ; (1918) M. W. N. 699 (F. B.).

However the matter be regarded, r. 63 is not in reality a mere question of "manner."

Again by section 36 of the Code " the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders." It cannot be contended that " the execution of decrees against immoveable property" is not meant to cover the Execution of orders for the purposes of section 7 or O. L; yet they are only excluded by implication.

The argument from previous Codes is apt to exceed the limits laid down in *Bank of England* v. *Vagliano* (6), but no doubt in so far as a revised Code takes the form of an amendment as regards a particular provision something may legitimately be gathered by a comparison. Compare, for instance, section 73 of the present Code and section 295 of 1882. But the whole manner and scheme of declaring the powers of Small Cause Courts were recast in 1908, though section 17 of Act IX of 1887 lives on. Section 5 of the Code of 1882 declares everything expressly mentioned in the second schedule to extend to Small Cause Courts to the extent provided. Section 7 and O. L of the present Code mention certain things as not to extend. Formerly every chapter was specifically dealt with, *i.e.*, inserted with or without qualification or omitted. Thus " Chap. XXXIV of Arrest, Attachment before judgment," except as regards " immoveable property." The Code of 1877 as amended in 1879 was exactly the same. The position which arose under Act XLII of 1860 (which first created the Provincial Small Cause Court) and the amending Act XI of 1865 was that these had to be read with the Code of 1859 which knew nothing of Small Cause Courts. Section 21 of the Act of 1860 provided that " except as hereinbefore provided " the Code of 1859 should be applicable " in so far as the same may be applicable and necessary." Section 47 of the Act of 1865 was equally general "so far as the same are or may be applicable." In this respect I think the comment of the learned Vakil for the appellant upon the Madras decision [*Marthamma* v. *Kittu Sheregara* (3)] has force. In 1871 there was a wide general direction left to be applied by common sense. From 1877 to 1908 there was clear and specific provision. The Code of 1908 did not revert to wide or general direction.

It is by no means absurd to suppose that the Code of 1908 may have meant, subject to the right of High Courts to amend the Rules . . . . . to extend the power of attachment before judgment to immoveable property in the case of Provincial Small Cause Courts, while refusing to such Courts the right to attach such property in execution of decrees. As the language of section 17 of the Provincial Small Cause Courts Act (IX of 1887) is now inapposite, I am inclined to think that the onus is on the person denying the existence of the power to show that it is excluded by the Code. I agree that the principle of *Marthamma* v. *Kittu Sheregara* (3) is not so forceful as it was under the old Acts. On the other hand, I think the difference between attachment before and after judgment is not so great as has been sometimes thought and I do not think the comparison of the present Code with the clear language of the Code of 1882 affords ground for a safe inference to the effect that the power was not meant to be excluded.

It is very difficult to think that a Court which so far as is possible is prohibited from entertaining questions of rights in immoveables and which may not levy thereon, nor attach such property to compel a witness to appear, should have been given without plain language the extreme right of attachment before judgment and of adjudicating on all claims which such an attachment may produce. That the debt must be small in all cases makes the difficulty greater. It is quite true that on the language of r. 54 of O. XXI the attachment is made an order ; but the peon or the officer who affixes on the premises the order of the Court and proclaims it by beat of drum could hardly deny that he was executing an order upon immoveable property any more than the Sheriff when seizing moveables could deny that he was executing an order. If section 7 (*a*) (*iii*) is read with section 36 as meaning to exclude " the execution of decrees or orders against immoveable property "— as I think it must—then, apart from O. L, I think that the power to attach immoveables before judgment is sufficiently, if not too clearly, negatived. [Cf. O. XXXVIII, r. 11.].

(6) (1891) A. C. 107 ; 60 L. J. Q. B. 145 ; 64 L. T. 353 ; 39 W. R. 657 ; 55 J. P. 676.

In the end, therefore, the appeal fails and must be dismissed with costs, hearing-fee, two gold mohurs.

Ghose, J.—I agree.

N. H. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION No. 448 OF 1921.

October 5, 1922.

Present :—Raymond, A. J. C.

MEHTA & CO.—RESPONDENTS NO. I

versus

MESSRS. PARMESHARDAS PARSHOTAMDAS—RESPONDENTS NO. II.

Sale of goods—C. I. F. contract, incidents of—Seller, duty of—Property, when passes—Failure of buyer to make payment—Cause of action, where arises—Place of suing—Civil Procedure Code (Act V of 1908), s. 20 (c).

A C. I. F. sale is not a sale of goods, but a sale of documents relating to goods. It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination and the ordinary contract of insurance on that voyage and to tender these documents against the payment of the contract price. (p. 805, col. 1).

That he secures the freight for the carriage of the goods in question to their destination, has the goods covered by an insurance policy for the voyage, places the goods on board the ship proceeding to the destination mentioned in the contract, and then tenders the necessary documents to the buyer. When he has done this, he has done all that he need do to entitle him to the payment of the price at which the goods have been agreed to be purchased. The insurance of the goods is intended for the protection of the buyer and if the goods are lost in transit, it is the buyer that recovers the amount of the insurance policy. The buyer, therefore, protects himself against the loss of the goods by getting the seller to insure them as soon as they are placed on board and the property in the goods, therefore, which are appropriated to the buyer passes to him as soon as the seller puts the goods on board a ship bound for the place of destination. (p. 804, col. 2).

Respondents Nos. 1 and 2 were both residents of and carried on business at Amritsar. Respondents No. 2 contracted to purchase certain goods from respondents No. 1 C. I. F. Karachi.

The indent contained the following clause :—

" For reimbursement we authorize you or your corrrespondents to draw upon us at 30 days sight with relative documents attached for payment (in case of need sellers invoice to be taken in lieu of the draft) which drafts we engage and bind ourselves to accept, on presentation and pay on maturity notwithstanding any objection we may have regarding maturity or on account of any variation whatever from the terms of the Indent. "

The goods arrived at Karachi and the drafts for the price together with the relative documents were despatched to the Amritsar branch of the Chartered Bank of India. Due notices were sent to Respondents No. 2 to retire the drafts and make arrangements for taking delivery of the goods but they failed to do either, contending that the goods had been late shipped. Respondents No. 1 then retired the draft and referred the disputes between them and Respondents No. 2 to the arbitration of certain arbitrators at Karachi, who made an award in their favour. Respondents No. 1 then made an application to the Court at Karachi to file the award :

Held, that the contract having been made at Amritsar, the documents of title having been tendered to Respondents No. 2 at Amritsar, and the latter being bound to make the payment at Amritsar, no part of the cause of action had arisen at Karachi, and the mere fact that the goods were lying at Karachi did not give the Karachi Court jurisdiction to deal with the matter.

Mr. *Kimatrai Bhojraj*, for the Respondents No. 1.

Mr. *Dipchand Chandumal*, for the Respondents No. II.

JUDGMENT.—This an application to file an award under the Indian Arbitration Act and the jurisdiction of the Court to entertain it has been challenged.

Respondents Nos. 1 and 2 are both residents of, and carry on business, at Amritsar. By an indent dated the 21st January 1920 and executed at Amritsar, respondents No. 2 contracted to purchase from respondents No. 1, five bales of cotton blankets at Sh. 7—6d. per piece, shipments to be of June, August 1920. Para. 5 of the Indent is as follows: It is distinctly understood that all prices in this Indent are C. I. F. C. I. Karachi. Regarding payment for the goods, clause 1 of the Indent provides "For reimbursement we authorize you or your correspondents to draw upon us at 30 days sight with relative documents attached for payment (in case of need sellers invoice to be taken in lieu of the draft) which drafts we engage and bind ourselves to accept, on presentation and

pay on maturity notwithstanding any objection we may have regarding maturity or on account of any variation whatever from the terms of the Indent." The goods arrived at Karachi and the drafts for the price together with the relative documents were despatched to the Amritsar branch of the Chartered Bank of India. Due notices were sent to respondents No. 2 to retire the drafts and make arrangments for taking delivery of the goods but they failed to do either, contending that the goods had been late shipped. Respondents No. 1 then retired the draft and referred the disputes between them and Respondents No. 2 to arbitration, the arbitrators have made their award in favour of Respondents No. 1 who now seek to file it.

The objection as to jurisdiction is based on the contract being on C. I. F. terms. Mr. Dipchand for respondents No. 2 contends that as the contract was on C. I. F. terms which implied that the seller was to contract for freight and effect insurance the seller fulfilled his obligations by shipping the goods and tendering to the buyer the relative documents to the goods and the buyer had to pay at Amritsar the price agreed upon in exchange for the documents. As the property in the goods had passed to the buyer from the moment they were shipped, the seller's responsibility was discharged in respect of them, all that remained for the seller to do was to tender the documents of title to the purchaser and accept from him (of course through the Bank) the agreed purchase price. The tendering of the documents of title and the payment were to be made at Amritsar and consequently no part of the cause of action arose at Karachi. Mr. Kimatrai on the other hand for respondents No. 1 disputes the assertion that the property in the goods passed to the buyer as soon as the goods have been shipped, the appropriation of the goods and the assent thereto by the buyer, he argues, can only take place after the goods have arrived at their port of destination, and the buyer is entitled to an opportunity to examine the goods before any obligation arises to pay for them, and as the examination or inspection of the goods could only take place in Karachi where the goods were lying, a material part of the cause of action arose within the jurisdiction of this Court.

The leading case as to the significance of a contract on C. I. F. terms is that of *Biddell Bros.* v. *Clemens Horst Company* (1), where the dissenting judgment of Kennedy, L. J., was adopted on appeal, *Clemens Horst Co.* v. *Biddel Bros.* (2). The obligations for a seller under a C. I. F. contract, are I conceive to be, that he secures the freight for the carriage of the goods in question to their destination, has the goods covered by an insurance policy for the voyage, places the goods on board the ship proceeding to the destination mentioned in the contract, and then tenders the necessary documents to the buyer. When he has done this, he has done all that he need do to entitle him to the payment of the price at which the goods have been agreed to be purchased. The insurance of the goods is clearly intended for the protection of the buyer and if the goods are lost in transit, it is the buyer that recovers the amount of the insurance policy. The buyer, therefore, protects himself against the loss of the goods by getting the seller to insure them as soon as they are placed on board and the property in the goods, therefore, which are appropriated to the buyer passes to him as soon as the seller puts the goods on board a ship bound for the place of destination. If this be the true significance of a contract on C.I. F. terms it is hardly open to a purchaser to contend that the obligation to make payment does not arise till he has had an opportunity to inspect the goods. And no better answer to Mr. Kimatrai's argument before me could be given than in the words of Kennedy, L. J. " Suppose the goods to have been shipped, the bill of lading taken, and the insurance for the benefit of the buyer duly effected by the sellers, as expressly stipulated in the contract. Suppose the goods then during the ocean transit to have been lost by the perils of the sea. The vendor tenders the bill of lading, with the insurance policy and the other shipping documents (if any) to the purchaser, to whom from the moment of shipment the property has passed and at whose risk covered by the insurance, the goods were at the time of loss ; is it, I ask myself, arguable that the purchaser could be heard to say "I will not pay because I cannot have delivery

(1) (1911) 1 K. B. 214 ; 55 S. J. 47; 27 T. L. R. 47.
(2) (1912) A. C. 18 ; 81 L. J. K. B. 42 ; 105 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42.

of and an examination of the goods ?" But it is just this which is necessarily involved in the contention of the plaintiffs. "The seller's answer, and I think conclusive answer is " You have the bill of lading and the policy of insurance." In *Groom Ltd.* v. *Barber* (3) it was held that in a contract for sale on C I. F. terms the seller's obligation is performed by delivering to the buyer within a reasonable time from the agreed date of shipment the shipping documents, namely, the bill of lading, the invoice, and the policy of insurance which will entitle the buyer to obtain, on arrival of the ship, delivery of the goods, or in case of their loss, will entitle him to recover on the policy their value if they have been lost by a peril agreed to be covered, and will give him a rightful claim against the ship in respect of misdelivery or wrongful treatment of the goods. In *Arnold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (4), Scruttan, J., made the following observations : I am strongly of opinion that the key to many of the difficulties arising in C. I. F. contracts is to keep firmly in mind the cardinal distinction that a C. I. F. sale is not a sale of goods, but a sale of documents relating to goods. It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination and the ordinary contract of insurance on that voyage and to tender these documents against the payment of the contract price."

With these authoritative decisions on a C. I. F. contract, I wish to consider in closer detail some of the clauses in the Indent between the parties in this case. It is not denied that the goods arrived in Karachi and that the draft for their value and the relative documents were presented to respondents No. 2 at Amritsar, and that the drafts were payable at Amritar. That the contract between the parties was on C. I. F. terms is equally open to no doubt as clause 5 and the heading of the last column at the foot of the contract clearly shows it. Clause 6 refers in express terms to the insurance being effected by seller for the benefit of the buyer, and by clause 1 which I have already reproduced in full, the buyer binds himself to accept the draft on presentation and pay it on maturity notwithstanding any objection that he may have in respect to any variation in the terms of the Indent. The acceptance of the draft and its payment is to be independent of any objection on the part of the buyer either to the quality of the goods or to any violation of the conditions in the Indent, and this is obvious from clauses 1 and 16 of the Indent which provides for a reference to arbitration in the event of any disputes between the parties as regards the quality of the goods or in reference to any of these conditions. Mr. Kimatrai relied on clause 10 of the Indent in support of his argument that the property in the goods does not pass to the buyer by their shipment. He contended that the arrival of the goods in Karachi was a condition precedent to the passing of the property and that in addition, there must be an appropriation by the seller after the arrival of the goods and the purchaser must assent to the appropriation. Clause 10 of the Indent is as follows : " The whole or any portion of the goods noted below are cancelled on account of non-shipment or non-delivery arising from *force majeure* or from bankruptcy or failure of your manufacturers or suppliers or from non-arrival from perils of the sea, quarantine or stoppage in the Suez or Manchester Canal." Mr. Kimatrai is of the opinion that this condition differentiates this case from the English cases cited above. It does not appear to me that this clause in the Indent is destructive of the essence of the contract between the parties which is to be on C.I.F. terms. The clause is thus worded partly for the benefit of the seller and that of the buyer, and merely provides that in certain contingencies the contract should be deemed cancelled. In the present case the goods were placed on a ship bound for the destination in the contract, they were covered by an insurance policy and they arrived at Karachi. When the parties have themselves expressly stipulated in writing that the contract is to be on C.I.F. terms, it appears to me scarcely arguable that clause 10 could deprive it of the consequences incidental to a C.I.F. contract. Mr. Kimatrai's argument as based on clause 10 was to challenge the assertion that

(3) (1915) 1 K. B. 316; 84 L. J. K. B. 318; 112 L. T. 301; 20 Com. Cas. 71 ; 12 Asp. M. C. 594; 59 S. J. 129; 31 T. L. R. 66.

(4) (1915) 2 K. B. 379; 84 L. J. K. B. 1673; 113 L.T 185; 21 Com. Cas. 1; 31 T. L. R. 351.

the property in the goods passed to the buyer as soon as the shipment took place, but even assuming that the property did not pass at the time of the shipment, the contract still remained a contract on C. I. F. terms. I have already mentioned the incidents of a C. I. F. contract and in *Groom* v. *Barber* (3) it was held *inter alia* "It is immaterial in whom the property of the goods was before the tender of the documents. The seller must be in a position to pass the property in the goods by the bill of lading if they are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender." Mr. Kimatrai relied on the case of *In re Cargo ex S. S. Rappenfels* (5). This was a case where before the recent war H. S. N. C. & Co., British subjects had shipped some bales of jute by a German ship *S. S. Rappenfels* and had consigned them to D. C. and Co. British merchants. The *Rappenfels* was captured at sea after the declaration of war and was sent to Calcutta to have the liability of the cargo to condemnation determined by the High Court. H. S. N. & Co. submitted their claim and it was held that the property in the goods remained in the sellers and that it did not pass to the buyers at the time the goods were appropriated to the contract. The contract between the parties was no doubt on C. I. F. terms, but there was an express agreement for the goods to arrive, so that the arrival of the goods was an essential term. The goods had not arrived and their price had not been paid and the bills of lading were with the claimants. Jenkins, C J. in the course of judgment remarked "though under a C. I. F. contract, risk is ordinarily on the buyer, this is qualified in this case by a provision which makes arrival of the goods an essential term". The question in this case, was not as between the seller and the buyer and there is nothing in the judgment which would show that though the property in the goods still remained in the seller, yet the contract did not remain a contract on C. I. F. terms as between the seller and the buyer.

Now owing to the failure of respondents No. 2 to retire the draft respondents No. 1 paid the amount to the Chartered Bank at Amritsar and then had the disputes between them and respondents No. 2 referred to the arbitration of two European merchants at Karachi, respondents No. 2 did not appear before the arbitrators nor were represented. After the award respondents No. 1 sent to respondents No. 2 a statement of the account which showed the amount due to them as found by the arbitrators. The arbitrators have awarded respondents No. 1 the amount mentioned in the two drafts with interest thereon and some incidental charges that were claimed by the respondents No. 1. What, therefore, was referred to arbitration was the question as to the liability of respondents No. 2 to pay the amount of the two drafts, and if the subject-matter submitted to arbitration were the subject of a suit, such suit, in my opinion, could not have been instituted in Karachi, as the cause of action arose entirely in Amritsar. The contract was made in Amritsar, payment was to be made in Amritsar and the contract being on C. I. F. terms respondents No. 1 had fulfilled their part of the contract by tendering the documents of title to respondents No. 2 which was done at Amritsar and no part of the cause of action arose at Karachi. The fact of the goods lying at Karachi was immaterial so far as the respondents No. 1's cause of action was concerned. If the goods did not conform to the quality agreed or if there were any variations from the terms of the Indent, respondents No. 2 could claim the necessary relief by the instrumentality of arbitration proceedings, but their obligation for the payment of the drafts was unconditional. I am, therefore, of opinion, that the objection of respondents No. 2 that this Court has no jurisdiction to entertain the application for filing the award is sound and must be upheld.

Mr. Kimatrai pressed very strongly upon my attention my judgment in *Loise Dreyfus* v. *Kuwarbhan Sukhanand*, (6) as supporting his contention that this Court has jurisdiction. But the two cases present essential features of difference. In *Louis Dreyfus* case the contract was not on C. I. F. terms and secondly though it was on what is called "Agency Pass Terms" Louis Dreyfus reserved to themselves the right of the final acceptance of the goods at Karachi, and I stated in my judgment that though the wheat was examined and tested at Lyalpur before its despatch to Karachi, and if approved the purchase-price was paid,

(5) 30 Ind. Cas. 174 ; 42 C. 334.

(6) Mis. No. 252 of 1922.

yet Louis Dreyfus reserved to themselves the right of further examination of the goods on their arrival at Karachi before they were finally accepted.

In view of my finding as to jurisdiction, it is unnecessary to discuss the other objections. I dismiss the application and at Mr. Kimatrai's request direct the return of the reference, the award and other papers connected with it to petitioner.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 211 OF 1921.

July 2, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

MALCHAND BOID AND OTHERS—PLAINTIFFS—APPELLANTS
versus
OSMAN ALI MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXIII, r.3—Compromise, decree in accordance with—Test for determining whether compromise lawful—Appeal, compromise during pendency of—Compromise enhancing amount payable, effect of.

It is incumbent on a Court to pass a decree in accordance with a compromise, only if the compromise is lawful, that is to say, enforceable in law, and one test for determining this is, whether the parties were competent to enter into the compromise in order to achieve the purpose they had in view. (p 307, col. 2).

Where during the pendency of an appeal, the parties effect a compromise, and the effect of the compromise is to enhance the amount payable under the decree appealed against, a decree ought not to be passed in terms of the compromise.

Appeal against the decree of the Subordinate Judge, Rajshahi, dated the 31st May 1921.

Babus *Manmatha Nath Mukherjee, Amarendra Nath Bose* and *Panna Lal Chatterjee*, for the Appellants.

Babus *Mahendra Nath Ray, Sarat Chunder Khan* and *Bireswar Bagchi*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit to enforce a mortgage-security executed in their favour by the Mandal defendants on the 20th June 1914. The Saha defendants have been brought before the Court, as a second mortgage was executed in their favour by the mortgagors on the 17th September 1914. The claim was decreed in part by the Subordinate Judge. The plaintiffs, the first mortgagees, thereupon preferred this appeal, and the puisne mortgagees, when they entered appearance, filed a memorandum of cross-objection.

During the pendency of this appeal, on the 25th July 1922, a petition of compromise was filed which purported to settle the differences between the appellants (the first mortgagees) and the respondents (the mortgagors). The second mortgagees-respondents were not parties to this settlement. The effect of the compromise is to increase the amount payable under the decree to the first mortgagees. The compromise is thus detrimental to the interest of the second mortgagees, and the question consequently arises, whether a decree should be passed in accordance with the compromise, notwithstanding the opposition of the second mortgagees. The answer depends upon the true construction of r. 3 of O. XXIII of the Code of 1908, which provides as follows :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

It is incumbent on the Court to pass a decree in accordance with the agreement or compromise, only if the agreement or compromise is lawful, in other words, if it is enforceable in law. One test may be applied to determine whether the agreement or compromise is lawful; were the parties competent to enter into the agreement or compromise in order to achieve the purpose they had in view? The decree of the Subordinate Judge directs the sale of the properties comprised in the first mortgage. As the second

mortgagees are parties to the suit, the effect of such a sale would be to vest the properties in the purchaser, free of the interests of both the mortgagees. The sale proceeds would then have to be applied in satisfaction, first, of the dues of the first mortgagees, next, of the dues of the second mortgagees. Consequently, if the amount recoverable by the first mortgagees is increased, the balance available for the satisfaction of the dues of the second mortgagees would be disminished. The effect of the compromise is to alter the decree—a decree wherein the mortgagors as well as the first and second mortgagees are interested. Such a decree plainly cannot be varied by consent of two out of the three persons interested. It is an elementary principle that a consent decree cannot operate to a larger extent than the contract itself. As was observed by Parke, J., in *Wentworth* v. *Bullen* (1), the contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge. The agreement between the first mortgagees and the mortgagors that the decree should be varied does not bind the second mortgagees and, a decree based thereon, cannot operate against them. If we accept the contention of the appellants, there will thus be two distinct and possibly contradictory decrees in the suit, for sale of the mortgaged properties and distribution of the sale proceeds, one, by consent, between the mortgagors and the first mortgagees, another, on contest, between the mortgagors and the second mortgagees.

We have been pressed to hold, however, that it is no concern of the second mortgagees how the matters in difference between the mortgagors and the first mortgagees are made up. This argument is manifestly fallacious. The first mortgagees seek to cut off the equity of redemption of their own mortgage. That equity of redemption is now vested not merely in the mortgagor but also in the second mortgagees, and can be affected, either by an adjudication of the Court or by an agreement of all the parties interested. A useful analogy is furnished by the decisions in *Nityamoni Dasi* v. *Gokul Chandra Sen* (2), *Gobind Chandra Sarkar* v. *Bhagabat Sardar* (3) and *Taraprasanna Sarkar* v. *Kalikamohan Sarkar* (4) where a similar question arose in respect of the subject-matter of a partition-suit. We hold accordingly that the compromise is not a lawful agreement or compromise within the meaning of r. 3 of O. XXIII of the Code and we must decline to make a decree in accordance with it.

W. C. A. *Compromise petition rejected.*

(1) (1829) 9 B. & C. 840; 9 L. J. (O. S.) K. B. 33; 109 E. R. 873; 33 R. R. 353.
(2) 9 Ind. Cas. 210; 13 C. L. J. 16.
(3) 27 Ind. Cas 242.
(4) 75 Ind. Cas. 319; 38 C. L. J. 111; (1924) A. I. R. (C.) 80.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 749 OF 1920.

February 20, 1922.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

NIROD CHANDRA ROY—PLAINTIFF—APPELLANT
versus
RAJA KIRTYA NANDA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872) s. 7—Proposal, when converted into promise—Acceptance subsequent to refusal, whether creates contract—Servant, dismissal of—Sufficient notice, what is.

To convert a proposal into a promise, the acceptance must be unqualified and without condition. When once a proposal has been refused no subsequent acceptance can convert the proposal into a promise so as to create a contract. (p. 311, col. 2).

The rule of one month's notice which applies to menials, does not apply to the case of a school-master. The rule as to yearly hirings extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and each case must be considered by itself and in each case it must be decided what notice would be reasonable. (p. 311, col. 2).

In the case of a school-master, especially when he was intending to leave his profession and join another, a notice of three months would be reasonable. (p. 311, col. 2).

Todd v. *Kerrick*, (852) 8 Ex. 151; 22 L. J. Ex. 1; 17 Jur. 119; 20 L. T. (O. S.) 101; 91 R. R 403; 155 E. R. 1298, followed.

NIROD CHANDRA ROY *v.* RAJA KIRTYA NANDA SINGH

Wittenbaker v. *Galstaun*, 43 Ind. Cas. 11; 44 C. 917, distinguished.

Messrs. *Imam*, *S. P. Sen*, *N. C. Sinha* and *S. P. Roy*, for the Appellant.

Messrs. *C. C. Das* and *S. N. Palit*, for the Respondents.

JUDGMENT.—The plaintiff in the suit giving rise to this second appeal, sought for damages for wrongful dismissal against the Managing Committee of the Tej Narain Jubilee College, Bhagalpur.

It appears that the plaintiff-appellant was appointed Professor of History at the College on a salary of Rs. 100 per mensem in July 1908, but, beyond the mere appointment on that salary no agreement was drawn up as to the term of the appointment or as to the conditions on which it was made. In 1909, having been offered a Professorship at St. Columba's College, Hazaribaugh, the plaintiff resigned but subsequently withdrew his resignation, and, therefore, drew salary at the increased rate of Rs. 120 per mensem. Meanwhile he was studying law and in July 1912 passed the B. L. examination and obtained the B. L. diploma in March 1913. At the end of that year he was enrolled as a Pleader and obtained the permission of the High Court, Calcutta, to work as a Professor at the College while practising as a Pleader. He did not at the same time take the permission of the Managing Committee to practise as a pleader while holding the appointment of Professor of History. On the 6th April 1914 he obtained his license to practise, and from the 8th of April began to attend the Courts at Bhagalpur.

In November 1913 the Director of Public Instruction informed the Managing Committee of the College that it was the intention of Government to make a grant of Rs. 1,000 per mensem to the College on condition that an adequate staff of teachers was maintained and those teachers were paid salaries not less than certain minima to be approved by the Government, and requested the Committee if they accepted the conditions to submit their scheme. In connection with this matter the Principal of the College in his letter dated 13th September 1913 (Exhibit 8) suggested that the salary of the Professor of History should be raised from Rs. 120 to Rs. 150 and noted "Professor Ray" (the plaintiff) "is leaving the institution shortly but a Professor will have to be appointed in his place" and again "Professor N. C. Roy :—has passed his B. L. and applied for license to join the Bar, will do so within a month or two." In his letter dated the 22nd December 1913 the Director of Public Instruction communicated sanction to the payment of a grant of Rs. 1,000 per mensem to the College for one year with effect from June 1st, 1913 on condition among others, that a Professor of History should be maintained on a salary of Rs. 150. At the end of May 1914 the Managing Committee accepted the offer and in pursuance of the new system of graded salaries submitted to the Director of Public Instruction a list allowing increments with effect from June 1913 to some of the Professors and with effect from January 1914 to others, but allowing nothing to the plaintiff.

The reason for this attitude of the Managing Committee seems to have been that the Member had come to know of the plaintiff's intention to leave the College and join the legal profession, and also that the Committee had discovered that the plaintiff had been attending Court as a pleader without obtaining their permission.

A meeting of the Committee was held on the 31st May 1914 and in pursuance of instructions the Secretary wrote to the plaintiff on June 2nd,—

"It has come to the knowledge of the Managing Committee that you have taken out license and joined the local Bar. This, if true, would naturally stand in the way of your throwing your whole heart into the work of College which, if not done with earnestness and whole-hearted devotion, is bound to be ill done. The Committee, under the circumstances, feel constrained to demand that you will either be pleased to have your license cancelled and give the Committee an undertaking that you will serve the Institution devoting your whole time to it for at least two academical years or resign your post at the College."

In reply the plaintiff wrote on the 13th June 1914 that he agreed to give an undertaking "to stick to the College for a further and longer period, but that, as in order to qualify himself for enrolment as a High Court Vakil he would have to practise in the mofus-

sil Courts for four years, he requested that a cancellation of his license should not be insisted on. He stated that he had already renewed his license for 1914, and was doubtful whether he could have it cancelled, while with regard to 1915 it would be optional with him to renew the license or not, but he was afraid that such renewal would be necessary in order to complete the four years' practice. He then proceeded to insist that he should be allowed salary at the rate of Rs. 150 per mensem with retrospective effect from June 1913, and that the Syndicate of the Calcutta University might be consulted on the question whether he should be allowed to practise as a pleader while holding the Professorship.

There was no further meeting of the Managing Committee till the 13th September 1914 and on that date the plaintiff handed to the Secretary a letter to be placed before the Committee. In that letter he stated, "As desired by you I undertake to serve the Institution devoting my whole time to it for two academical years. You have, however, desired me to cancel my pleader's license but this, I regret to point out, is not possible for me to do as there is no provision in the High Court rules for cancellation of a license already issued. I may, however, fulfil your desire by not practising as a pleader till the end of December next and then by not renewing my license for the ensuing year." He then again asked that increment of salary might be granted with effect from June 1913, and that the advantage of any new grade system which might be introduced should be extended to him.

After considering this letter and the letter of the 14th June, the Committee passed the following Resolution

"Resolved that the application of Babu Nirod Chandra Roy be rejected and that he be asked forthwith to resign his post, failing which his services will be dispensed with effect from the 1st October 1914."

The plaintiff was thus given fifteen days notice before dismissal, and was dismissed as from the 1st October, receiving salary up to that date. He moved the Syndicate and Senate of the Calcutta University, but, after some inquiry and a motion in the Senate it was decided to take no action. Similarly, the Director of Public Instruction, though moved, abstained from interference in the matter of the refusal to grant increment of salary to the plaintiff with retrospective effect.

The plaintiff then instituted the present suit on 31st October 1917, asserting that the letter of the 2nd June 1914 had contained a proposal by the Committee that he should serve them for two academical years and that, as he had accepted that proposal in his letter of September 13th, a contract had been entered into which had been broken by his wrongful dismissal on the 1st October 1914. He claimed salary from October 1914 till May 1915 at the rate of Rs. 160 per mensem and at the rate of Rs. 170 per mensem, for the month of June 1915, in all Rs. 1,450. He also claimed back increment at the rate of Rs. 30 per mensem from June 1913, at Rs. 40 from June to September 1914 in all Rs. 520, and damages for travelling expenses assessed at Rs. 300. His total claim amounted to Rs. 2,270, or if he were found entitled only to salary up to the end of the session, having been dismissed in the middle of it, to Rs. 2,100.

Both of the lower Courts have agreed in dismissing the plaintiff's suit. The learned Munsif in a clear and well considered judgment found that the proposal contained in the Secretary's letter of June 2nd, 1914, was not accepted by the plaintiff in his letters either of the 14th June or the 13th September as to effect any contract between the parties, as there was no unqualified acceptance nor was there an acceptance within a reasonable time. He held that the Committee were justified in objecting to the plaintiff's conduct as being prejudicial to the interests of the College, and that the plaintiff took no heed of the warning but continued to practise in spite of the objection which fact might have given the Committee a right to dismiss him summarily, but he was given a fortnight's notice. He decided that the plaintiff was not wrongfully dismissed.

With regard to the sufficiency of the fifteen days notice, after discussing the evidence to show that notice of fifteen days or at most a month is customary in the College, he pointed out that the plaintiff really had notice on the 3rd June that he would be called on to resign, and, therefore, it could not be held that sufficient notice was not given.

As to the increments of salary claimed, the learned Munsif pointed out that the plaintiff's name had been expressly excluded from the list sent to the Director of Public Instruction, and no amount was officially sanctioned for the plaintiff, nor was any trust created by the Government in favour of any of the Professors. He found the claim to be unsustainable.

On appeal the learned District Judge agreed with the Munsiff and held that the plaintiff was guilty of a dereliction of duty which exposed him to summary dismissal, and that in any case one month's notice would have been ample. As to the increments, the District Judge found that the grant was made for the benefit of the College and not for that of a Professor who was known to be intending to leave his post, and that the recommendation of the Committee as to the exclusion of the plaintiff from the benefit of increment of salary was not dissented from by the Director of Public Instruction. He dismissed the appeal.

The learned Counsel for the appellant has argued that the notice given to his client was insufficient, and that there not having been any period fixed at the time of the appointment, it must be held that there was a yearly hiring, and, therefore, the appellant was entitled to claim salary up to the expiry of the year during which he was dismissed. He contended that the appellant ought to be paid the equivalent of his salary up to June 1915, or if not that, up to the end of the current session, that is to say, up to May 1915.

His contention in the first place is that by the letter of June 2nd, 1914, the Committee made a proposal to the appellant that he should serve the College for two academical years and that the appellant by his letters of the 14th June and the 13th September agreed to serve for two years and thus, though at the time of his first appointment no agreement was made as to its term, a new contract was effected by the plaintiff's letters of acceptance. We need, I think, only look at the contents of the letters to see that the contention cannot be sustained. The Committee asked the appellant either both to have his license cancelled and to undertake to serve for two years or to resign. The plaintiff replied that he agreed to serve for two years, but was not ready either to cease practice or to have his license cancelled. He also insisted on an increment of his salary with retrospective effect. This was no acceptance of the proposal; to convert a proposal into a promise the acceptance must be unqualified and without conditions. By his conduct too the appellant showed that he did not accept the proposal for he continued to attend the Courts. Again by his letter of the 13th September the appellant, though undertaking to serve the College for two academical years, and suggesting that he might carry out the Committee's desire by not practising as a Pleader till the end of December and thereafter not renewing his license, refused to get his license cancelled and furthermore again asked for increment. Besides the fact that the letter contained no unqualified acceptance, the reply was made unreasonably late, and after the practical refusal of the 14th June. After that refusal the proposal cannot be held to have good, and after it no acceptance could convert the proposal into a promise so as to create a contract. The support of this proposition I need only refer to the case of *Hyde* v. *Wrench* (1). It is clear then that no new contract was effected between the appellant and the Committee for the former's service for the period of two years.

In case the first contention failed the learned Counsel fell back upon the general law that where no term is expressed a hiring will be held to be a yearly hiring and argued that the appellant would be entitled to be paid up to the end of the year in which he was dismissed. He has referred us to various works on the law of Master and Servant. It is quite obvious that the rule of one month's notice which applies to menials, will not apply to the case of a school master. The rule I have mentioned as to yearly hiring extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and, as has been pointed out in MacDonnel's "Master and Servant" page 136, each case must be considered by itself, and in each case it must be decided what notice would be reasonable.

In my opinion, in the case of a school master, especially when he was intending to leave his profession and join another, a notice of three months would be reasonable, and this period was held to be reasonable in the

(1) (1840) 3 Beav. 334 ; 4 Jur. 1106; 52 R. R. 144; 49 E. R. 132.

case of Governors and School mistresses in *Todd* v. *Kerrick* (2).

In the alternative the learned Counsel argued that the plaintiff-appellant was entitled to receive pay to the end of the session, that is to say, till May. He relied on a Resolution of the Syndicate of the University of Calcutta dated the 21st January 1911 to the following effect :—

" In every case that the services of a teacher or a professor are dispensed with for reasons other than incompetence or dereliction of duty his pay for the full period of twelve months must be paid to him," and urged that this was binding on the Committee. It is unnecessary to discuss how far this resolution bound the Committee ; it will be sufficient to refer to my decision later in this judgment that the real reason for the dismissal of the plaintiff was a dereliction of duty, and so the resolution does not affect the circumstances of this case. The learned Counsel also relied on the case of *Wittenbaker* v. *J. C. Galstaun* (3). In that case the plaintiff had been appointed Master at the Armenian College, Calcutta, for a term of three years in 1912, and on the 26th July 1916, while he was still teaching after the expiry of his three years' term, received a notice that his services would be dispensed with on August 1st, and he was offered and received one month's salary. It appears that his dismissal was not due to any misconduct, or dereliction of duty on his part. In the suit which he subsequently instituted the Principal of the City College deposed that it was the custom in the City College and the Schools which he knew, that the teachers or Governing Body were entitled to terminate an engagement by giving notice to terminate it with the existing session. Greaves, J. after considering, what the plaintiff's position was after the expiry of the three years for which he was appointed, stated that he was inclined to think that after the three years the plaintiff's employment must be considered to continue as a yearly employment which would terminate with the end of the school year or session. He held, however, that the plaintiff was entitled to a reasonable notice and that a notice of three months would be reasonable.

That case can be distinguished from the present one in that the dismissal was not for any misconduct, dereliction of duty or fault of the plaintiff, and in the Armenian College the academical year is divided into three terms, while in the case of the Tej Narain Jubilee College there are not terms.

Whatever may have been deposed to be the custom in Calcutta schools and Colleges in that case cannot affect this case, in which the evidence, including that of the plaintiff himself would seem to show that a notice of one month or even fifteen days had ordinarily been held to be sufficient. However, the learned Judge in *Wittenbaker* v. *Galstaun* (3), held, as I hold in this case, that a notice of three months would be reasonable, and he considered three months to be about equivalent to a term.

In the present case the appellant was asked to cancel his license or resign by the letter of June 2nd 1914. This was practically a notice to him given four months before his actual dismissal, and thus I consider that he could not complain that he had no sufficient notice. He had full time to look for another appointment if he wanted one.

The letter of June 2nd too, informed him plainly that the Committee did not approve of his practising as a pleader, it was virtually a direction to him to cease practice, and he was informed that the Committee held that the practice was detrimental to the interests of the College. In spite of this the appellant continued to practice and paid no attention to the warning given to him. It is quite plain that the appellant's practice in Court must be detrimental to the interests of the College to which the appellant was required to give his whole attention. The direction, therefore, contained in the Secretary's letter was a reasonable one, and the appellant wilfully paid no notice to it. I am of opinion in agreement with the lower Court, that there was dereliction of duty on the part of the appellant and disobedience to a lawful and reasonable direction of the Committee which would have justified his summary dismissal.

I see no reason to differ from the findings of the lower Court and would dismiss the appeal. Having regard to all the circum-

(2) (1852) 8 Ex. 151; 22 L. J. Ex. 1 ; 17 Jur. 119; 20 L. T. (O. S.) 101 ; 91 R. R. 403 ; 155 E. R. 1298.
(3) 43 Ind. Cas. 11 ; 44 C. 917.

stances of the case, I am of opinion that each party should bear its own costs throughout.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL REVISIONS NOS. 143 TO 146 OF 1923.

August 6, 1923.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

KHARARIA MIJAZILLA ZEMINDERI SYNDICATE, LTD.—DECREE-HOLDERS—PETITIONERS

versus

OMED SHEIKH AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 11 (2)—Execution application by person other than decree-holder—Verification—Procedure.

It is not necessary that an application for execution made by a person other than the decree-holder under O. XXI, r. 11 (2) of the Civil Procedure Code should be verified after the application for permission has been made nor is it necessary that the verification should be made in the presence of the Court. All that is necessary is that the Court should be satisfied that the person who signed the verified application is acquainted with the facts of the case.

Rules against the order of the Munsif, Perojpur.

Babu *Nagendra Nath Ghose*, for the Petitioners.

JUDGMENT.—These Rules must be made absolute. It is not necessary that the application for execution made by a person other than the decree-holder under O. XXI, r. 11 (2) should be verified after the application for permission has been made; nor is it necessary that the verification should be made in the presence of the Court. All that is necessary is that the Court should be satisfied that the person who signed the verified application is acquainted with the facts of the case. In the present case there can be no doubt that the person who signed this application was

acquainted with the facts of the case and there was no ground for rejecting the application.

We accordingly set aside the order of the lower Court rejecting these applications and direct that he do admit them and do proceed according to law.

This order will govern Civil Revision Nos. 143 to 146 of 1923.

We make no order as to costs in these Rules.

Let all records be sent down at once.

N. H. *Rules made absolute.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 89 OF 1922.

November 6, 1922.

Persent:—Mr. Justice Piggott.

KRISHNA DATT DUBE—PLAINTIFF—APPLICANT

versus

BRIJ LAL AND OTHERS—DEFENDANTS—OPPOSITE PARTIY.

Custom—Wajib-ul-arz, entry in, construction of—Grove-holder, right of, to sell trees—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Interpretation of words—High Court, interference by.

The *wajib-ul-arz* of a village provided that a grove-holder could fell any tree and appropriate the timber to his own use and was entitled to plant new trees in place of those he might fell. It was also provided that at the time of sale the proprietor of the land was entitled to receive one quarter of the sale price in virtue of his proprietary rights. A grove-holder sold two standing trees in the grove and the vendee cut and removed the timber. On a claim by the landlord to recover one-quarter of the sale price of the trees;

Held, that the trees not having been cut and removed by the grove-holder the landlord was entitled tc succeed under the terms of the *wajib-ul-arz*.

The High Court would decline to interfere in revision in a case where there is a mere question of the interpretation of particular words in a document and the circumstances are such that the words are susceptible of more than one interpretation. (p. 314, col. 1).

KRISHNA DATT DUBE *v.* BRIJ LAL

Revision against the order of the Munsif Jaunpur, dated the 29th March 1922.

Mr. *K. N. Katju*, for the Applicant.

Mr. *S. D. Sinha*, for the Opposite-Partiy.

JUDGMENT.—The plaintiff in this case is the proprietor of a plot of land on which there is standing a grove. The first seven defendants are in possession of the said plot and of the trees thereon, with the rights of grove-holders. The finding is that these defendants sold two standing trees for Rs. 50 to defendant No. 8 who felled the trees and removed the timber. The plaintiff claims that, by village custom as recognised in the *wajib-ul-arz* he is entitled to ¼ of the price. It is quite clear from the pleading and from the Judgment of the Court below that both parties were agreed that the local custom determining the rights *inter se* of the proprietor of the soil and the grove-holders, in respect of the grove in suit, was correctly recorded in the *wajib-ul-arz* and that both parties were bound by that record. The only question remaining for determination was the interpretation of the relevant entry in the *Wajib-ul-arz* considered in its bearing on the established facts of this case. The Trial Court found that under the custom so recorded, the plaintiff was not entitled to recover ¼ of the price. The plaintiff has brought the matter before this Court in revision. The decision of the Court of Small Causes is one calculated to have far reaching consequences affecting the rights of the plaintiff and the other proprietors, if any, in this village with reference to grove lands. If it were a mere question of the interpretation of particular words in a document, and the circumstances were such that these words were clearly susceptible of more than one interpretation, I have no doubt that this Court would decline to interfere in revision. The view which I take, however, admits of being briefly stated. The parties are admittedly bound by a record of custom which says that at the time of sale the proprietor of the land receives ¼ of the sale price in virtue of his proprietary rights. The words are plain enough and really admit of only one possible interpretation. The only question raised in the Court below may be put in the form of a question, namely, at the time of the sale of *what* does this right arise in favour of the proprietor? The Trial Court was evidently much impressed with the very wide rights enjoyed by grove-holders in this village under the terms of the *wajib-ul-arz*. The document contains other clauses very favourable to the grove-holders, and it is not surprising that the defendants in the present suit should have placed their reliance upon this document and should have been quite ready to accept it as a complete and correct record of the custom by which the parties were bound. The Trial Court obviously thinks that in as much as any grove holder in possession under this custom could have felled any tree and appropriated the timber to his own use, and moreover was entitled under the custom to maintain the character of the grove by planting a new tree in place of any tree that he might fell, it would be an illogical development of the custom to require him to pay to the *zemindar* a portion of the sale price, in the event of his selling the timber instead of appropriating it to his own use. My own opinion is that a good deal could be said by way of rejoinder to the argument as thus stated, but the consideration which determines my decision is that the facts as found by the Trial Court are not those assumed for the purpose of the argument above stated. The first seven defendants to this suit did not fell the trees, remove the timber and sell the same for their own profit. The finding is that they sold the trees as they stood and that it was the vendee who cut them down. In my opinion this circumstance makes the decision of the Trial Court hopelessly inconsistent with itself and fully warrants interference by this Court in the exercise of the general powers of supervision vested in it by the Provincial Small Cause Courts Act. The Court below says that the right to receive ¼ of the price would arise in case of a sale of grove, or a fractional share thereof, or a specified portion of it. Now the sale of two standing trees *is to my mind* quite indistinguishable from the sale of a specified portion of a grove. I am of opinion, therefore, that this application must be allowed. I set aside the decree of the Court below and in lieu thereof give the plaintiff a decree for the sum of Rs. 12-8-0 claimed by him with costs throughout.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NOS. 1887, 1886, 1893, 1904, 2158, 2159 OF 1919 AND 300, 331, 302 AND 374 OF 1920.

January 11, 1922.

Present :—Mr. Justice Chatterjee and Mr. Justice Henderson.

CHANDY CHARAN LAW—APPELLANT
versus
SREEMUTTY AZIZERNESSA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 179—Permanent and heritable Tenure—Mocurrari—*Rent interest on—Rate fixed in* kabuliyat *excessive—Tenant, whether can get relief.*

Plaintiff-landlord sued to recover interest on rent payable by the tenant under *Kabuliyat* which provided for payment of interest at the stipulated rate. It appeared that the word "*mocurrari*" had not been used in the document nor was there any express provision that the rent shall not be enhanced, but there was a provision that if there was an increase in the land on measurement, the tenant would have to pay rent separately at the stipulated rate

Held (1) that the tenure was and permanent heritable; (p. 316, col. 1).

(2) that the rent was agreed on and could not be enhanced ;

(3) that as there was no evidence on the record to show that any undue influence had been exercised by the *Zemindar* the tenant was liable to pay interest at the stipulated rate. (p. 316, col. 1).

Mr. *Dwarkanath Mitter* and Mr. *Satyendra Nath Mitter*, for the Appellant.

Moulvi *Nural Huq*, for the Respondents.

JUDGMENT.—The only question involved in the appeal relates to interest on rent payable by the tenant under a *kabuliyat.*

The interest stipulated to be paid was 2 per cent. per annum.

The Courts below held that the tenant had no permanent *mocurrary* right in the land and that, therefore, the landlord was not entitled to interest at the stipulated rate and accordingly interest at 12 per cent. only was allowed.

It is contended on behalf of the plaintiff-landlord that the interest of the tenant was that of a *mocurrari* permanent tenure-holder and that, having regard to the provisions of section 179 of the Bengal Tenancy Act, he is liable to pay interest at the rate stipulated in the *kabuliyat.*

The *kabuliyat* describes the tenure as a *darsikmi kayami taluka* and states that the rent is payable in ten *kists.* It then goes on to say :—

" I down to my sons, son's sons and so on in succession, being vested with the right to make a gift and sale of the land covered by this *kabuliyat*, shall hold and enjoy the same, with the greatest felicity on payment of the rent, and on making improvements in the *Mahal* by excavating and filling up tanks, ditches and wells, making *bastu* and garden, constructing passages and roads and planting trees. etc., and by keeping intact the limits and boundaries as before."

There is no doubt, therefore, that it was a permanent tenure and also heritable. The power of transferability was expressly granted.

The only question is whether the rent was fixed.

The word "*Mocurrari*" has not been used in the document and there is no express provision in the document that the rent shall not be enhanced. But there is some indication in the document to show that the parties did not intend that there should be an enhancement of rent. The *kabuliyat* provides that if there was an increase in the land on measurement, the tenant would have to pay rent separately for the excess area at the rate stipulated in the *kabuliyat.* That shows that the rent was a fixed one, because it could not have been intended that the tenant would pay for the excess area at the rate stipulated in the *kabuliyat* and at the same time would have to pay at an enhanced rate for the original area mentioned in the *kabuliyat.*

Then, there are other terms in the document such as " There will be no remission of rent on account of decrease in the area of land except on the ground of the land being washed away by river, that the tenant shall be responsible for all losses and profits in respect of the land under settlement arising in consequence of drought, inundation, failure of crops, the land lying patit and Providential visitation

etc., which also go to indicate that the tenure was not a *ryoti* holding but a permanent *mocurrari* tenure.

It is pointed out that there is a provision in the *kabuliyat* for payment of interest at 2 per cent. as well as damages at 25 per cent. and it is contended that the provision is a final one, but no damages have been claimed and only interest at 2 per cent. per mensem has been claimed in the suit.

It is also contended that the rate of interest is very high. But there is no evidence on the record to show that any undue influence was exercised by the *Zemindar*. We are unable, therefore, to give any relief to the defendant on this ground.

We are of opinion that the right of the tenant under the *kabuliyat* is a permanent *Mocurrari* right and the plaintiff, therefore, is entitled to interest at the rate stipulated in the *kabuliyat*.

The same points arise in S. A. Nos. 1886, 1904, 2159 of 1919; and 300, 301, 322 and 374 of 1920 in which the tenancies are tenures and in S. A. Nos. 1893 and 2158 of 1919 in which the lands, though *ryoti*, are held at fixed rates. The above decision, therefore, will govern them all.

The result is that all the appeals are allowed and the plaintiff will be entitled to get interest at the rate stipulated in the *kabuliyat*.

Each party to bear his own costs in this Court and the lower Appellate Court, the plaintiff being entitled to get costs in the Court of first instance on the amount which will be found due to the plaintiff under the decree of this Court.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1522 OF 1923.

January 29, 1924.

Present :—Mr. Justice Moti Sagar.

RALYA SINGH—DEFENDANT—APPELLANT
versus
TUNIA MAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Execution of decree—Sale of properties belonging to judgment-debtor—Decree set aside on appeal—Restitution—Commission paid to auctioneer, whether can be deducted—Interest, whether can be allowed.

Where properties belonging to a judgment-debtor are sold in execution of a decree and the decree is subsequently set aside on appeal, the judgment-debtor is entitled to recover from the decree-holder under section 144 of the Civil Procedure Code the full amount of consideration paid by the auction-purchaser for the properties *plus* interest on the amount for the period during which the money remained in the hands of the decree-holder. The latter is not entitled to deduct from the sale price the amount of commission paid to the auctioneer.

Appeal from the order of the Senior Sub-Judge, Ludhiana, dated the 29th March 1923.

Mr. *Devi Dayal*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Senior Subordinate Judge of Ludhiana made on an application under section 144 of the Civil Procedure Code. On the 29th of March 1917, the respondents obtained a decree from his Court for Rs. 5,705 against the present appellant. In execution of that decree the moveable and immoveable properties of the appellant were attached and put to sale. Some of the properties were purchased by the respondents while the rest were purchased by certain third parties. On an appeal by the appellant the decree was set aside by the High Court on the 4th February 1921, and the respondents' suit dismissed with costs throughout.

The appellant then made an application for restitution to the Court below under section 144 of the Civil Procedure Code. The prop-

erties which were purchased by the respondents themselves were restored to the appellant, while in respect of the others, which had been purchased by third parties, the respondents stated that they had realised a sum of Rs. 2,320 by the sale thereof, and that they were prepared to refund it to the appellant. The money was accordingly deposited in Court and withdrawn in due course by the present appellant. In the application out of which the present appeal has arisen it was stated by the appellant that the properties had been sold at much below their proper value on account of the illegal action of the respondents and that he was entitled to be fully recouped for the loss which he had without any fault of his sustained at their hands. The details of the loss claimed by the appellant are fully stated in the application, dated 4th of April 1921, made in the Court below, and it is not necessary that they should be recapitulated in this judgment.

A certain amount of oral evidence was produced in support of the contention that the value of the property was much more than what it had fetched at the time of the sale but this evidence has not been believed by the learned Senior Subordinate Judge and rejected on the ground that the witnesses were biassed and, therefore, not worthy of credit. I have carefully read this evidence and have no hesitation in holding that it is worthless and that the learned Senior Subordinate Judge was right in discarding it. I, however, do not see why the appellant should not have been allowed interest at a reasonable rate for the period during which the money realised by the sale of the properties remained in the hands of the respondents. A sum of Rs. 40 has been claimed on account of *mesne* profits for the houses which were purchased by the respondents themselves and subsequently restored to the appellant. No satisfactory reason has been shown by the respondents for disallowing this item. The sum claimed is very reasonable and in my opinion, ought to have been allowed. Another item which, in my opinion, ought to have been allowed to the appellant is the commission which the respondents say was paid to the auctioneer on account of the sale of the properties and which of course was not included in the sum of Rs. 2,320 deposited by the latter for payment to the appellant. The property was sold at the instance of the respondents and on the decree having been set aside they were bound to restore the property to the appellant in its original condition. This, of course, was impossible on account of the property having been purchased by the third parties, but there is no reason why the actual price at which the properties were sold and which, of course, included also the commission paid to the auctioneer should not have been paid to the appellant. The contention of the learned Counsel for the respondents is that the fees paid to the auctioneer were not kept by his clients and that they have paid what was actually recovered. But, as already pointed out, it was on account of the illegal action of the respondents that the property was sold, and it is, therefore, only reasonable that they should pay the commission of the auctioneer out of their own pockets.

I accept the appeal and return the case to the Senior Subordinate Judge for fresh orders in the light of the observations above made. Parties shall bear their own costs throughout.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 1912 OF 1920.

July 16, 1923.

Present :—Mr. Justice Page.

CHANDMULL KANGORIA—
PLAINTIFF
versus
DEBI CHAND AND OTHERS—
DEFENDANTS.

Presidency Small Cause Courts Act (XV of 1882) s. 22, application of—Suit cognisable by Small Cause Court instituted in High Court, effect of—Amount or value of subject-matter of suit, determination of—Presidency Small Cause Court, jurisdiction of—Suit for damages for trespass whether cognisable by Small Cause Court—Construction of statutes—Courts, duty of—Practices, questions of, how determined.

On a true construction of section 22 of the Presidency Small Cause Courts Act, where a plaintiff institutes a suit of a character cognisable by the Small Cause Court, in the High Court, and estimates the amount or value of his claim in the plaint at a sum which

CHANDMULL KANGORIA *v.* DEBI CHAND

is within the ambit of the jurisdiction of the Small Cause Court, that section is applicable to the suit, and the plaintiff must be taken to have deliberately accepted the risk to which the provisions of that section expose him. (p. 320, col. 1).

The test of the amount or value of the subject-matter of a suit is to be determined by the amount set forth in the plaint But by placing a fictitious value on his claim, the plaintiff is not at liberty to determine the tribunal by which the suit is to be tried. (p. 319, col 2).

A suit is cognisable by a Small Cause Court if in respect both of its character and the amount or value of its subject-matter it is within the jurisdiction of the Court. (p 318, col. 2).

A suit claiming damages for trespass to plaintiff's land by unauthorised deposit thereon of building materials is cognisable by a Small Cause Court.

In construing a Statute, Courts of Justice should endeavour to discover the meaning to be given to it by a consideration of its terms (p. 320, col. 2).

Questions of practice in India are to be determined in accordance with the principles laid lown by the Courts in India. (p. 320, col. 2).

Messrs. *S. N. Banerjee* and *S. Ghose*, for the Plaintiff.

Messrs. *N. N. Sircar* and *S. M. Bose*, for the Defendants.

JUDGMENT.—This application involves the determination of an important question of practice.

It is an application by the defendant, which, by consent of the parties, has been treated as an application under O. XLVII to review an order awarding the plaintiff costs.

The plaintiff brought a suit in the High Court claiming damages for trespass to his land by reason of the unauthorised deposit thereon of building material by the defendant. The plaintiff in his plaint claimed Rs. 5,300 as damages and obtained a decree for Rs. 10, and costs were awarded to him on the High Court Scale No. II.

The defendant now applies for a review of the above order relating to costs on the ground that the suit was cognisable by the Court of Small Causes of Calcutta, and, inasmuch as the plaintiff obtained a decree for damages for trepass of an amount less than Rs. 300, the Court had no jurisdiction to award him any costs by reason of the provisions of section 22 of the Presidency Small Cause Courts Act of 1882. The plaintiff applied under this section for a certificate that the suit was one fit to be brought in the High Court, but this was refused.

I have, therefore, to decide whether the suit was cognisable by the Small Cause Court or not. A suit, in my opinion, is cognisable by the Small Cause Court if in respect both of its character and of the amount or value of its subject-matter it is within the jurisdiction of the Court. This suit in respect of the character of the relief claimed, was clearly one which the Small Cause Court was entitled to entertain. [See *Peary Mohun Ghosaul* v. *Harran Chunder Gangooly* (1).]

Was it also within the ambit of the jurisdiction of the Small Cause Court by reason of the amount or value of its subject-matter? That depends upon whether the amount or value is that actually recoverable or ascertained at the trial, or that claimed by the plaintiff and set out in the plaint.

The law and practice in British India, contained partly in legislative enactments, and partly in a long and continuous stream of judicial decisions, are, in my opinion, in favour of the latter view.

Learned Counsel for the defendant urged that if this view is to prevail, the effect will be that if the plaintiff elects to value his claim at Rs. 1,200 the suit will come within section 22, while if he inflates his claim to Rs. 12,000 the section will not be applicable. In favour of his contention he has cited an unreported judgment of my brother Buckland, in suit No. 1657 of 1922. With great respect to the learned Judge I find myself unable to agree in the opinion which he expressed in that case as to the construction of section 22. If the test of the amount or value of the subject-matter of the suit be that for which the defendant contends, one result would appear to be that in a suit, for example, in respect of negligence or of trespass, in which the damages are at large, and it is impossible *a priori* to estimate, even approximately, the amount of the damages which ultimately will be awarded, a plaintiff, however *bona fide* may be his estimate of the damage he has suffered, would be unable to bring his suit in the High Court without running the risk of losing

(1) 11 C. 261 ; 5 Ind. Dec. (N. S.) 933,

his costs even if he were to be successful. In my opinion, the object of the Legislature was to prevent congestion in the High Court, and to provide, where the plaintiff values his claim at a sum which brings his suit within the jurisdiction both of the High Court and of the Small Cause Court, and yet elects to institute proceedings in the High Court, that he should do so at his peril. It is not to be supposed that the Legislature intended *ex post facto* to penalise a plaintiff because he had failed to guess correctly which was the proper Court in which to launch his suit. If the construction urged upon me by the defendant were the correct one, it would result in a mere gamble and add a new terror to litigation.

Chief Justice Edge makes some pertinent observations on this subject in *Madho Das* v. *Ramji Patak* (2). There the learned Chief Justice says :—

" Now it has been held by this Court in *Mahabir Singh* v. *Behari Lal* (3) that " for the purpose of determining the proper Appellate Court in a civil suit, what is to be looked to is the value of the original suit, that is to say, 'the amount or value of the subject-matter of the suit ' ; such ' amount or value of the subject-matter of the suit' must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint." As a matter of fact in this case the value assigned by the plaintiff in his plaint was Rs. 1,500. That valuation made the suit one which was triable in the Court of the Subordinate Judge, and that valuation also made the appeal from the decree of the Subordinate Judge lie to the Court of the District Judge. The law contemplates that, in many cases, it may be impossible for a plaintiff, at the inception of his suit to state correctly the value of the relief which he seeks, as for example, in cases to which section 11 of the Court-Fees Act, 1870 (Act No. VII of 1870) applies. This was particularly a case in which, until all the evidence had been taken, it was impossible for the plaintiff to put anything more than a hypothetical value on the relief claimed *qua* the balance in the hands of Babu Madho Das. In our opinion it would be impossible to hold that the jurisdiction of an Appellate Court should depend upon the amount of the decree of the Appellate Court. Take, for example, this case. The lower Appellate Court here being satisfied that the plaintiff under his second relief was entitled to a decree for over Rs. 7,000, gave him that decree. If the lower Appellate Court had no jurisdiction to give that decree, what would have been the result ? According to the argument for the defendant-appellant the lower Appellate Court could have done nothing except return the memorandum of appeal for presentation in the High Court. It could not, according to that contention logically worked out, have given the plaintiff in his appeal a decree for any sum whatever, even a sum less than Rs. 5,000, as if that contention was correct, its jurisdiction was determined by the finding that the plaintiff was entitled in appeal to a sum exceeding Rs. 5,000. If that contention were correct, and the lower Appellate Court returned the memorandum of appeal, and it was presented in this Court as a first appeal, it is conceivable that this Court might have come to the conclusion that the plaintiff was entitled, we shall say, to Rs. 2,000 only. Now if the defendant's contention were correct, in that event what could this Court do except again return the memorandum of appeal to be presented in the Court having jurisdiction, *i.e.*, that of the District Judge ? That is an illustration which we think goes to show that it is the plaintiff's valuation in his plaint which controls the jurisdiction, not only of the first Court, but of the Appellate Court, and not the amount which may be found and decreed by the first Court or by the Appellate Court."

It has repeatedly been held by the High Courts in India that the test of the amount or value of the subject-matter of a suit is to be determined by the amount set forth in the plaint. [See *Lakshman Bhatkar* v. *Babaji Bhatkar* (4), *Mahabir Singh* v. *Behari Lal* (3), *Hamidunessa Bibi* v. *Gopal Chandra Malakar* (5) and *Raj Krishna Dey* v.

(2) 16 A. 286 ; A. W. N. (1894) 84 ; 8 Ind. Dec. (N. S.) 186.
(3) 13 A. 320 ; A. W. N. (1891) 107 ; 7 Ind. Dec. (N. S). 202.
(4) 8 B. 81 ; 4 Ind. Dec. (N. S.) 395.
(5) 24 C. 661 ; 1 C. W. N. 556; 12 Ind. Dec. (N. S.) 1110.

Bepin Behari Dey (6).] And a perusal of the material statutes leads me to the same conclusion. By the Suits Valuation Act of 1887, section 8, "the value as determinable for the computation of court-fees and the value for the purpose of jurisdiction shall be the same."

By the Court-Fees Act of 1870, section 4, court-fees are payable as indicated by the Schedule to that Act. By the Bengal Fees Amendment Act of 1922, section 5, court-fees are payable according to the amount or value appearing in the plaint [See also on this subject Court-Fees Act of 1870, sections 5 and 7, sub-sections (1) and (4), and section 17 of the Presidency Small Cause Courts Act, section 18, Exp. I, and also sections 20 and 21 and 39 (1), (2) and (4). See also Civil Procedure Code, O. VII, r. 1 (*i*), r. 2 and r. 11 (*b*)].

In clause 12 of the Letters Patent, 1865, it is provided that the High Court shall not have such Original Jurisdiction in a case falling within the jurisdiction of the Small Cause Court of Calcutta in which the debt, or damage, or value of the property sued for does not exceed Rs. 100. It has to be observed that the words are "sued for" and not "recoverable."

In my opinion, on a true construction of section 22 of the Presidency Small Cause Courts Act, where a plaintiff institutes a suit of a character cognisable by the Small Cause Court in the High Court, and estimates the value or amount of his claim in the plaint at a sum which is within the ambit of the jurisdiction of the Small Cause Court, section 22 is applicable to the suit, and the plaintiff must be taken to have deliberately accepted the risk to which the provisions of the section expose him. On the other hand, the plaintiff's estimate of the value or amount of his suit may be so high that the suit is not cognisable by the Small Cause Court, but it is erroneous for that reason to suppose that the plaintiff is entitled, by a designed exaggeration of the claim, to oust the jurisdiction of the Small Cause Court. The plaintiff by placing a fictitious value on his claim is not at liberty to determine the tribunal by which his suit is to be tried. [See cases cited *supra*, also *Dayaram* v. *Gordhandas* (7), *Ashiq Ali* v. *Imtiaz Begam* (8)].

Ample safeguards are provided to meet such a contingency. Where the relief obtained in the plaint is incorrectly valued, the Court may reject the plaint, or return the plaint to be presented to the proper Court under O. VII, rr. 10 and 11. The Court of first instance, in a proper case where it deems such a preliminary investigation to be desirable, will itself determine the amount and value of the subject-matter of the suit, if objection is taken in the Court of first instance at or before the hearing at which issues are first framed and recorded. [See Suits Valuation Act, section 11 and *Koti Pujari* v. *Manjaya* (9)].

Moreover, the High Court under section 35 of the Civil Procedure Code possesses an unfettered discretion of deciding all questions of costs in such a suit. It might, for example, under such circumstances, deprive the plaintiff wholly of costs, or only award him such costs as he would have recovered if he had brought his suit in the Small Cause Court.

Courts of Justice, in construing a statute, must endeavour to discover the meaning to be given to it by a consideration of its terms. Little or no assistance is to be obtained by referring to other statutes in which the words used are not the same.

The provisions of the English County Court Acts from 1867 to 1919 do not contain the safe-guards which are to be found in the Indian practice. Moreover, the provisions of these Acts differ materially from those contained in the Statute relevant to the issues raised on this application, and the decisions thereunder proceed upon different considerations, and I do not, therefore, propose to refer to them.

In my opinion, questions of practice in India are to be determined in accordance with the principles laid down in the Courts in India.

Bearing in mind the evidence adduced at the hearing of this suit, and having regard to all the circumstances, I am not disposed to vary the decree which has been passed.

(6) 17 Ind. Cas. 162 ; 40 C. 245 ; 17 C. W. N. 591; 16 C. L. J. 194.

(7) 31 B. 73 ; 8 Bom. L. R. 885.
(8) 42 Ind. Cas. 891 ; 39 A. 723 ; 15 A. L. J. 794
(9) 21 M. 271 ; 7 Ind. Dec. (N.S.) 547.

I hold that this application has been misconceived, and I dismiss it with costs.

N. H. *Application dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 10 OF 1923.

October 4, 1924.

Present :— Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice LeRossignol.

Rai Sahib Pandit WAZIR CHAND AND OTHERS—APPELLANTS

versus

NATHU RAM AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908). Sch. I, Arts. 134, 148—Mortgage—Transferee from mortgagee—Good faith—Redemption, suit for—Limitation.

It is only a *bona-fide* transferee from a mortgagee who can claim the protection of Article 134 of Schedule I to the Limitation Act. In the absence of good faith, a suit against him by the mortgagor to redeem the mortgaged property would be governed by Article 148 of Schedule I to the Limitation Act. (p. 321, col. 2).

Muthaya Chetti v. *Kanthappa Chetti*, 45 Ind. Cas. 975; 34 M. L. J. 431 ; 7 L. W. 482 ; 23 M L. T. 291 ; (1918) M. W. N. 334 ; *Narayanasami Naicker* v. *Periasamy Odayar*, 68 Ind. Cas. 734 ; 14 L. W. 116 ; (1921) M. W. N. 465 ; 41 M. L. J. 163 ; 44 M. 951; *Baiva Khan* v. *Bhiku Sazba*, 9 B. 475 ; 5 Ind. Dec. (N. S.) 315; *Yesu Ramji Kalnath* v. *Balkrishna Lakshman*, 15 B. 583 ; 8 Ind. Dec. (N. S.) 393, referred to.

Letters Patent Appeal, under section 10 of the Letters Patent, from the order of Mr. Justice Broadway, dated the 5th December 1922.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—The date of the mortgages with which these appeals are concerned is not a matter which can be reopened in second appeal, and the sole point on which we have to come to a finding, is whether these suits to redeem are barred by Article 134 of Limitation Act.

The learned Judge in Chambers has held that the recital in the appellants' sale-deeds that their vendors' title reposed on a mortgage put them to inquiry, and they cannot be regarded as purchasers in good faith of an absolute title, such as their sale-deeds purported to convey.

Article 134 of the Limitation Act fixes a period of 12 years for a suit.

"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration".

Now if the Article alone were regarded, and the matter were *res integra* it would be hard to resist the conclusion that the transferee from a trustee and the transferee from a mortgagee are placed in the same position, and as, admittedly, the trustee's transferee comes within the shelter of the Article even in the absence of good faith, the mortgagee's transferee in spite of the knowledge of the defect in his absolute title would appear to be safe from attack from the mortgagor after the lapse of 12 years.

On the question whether Article 148 and Article 134 are in conflict, there has been some divergence among the High Courts, and for the appellants chief reliance is placed on two Madras rulings reported as *Muthaya Chettiv.Kanthappa Chetty* (1) and *Narayanasami Naicker* v. *Periasamy Odayar* (2), but, an examination of these rulings reveals the fact that the point was dealt with *obiter* and in a very cursory manner, and the same is true of *Bhaiva Khan* v. *Bhiku Sazba* (3) and *Yesu Ramji Kalinath* v. *Balkrishna Lakshman* (4).

An examination of the other authorities cited at the Bar indicates that the almost universal view is that only a transferee with a *bona fide* belief at the time of the conveyance can claim the protection of Article 134 and that in other cases the suit to redeem against him is governed by Article 148. We bow to the weight of authority and reject the appellants' contentions.

(1) 45 Ind. Cas. 975 ; 34 M. L. J. 431 ; 7 L. W. 482 ; 23 M. L. T. 291 ; (1918) M. W. N. 334.
(2) 68 Ind. Cas. 734 ; 14 L. W. 116 ; (1921) M. W. N. 465; 41 M. L. J. 163 ; 44 M. 951.
(3) 9 B. 475 ; 5 Ind. Dec. (N. S.) 315.
(4) 15 B. 583 ; 8 Ind. Dec. (N. S.) 393.

Finally it is urged that the suit is barred by Article 144, but this a new point, and its decision would involve a finding of fact, *viz.*, whether the appellants' possession was adverse to the knowledge of the respondents. It cannot be heard at this stage.

For these reasons, we dismiss the appeals with costs.

Z. K. *Appeals dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 494 OF 1922.

November 2, 1923.

Present :—Mr. Baker, Offg. J. C.

DEBICHARAN—APPELLANT
versus
SHANKER RAO—RESPONDENT.

Will in favour of grandson excluding son, validity of —Creditors of son, object to save property from, legality of.

There is no law which prohibits a person from taking measures to ensure that his self-acquired property over which he has an absolute power of disposal should enure for the benefit of his minor grandsons and should not be taken by the creditors of his son. A devise of immoveable property over which the testator has an absolute power of disposal, in favour of the testator's grand-sons, to the exclusion of his son, with the object that the property should not fall into the hands of the creditors of the son, is, therefore, perfectly legal. (p. 322, col. 2).

Appeal against the decree of the District Judge, Hoshangabad, dated the 15th August 1922, confirming the decree of the Subordinate Judge, Betul, dated the 27th March 1922.

Mr. *S. B. Gokhale*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The plaintiffs sued for a declaration that a house and well and the crop in occupancy land No. 344 of Betul Bazar were not liable to attachment in execution of the decree of the defendant against their deceased father. The first Court dismissed their suit as regards the house and well but awarded the claim as regards the crop. Both parties appealed and the appeals were dismissed by the District Judge, Hoshangabad. The plaintiffs make this second appeal as regards the house.

The plaintiffs' father was one Bansidhar whose father was Chandikaparasad. Chandikaparasad's wife was the daughter of the sister of one Durgadin who was the original owner of the house. It is contended that Durgadin gave the house to Chandikaparasad who left it by his Will to his grandsons, the present appellants, to the exclusion of their father Bansidhar. The lower Appellate Court has found that the house really belonged to Chandikaparasad. The first Court has found that the will of Chandikaparasad is proved on the evidence of (P. Ws. 6 and 10), the attesting witnesses. The lower Appellate Court has not disagreed with this finding but holds that inasmuch as the Will is dated 10th July 1919 and the suit in which the decree of the defendant was obtained was filed in the previous year ; there can be no doubt that the reason the property was not left to Bansidhar the plaintiffs' father, was to defraud the defendant by raising the plea that the property belonged to Bansidhar's sons the present plaintiffs. There is no other reason, apparent or alleged for passing over the son Bansidhar in favour of the grandsons, the plaintiffs, and even (P. W. 1) has admitted that Bansidhar used to live in the house within the last two years. It is not pleaded that the debt on which the decree of the defendant is based is such as would not bind the estate of the judgment-debtor Bansidhar liable to attachment in execution of the decree of the defendant.

The finding of fact of the lower Courts taken together, therefore, are that the house was the property of Chandikaparasad and that he left it by will to his grandsons; the object was that it should not be taken by the creditors of his son. The house being the self-acquired property of Chandikaparasad, he was entitled to dispose of it as he liked.

It is contended on behalf of the respondent that the Will was not intended to be acted upon. I am not aware of any law which prohibits a person taking measures to ensure that his self-aquired property should enure for the benefit of his minor grandsons and not be

taken by the creditors of his son. I have no doubt whatever that Chandikaparasad bequeathed the house by Will to plaintiffs in order that it might not be taken by the creditors of his son. There is nothing illegal in this, and once the Will is held proved the plaintiffs are the owners, and their father Bansidhar has no interest in the property nor is it liable to attachment and sale in satisfaction of his debts. The decree of the lower Appellate Court will, therefore, be set aside and the plaintiff's claim decreed with costs throughout.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 305 AND 306 OF 1920.

March 13, 1923.

Present :—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

JADU NATH HALDAR AND OTHERS—APPELLANTS

versus

MANINDRA NATH CHANDRA AND OTHERS—RESPONDENTS.

Provincial Insolvency Act, (*III of* 1907), *s.* 37—"*creditor*" *meaning of.*

The expression "creditor" in section 37 of the Provincial Insolvency Act does not include a secured creditor. (p. 324, col. 1).

Appeals from the orders of the District Judge, Bankura, dated the 12th June 1920.

Babu *Narendra Coomar Bose*, for the Appellants.

Babus *Amarendra Nath Bose* and *Hira Lal Chakkrabarty*, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—These two appeals are from orders made by the District Judge in insolvency proceedings arising out of applications made for adjudication as insolvents by two persons who are brothers. The appellants were the creditors of the two insolvents by two separate mortgage-bonds. The mortgage-bonds are dated 1893 and 1907 respectively. The mortgagors were the two insolvents and also two other brothers of those insolvents. It appears that one of the mortgage-bonds was sued on and a decree was obtained for Rs. 630. The amount alleged to have been due on the other bond from the mortgagors was Rs. 1,300 odd. Taken together, about Rs. 2,000 was due for those debts in May 1917. Then all the four brothers executed a deed of conveyance with regard to some of the mortgaged properties which included a house in Sonamukhi and some jote lands. The deed of sale is dated the 23rd May 1917 and the properties were sold for Rs. 2,000 to the appellant's father. Thereafter, two of the mortgagors presented petitions to the District Judge for being adjudged insolvents in July 1917 and an adjudication order was made and a Receiver was appointed of the properties of the insolvents. Then, the Receiver applied to the District Judge for avoiding the sale to the extent of the shares of the two insolvents in the properties included in the deed of sale dated the 23rd May 1917, and an order was made setting aside the sale with regard to those shares. That order, however, was set aside by this Court on appeal by the purchasers in December 1919 and both the cases were sent back for retrial. The cases were heard again and, on the 12th June 1920, the District Judge has made an order in each case avoiding the sale of the interests of the two insolvents. These appeals are preferred by the purchasers against those orders.

In these cases, the only evidence adduced was adduced by the purchasers. The sale was sought to be avoided under section 37 of Act III of 1907, which governs these cases, as having been in favour of creditors. The question in these cases is whether the sale was to a "creditor with a view of giving that creditor a preference over the other creditors." It is contended on behalf of the appellants that there is no evidence that this was so. The answer to the question depends upon whether section 37 applies to these cases. The purchasers were secured creditors and they were entitled to be paid to the full extent of their debts so secured in preference over other creditors,

There is distinction in the Act between a creditor and a secured creditor and the purchasers in this case do not come within the expression "creditor" as contemplated in section 37. In my judgment section 37 does not apply to these purchasers. The learned Judge has, however, found that the properties were worth Rs. 4,000 and it was not necessary to sell them for Rs. 2,000 and he observes: "Such being the case, I declare that the sale set up was not a *bona fide* but a fraudulent one intended to defeat or delay creditors." He, therefore, annuled the sales to the extent of the insolvents' share. There is no direct evidence as to the value of the properties, and it should be borne in mind that these two properties along with others were subject to the mortgages which were satisfied by the sale, and the other properties were released. The brothers of the insolvents, who had no object in making a fraudulent conveyance, joined in the sale by which they also lost their title to the properties. Then, the evidence shows that the purchasers were not aware at the time of the sale that the insolvents were heavily indebted, and there was nothing to show they were not acting *bona fide*. The sale, therefore, cannot be said to be fraudulent. The learned Judge further holds that the *bari* was not sold and was not intended to be sold. As a matter of fact, the *bari* was included in the deed of sale for which there was consideration, and the title of all the vendors passed to the purchasers in both the properties by the transaction. Whether the purchasers allowed any of the vendors to live in the house after the sale seems to me immaterial. No question has been raised as to the genuineness of the mortgage transactions. It is difficult to see how this sale can be impeached on the ground that it was either colourable or without consideration because this *bari* itself was the subject of the mortgages in satisfaction of which it was sold. I am, therefore, of opinion that the sale cannot be impeached as a mere colourable transaction. On these grounds, the judgment and orders of the learned Judge avoiding the sale to the extent of the interests of the two insolvents in the properties should be set aside. The appellants are entitled to recover their costs in these appeals from the estate of the insolvents. In appeal No. 305, the hearing fee is assessed at four gold mohurs and, in Appeal No. 306, no hearing fee is allowed but the appellants will be entitled to recover the other costs incurred.

Walmsley, J.—I agree.

N. H. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 345 OF 1920.

February 25, 1924.

Present :—Mr. Justice Campbell and Mr. Justice Broadway.

ZULFIKAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NABI BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Wakf—Mutwalli, *who may be appointed—Income to be applied to upkeep of Mosque and balance to be appropriated by* Mutwalli, *legality of—Procedure—Final decree, date fixed for passing—Decree passed before date fixed, legality of.*

There is nothing contrary to Muhammadan Law in a trust which provides that the income of the *wakf* property is to be applied, in the first instance to the upkeep of a mosque, and that the residue, if any, should be the remuneration of the *Mutwalli*. (p. 326, col. 1).

Ismial Ali Khan v. *Hamedi Begum*, 62 Ind. Cas. 455 ; 6 P. L. J. 218 ; 2 P. L. T. 658, referred to.

In the absence of a specific provision as to the appointment of the *Mutwalli* of a *wakf*, the descendants of the *wakif* have the first claim to be appointed *Mutwalis*. (p. 326, col. 1).

Where a date is fixed for the passing of a final decree, the Court acts illegally in passing the final decree before the date fixed. (p. 325, col. 2).

Appeal from the order of the Senior Sub-Judge, Multan, dated the 5th December 1918.

Lala *Badri Das* and Lala *Har Gopal*, for the Appellants.

Mr. *Muhammad Shah Nawaz*, for the Respondents.

JUDGMENT.—This appeal is the outcome of a suit brought under section 92

ZULFIKAR ALI *v.* NABI BAKHSH

Code of Civil Procedure, by Nabi Bakhsh and others against Ghulam Mustafa Shah and Fateh Ali Shah, sons of Hamid Shah.

The suit was instituted on the 15th April 1915, and the subject was a building in Multan City consisting of four shops with a mosque on the top of it. The plaint stated the defendants to be *mutwallis* of the mosque, and it prayed for their dismissal and the appointment of new *mutwallis* and a scheme of management, and for an order to the defendants to furnish accounts of the income and expenditure of the alleged *wakf* property.

The defendants denied mismanagement and liablity to render accounts, and stated that their father Hamid Shah had constructed the shops and the mosque which was originally a mere *masalla* or prayer platform, and had arranged that a part of the income from the shops should be devoted to the upkeep of the *masalla*, and the remainder enjoyed by himself and his descendants. In an oral statement Ghulam Mustafa Shah defendant expressly said that the shops were not endowed property, but were the property of the defendants.

The suit was at first dismissed by the Trial Court and was then remanded for redecision by the District Judge. It is unnecessary to say more than this about the earlier proceedings. The issues upon which the Trial Court has adjudicated after the remand are as follows :—

(1) Did the defendants' father build the mosque and shops ?

(2) Did he make it *wakf alal aulad* ? Is it valid under Muhammadan Law ?

(3) Are the defendants proprietors of the mosque and shops, and are they in possession as such and not as *mutwallis* ?

(4) Can defendants get any rights in the property or its income by their own previous acts or conduct ?

(5) Do not the defendants make a proper arrangement for the repairs etc., of the mosque ?

(6) Are the defendants, under any circumstances, liable to removal ?

(7) How much is due from defendants out of the rent of shops ?

Ghulam Mustafa Shah died before the 17th October 1917, and for him were substituted, as defendants, Zulfikar Ali Shah, his son, and *Mst.* Sardar Bibi, his widow. Fateh Ali Shah died before the 28th November 1918, and his representative was taken to be Zulfikar Ali Shah.

On the 5th December 1918, the lower Court decided the above issues. It held that Hamid Shah, father of the original defendants, had built the mosque and shops, but was not the founder of the mosque as there had been a mosque at the place before. Secondly, it held that the defendants were not the owners of the property, but had been in possession merely as *Mutwallis* of the mosque, and that they had no rights as owners of the property. It held further that no decision of the 5th and 6th issues was necessary since the original defendants had died and Zulfikar Ali Shah, not being a descendant of the founder of the mosque, had no claim on the post of *mutwalli*. On the 7th issue a preliminary decree was passed ordering the defendants to submit accounts.

On the 3rd January the Court fixed the 15th January for a final decree. It proceeded to pass a final decree on the 13th January by which the defendants were ordered to pay Rs. 5,000 from the property of the original defendants, and a committee of 5 managers, including Nabi Bakhsh, one of the plaintiffs, was appointed. On the 15th January, the date fixed, the defendants submitted an appplication praying that a final decree should not be passed till the decision of their appeal from the preliminary decree. This was endorsed by a note that a final decree had been passed already on the 13th January. There is no explanation of the very unusual procedure of the lower Court in fixing the 15th January, and then disposing of the case two days earlier, and for this reason alone the final decree would have to be set aside.

The defendants have appealed against both decrees. The finding of the learned Sub-Judge on the 1st issue is based upon documents which have not been proved, and upon evidence recorded by his predecessor which does not appear to us to have been understood properly. There is no tangible proof of the existence of any previous mosque, and we

must hold that Hamid Shah was the original founder of this religious institution. The learned Counsel for the plaintiffs-respondents does not dispute this conclusion.

The finding of the lower Court that the defendants were not owners of the shops is not challenged by the present appellants, and it is admitted that the whole premises are *wakf* property.

The question of mismanagement was not decided by the lower Court, but after examining the evidence we have no hesitation in holding that no mismanagement has been established. One of the plaintiffs' own witnesses, Din Mahomed, has admitted that the mosque is and has been properly equipped with everything necessary. A criminal complaint made by Gulam Mustafa Shah on the 24th February 1915 against Nabi Bakhsh and others has been put in by the plaintiffs and relied on by them. This complaint alleged that Nabi Bakhsh and others had interfered with repairs which were being carried out by the complainant at the mosque in question, and had declared that he would not allow the complainant to repair the place. If, therefore, there has been any neglect to carry out repairs the plaintiffs, or some of them, are responsible themselves.

Zulfikar Ali Shah is, we hold, the descendant of the founder, and he has first claim to be appointed manager. There is nothing to show that he is unfit. The two original defendants, admittedly, were *mutwallis*. There is no evidence that they were appointed by outside persons, and it is clear that they succeeded Hamid Shah, and that the *mutwalli ship* has gone by descent. Zulfikar Ali Shah has now succeeded as *mutwalli* and we see no reason why he should be removed.

There remains the question whether the plaintiffs have any right to call for accounts. As already stated, we hold that there has been no mismanagement, and it has been made clear in the evidence that Hamid Shah's disposition was that the income of the shops should be applied, in the first instance to the upkeep of the mosque, and that the residue, if any, should be the remuneration of the *mutwalli*. There is nothing contrary to law in a trust of this nature. As pointed out in *Ismail Ali Khan* v. *Hamedi Begum* (1) the situation would have been entirely different had the dedication allowed the *mutwallis* to appropriate, in the first instance, whatever amount they pleased and obliged them only to apply the remainder, if any, for the purposes of the mosque. In the present case, there is evidence that the late defendants have paid the *Imam* and have kept the mosque up on shop rents, which originally were not more than a few annas *per mensem*. There is also evidence, and it is a part of the plaintiffs case, that the plaintiffs or their predecessors, some years ago, sunk a well for the use of worshippers at this mosque, either paying the costs themselves, or collecting subscriptions for it. Had there been a surplus from the rents of the shops to which the mosque was entitled, there is no doubt that the cost or part of the cost of the well would have been claimed from the original defendants, and it is clear that this was done. No good cause has been established for the defendants being ordered to furnish accounts.

We accept both appeals, and order that the plaintiffs' suit be dismissed. In view of the defendants' original pleadings we order parties to bear their own costs in the 1st Court. The appellants will have their costs in this Court.

Z. K. *Appeals accepted.*

(1) 62 Ind Cas. 455 ; 6 P. L. J. 218; 2 P. L. T. 658.

JAGANNATH PERSHAD *v.* BECHU

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 61 OF 1923.

August 30, 1923.

Present :—Mr. Dalal, J. C.

JAGANNATH PERSHAD AND OTHERS—PLAINTIFFS—APPLICANTS
versus
BECHU AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Oudh Rent Act (*XXII of* 1886), *ss.* 119, 135—*Civil Procedure Code* (*Act V of* 1908), *ss.* 100, 115—*Appeal to District Judge from appellate decree of Collector—Second appeal, grounds for—Finding of fact—Decision of District Judge as Rent Court—Revision, whether competent.*

The High Court has jurisdiction to interfere in revision with a decision of a District Judge acting as a Rent Court, under the provisions of section 115 of the Civil Procedure Code read with section 135 of the Oudh Rent Act (p. 328, col. 1).

Chauharja Baksh v. *Kalka Pande*, 72 Ind. Cas. 394; 9 O. L. J. 543; (1923) A. I. R. (O.) 18, followed.

By virtue of the opening words of section 119 of the Oudh Rent Act, an appeal to the District Judge from an appellate decree of the Collector will attract the provisions of section 100 of the Civil Procedure Code, and will be limited to grounds on which a second appeal is admissible. (p. 328, col. 1).

The question whether a fact has been proved when evidence for and against has been properly admitted is a pure question of fact. (p. 329, col. 1).

Nafar Chandra Pal v. *Shukur Sheikh*, 51 Ind. Cas. 760; 46 C. 189; 23 C. W. N. 345; 9 L. W. 552; 45 I. A. 183 (P. C.), followed.

Revision against the decree of the First Additional District Judge, Lucknow, dated the 19th March 1923, reversing the decree of the Collector, Bara Banki, dated the 12th December 1922.

Mr. *Haider Husain*, for the Applicants.

Mr. *Moti Lal Saksena* and Dr. *J. N. Misra*, for the Opposite Party.

JUDGMENT.—This application for revision under section 115 of the Code of Civil Procedure primarily involves the question of the interpretation of some additional words added to section 119 of the Oudh Rent Act (XXII of 1886). It is enacted there that subject to the Provisions of the Code of Civil Procedure 1908, as applied by this Act, an appeal shall lie from original or appellate decree of a Collector, in a suit of a description mentioned in clause (2) of section 108, to the District Judge if the value of the suit does not exceed by Rs. 5,000. In the present case a suit for the recovery of arrears of rent was instituted in the Court of an Assistant Collector of the second class in the District of Bara Banki. A certain amount was claimed by the proprietor and the defence was that the amount of the rent was a sum entered in the village record. The proprietor replicated by an exhibition of fraudulent concealment of rent to avoid enhancement of revenue and alleged that what he claimed was the actual rent agreed between the parties, though a lower rent was entered in the village record with the connivance of the *patwari*. The Assistant Collector accepted the facts to be as put forward by the proprietor and entered a finding that the amount of the rent was the amount entered in the plaint. He passed a decree against the defendant in accordance with this finding. The tenant took the matter in appeal to the Collector of the District, under section 116 (*a*), who upheld the finding of fact of the Assistant Collector. The tenant next appealed to the learned District Judge of Lucknow under section 119 as such an appeal from an appellate decree of the Collector is allowed under the provisions of that section. The learned Judge was of opinion, that his powers of interference in an appeal from an appellate decree of the Collector were the same as his powers in the case of an appeal from an original decree of the Collector. Having taken that view he examined the evidence on the record and came to the conclusion that the finding of fact of the two Courts subordinate to his was incorrect. He held the rent to be the amount entered in the village record. In revision before this Court it is pleaded on behalf of the proprietor that the learned District Judge over-stepped the limit of his jurisdiction, because his interference in appeal from an appellate decree of a Collector was restricted to the grounds mentioned in section 100 of the Code of Civil Procedure, similar to those for which a second appeal may lie to the High Court.

JAGANNATH PERSHAD *v.* BECHU

A preliminary objection was taken by the learned Counsel for the respondent that this Court has no authority under the Oudh Rent Act to exaimne tho procedure of the learned District Judge under section 115 of the Code of Civil Procedure. This matter, however, is concluded by authority in favour of tho jurisdiction of this Court. In *Chauharja Bakhsh* v. *Kalka Pande* (1) the question was considered by a Bench of this Court and a preliminary objection, such as is raised here, was rejected. The provisions of the Code of Civil Procedure, so far as they are not inconsistent with the provisions of the Oudh Rent Act, are made applicable to all suits and other proceedings under that Act by section 135. There is no special provision in the Act in bar of the exercise of the revisional jurisdiction of this Court over any of the Courts in Oudh subordinate to it in the terms of the Code of Civil Procedure. It must, therefore, follow that the provisions of section 115 will have effect even where the District Judge has acted as a Rent Court.

In my opinion, the view taken by the learned Judge of the provisions of section 119 is incorrect. He has not appreciated the force of the opening words of the section. "Subject to the provisions of the Code of Civil Procedure as applied by this Act." An appeal from an appellate decree will attract the provisions of the Code of Civil Procedure and will be limited to only certain grounds on which a second appeal is admissible. It is true that this is not specifically stated in this particular section or anywhere else, but the provisions of other sections and the trend of the Act imply such a restriction. By section 119 (A) the rules for the time being in force in regard to the manner in which appeals from the decrees of Civil Courts are heard and determined are made applicable in respect to appeals under the Act both to the District Judge and to the Judicial Commissioner. I think the provisions of section 116 or, if I may be permitted to say so, the explicit and implied provisions of that section throw a considerable light on the method of codification and the manner in which the Act should be interpreted. That section allows an appeal from a decree made by a Collector to the Commissioner and also from a decree made by an Assistant Collector of the first class. If the Collector happens to pass an original decree there is a proviso that the appeal, in cases where one lies to the Commissioner and not to the Civil Court, shall not lie except on the grounds mentioned in section 100 of the Code of Civil Procedure. Even the first decision of a Collector on facts is held to be final in matters to which an appeal is allowed to the Commissioner. At the same time there is no such explicit proviso as regards a finding of fact by a Collector recorded in appeal from a decree made by an Assistant Collector of the second class. The framers of the Act obviously thought that this would be implied because section 116 also opens with the words similar to section 119 "subject to the provisions...of the Code of Civil Procedure." This method of codifying may be lacking in merit, but I think there ought to be no doubt as to the meaning. It appears that the word "appellate" was added to section 119 by Act No. IV of 1921 in order to remove second appeals in Rent and cognate suits from the cognizance of the Commissioner under section 116 and to give jurisdiction over them to the District Judge and not with a view to make the District Judge a Judge 'of facts in second appeal, contrary to well recognised principles of legislation in India. If the latter intention had been entertained by the local Legislature, a first appeal to the Collector would have been considered superfluous and discontinued by an amendment of Section 116. (*a*).

The one question now remains whether the decree of the lower Appellate Court is open to interference by this Court under section 115. The learned Counsel for the respondent ingeniously argued that the point decided by the lower Appellate Court was one of law as depending on inferences to be derived from certain facts. Unfortunately for this argument, the learned Judge makes it clear that he has not proceeded on an examination of the facts of the case from that point of view. He has deliberately stated that he re-opened the question of fact because he was entitled to do so under the law. In doing so it is clear, in accordance with the interpretation placed by me on the wording of section 119, that he has exercised a jurisdiction not vested in him by law. The learned Counsel

(1) 72 Ind. Cas. 394 ; 9 O. L. J. 543 ; (1923) A. I. R. (O.) 18.

for the applicant referred to a ruling of the Privy Council which completely covers this point *Nafar Chandar Pal* v. *Shukur Sheikh* (2). Their Lordships observed at page 195 of the report. "Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact.

"Their Lordships have carefully considered the Judgment of the High Court with these matters present to their minds, but they are unable to find that the decision of the District Judge stood in any shadowy borderland between fact and law."

Here also the finding of the Collector after weighing the evidence on the record is clear and distinct as to the amount of rent payable by the tenant to the proprietor and does not stand "in any shadowy borderland between fact and law." The learned Judge has given excellent reasons in support of his finding of fact but he had no jurisdiction to interfere with the finding of fact recorded by the Collector.

In the result, this application and the other similar applications are allowed. The decree of the learned District Judge is set aside and the decree of the Collector restored. Having regard to the facts and circumstances of the case I direct that parties shall bear their own costs subsequent to the decree of the Collector.

Z. K. *Application allowed.*

(2) 51 Ind. Cas. 760 ; 46 C. 189 ; 23 C.W. N. 345; 9 L. W. 552 ; 45 I. A. 183. (P.C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2285 OF 1920.

November 19, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

Mussammat BASANTI AND ANOTHER —DEFENDANTS —APPELLANTS

versus

KABUL SINGH AND OTHERS— PLAINTIFFS —RESPONDENTS.

Custom—Ancestral property—Burden of proof—Presumption—Appeal, second—Finding of fact based on no evidence, whether binding.

A finding as to the ancestral nature of certain property based on mere conjectures and presumptions is liable to be set aside in second appeal. (p. 330, col. 1).

Bhagwan Das v. *Shamsher Singh*, 44 Ind. Cas. 433; 33 P. L. R. 1918 ; 55 P. W. R. 1918, followed.

The mere fact that the ancestor of the plaintiffs and of the last male holder of the property, who were brothers, were at one time in possession of lands in the *patti* in which the land in dispute is situate, is not sufficient on which to base a finding that their father was in possession of the land in dispute. (p. 330, col. 2).

Jiwan Singh v. *Har Kaur*, 22 Ind. Cas. 415; 41 P. R. 1914 ; 51 P. L. R. 1914 ; 94 P. W. R. 1914, distinguished.

Appeal from the decree of the District Judge, Ambala, at Simla, dated the 26th July 1920, reversing that of the Junior Subordinate Judge, Ambala, dated the 15th April 1920.

Mr. *M. L. Puri*, for *Bakhshi Tek Chand*, for the Appellants.

Dr. *G. C. Narang*, for the Respondents.

JUDGMENT.—The plaintiff-respondents sued for a declaration that the gift of certain land, dated the 22nd July 1918, by *Musammat* Sobhi, widow of Kaula, to her daughter *Musammat* Bishni should not affect the reversionary rights of the plaintiff. There were two points for decision : (1) whether the plaintiffs were reversioners of Kaula ; and (2) whether the land was their ancestral property. The first Court dismissed the suit holding that the plaintiffs had not proved that they were Kaula's reversioners, but it did not

decide the question whether the land was ancestral or not. The learned District Judge decided both points in plaintiffs' favour and decreed their claim.

In second appeal by the defendants it is urged that the finding of the District Judge that the land is the plaintiffs' ancestral property is based upon no evidence. A finding of fact by lower Appellate Court if based upon evidence is no doubt binding upon this Court, but if it is not based upon any evidence it is not binding. The only evidence referred to by the learned District Judge in support of his finding is in the *kaiffiyat deh* of 1888 when the proprietors of *Patti* Sudh Singh where the land in suit is situated, stated that Kuman, Sukhia and Dhuman were their ancestors, and that Dhuman's branch held one plough and Kuman and Sukhia half a plough each. Kaula is the descendant of Sukhia and the plaintiffs are the descendants of Kuman and Dhuman. These three, it has been held by the learned District Judge, are the sons of Shamira, and he appears to have considered that because these three brothers held the land in the *Patti* in the shares above stated, it must have descended to them from their father. The *kaiffiyat deh* shows that Phanu was another proprietor in this *Patti* and that his share in the land was proportionate to two and a half ploughs. We do not see how it is legitimate from these facts to draw the inference that the father of Kuman, Sukhia and Dhuman must have held the land. In the case reported as *Jiwan Singh* v. *Har Kaur* (1), the learned Judges said that the express mention of the common ancestor in the pedigree-table was presumptive proof that the land had descended from him. But Shamira's name does not appear in the pedigree table of the village and, therefore, even this amount of proof that the land descended from him is wanting. We have been referred to the case reported as *Bhagwan Das* v. *Shamsher Singh* (2), where it was held that a judgment based upon mere conjectures and presumptions was liable to be set aside even in second appeal. In that case on the death of an occupancy-tenant his collaterals claimed to succeed to his tenancy, and it was held that the *onus* lay on them to establish affirmatively that their common ancestor occupied the land. Here also it lay upon the plaintiffs to prove that their common ancestor Shamira occupied the land. Bahadur Singh, the father of Kaula, is shown in the Settlement Record of 1852 as owning some land at that time, but no attempt has been made to show that he was in possession of the land now in suit. If this had been shown it would have been a piece of evidence in favour of the plaintiff's case. We hold that the mere fact that the ancestors of the plaintiffs and of Kaula were formerly in possession of the lands in this *Patti* is not sufficient on which to base a finding that their father was in possession of the land in suit.

We, therefore, accept the appeal and, setting aside the order of the lower Appellate Court, restore the order of the first Court, and dismiss the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 22 Ind. Cas. 415; 41 P. R. 1914 ; 51 P. L. R. 1914; 34 P. W. R. 1914.

(2) 44 Ind. Cas. 433; 33 P. L. R. 1918; 55 P. W. R. 1918.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 14 OF 1923.

September 14, 1923.

Present :—Mr. Dalal, J. C.

Must. CHANDRA KUAR—OBJECTOR—APPELLANT

versus

CHOTEY LAL—APPLICANT—RESPONDENT.

Guardian and Wards Act (VIII of 1890), ss. 19, 25—Father, whether can be appointed guardian of minor son—Custody of minor, recovery of—Procedure.

Under section 19 of the Guardian and Wards Act, a District Judge has no jurisdiction to appoint a father as the guardian of his infant son. The father is the natural guardian of the son. (p. 331, col. 1).

Mushaf Husain v. *Muhammad Jawad.* 48 Ind. Cas. 60; 21 O. C. 194 ; 5 O. L. J. 616 ; *Mrs. Annie Besant* v. *Narayaniah,* 24 Ind. Cas. 290 ; 38 M. 807 ; 27 M. L.

CHANDRA KUAR *v.* CHOTEY LAL

J. 80 ; 18 C. W. N. 1089 ; 1 L. W 520 ; (1914) M. W. N. 585 ; 16 M. L. T. 165 ; 20 C. L. J. 253 ; 16 Bom. L. R. 625 ; 12 A. L. J. 1155 ; 41 I. A. 314 (P. C.), relied on.

The remedy of a father to obtain the custody of his infant son is by means of a regular suit and not by application under section 25 of the Guardian and Wards Act. (p. 331, col. 2).

Achratlal Jekisendas v. *Chimanlal Parbhudas*, 37 Ind. Cas. 215 ; 40 B. 600 ; 18 Bom. L. R. 582, relied on.

Appeal against the order of the District Judge, Sitapur, dated the 11th April, 1923.

Mr. *L. S. Misra*, for the Appellant.

JUDGMENT.—According to the arguments of the learned Counsel himself who appears on behalf of *Must.* Chandar Kuar this Court has no jurisdiction to interfere with the custody of the child, the son of *Must.* Chandar Kuar and Chotay Lal. It was pointed out by the learned Counsel that under section 19 of the Guardian and Wards Act the District Judge had no authority to appoint Chotay Lal guardian of his son. This contention is correct as laid down by this Court in *Mushaf Husain* v. *Muhammad Jawad* (1), following the Privy Counsel ruling reported in *Mrs. Annie Besant* v. *Narayaniah* (2). There is, therefore, no guardian appointed of the child. The father is the natural guardian and has at present the custody of the child. I do not see how the applicant without being appointed guardian by the District Judge can obtain custody of the child. If she wants custody of the child the proper procedure for her would be to apply to the Court of the District Judge for certificate of guardianship. If she does obtain a certificate she will then be entitled to claim the custody under section 25. At present as the proceedings stand neither the District Judge nor this Court has any authority to remove the minor from the custody of his natural guardian even if that natural guardian is unfit. As I observed the fitness or unfitness of the respondent to be guardian does not arise in the proceedings. There is no other guardian to take charge of the boy and no one has taken proceedings to be appointed guardian by reason of the unfitness of the father, the natural guardian of the child, to hold that post of responsibility. This is, therefore, not the occasion to inquire into the character and the capacity of the respondent whether he is fit to be guardian of the child or not. It may be noted that the lower Court passed an order under section 25 in favour of the respondent father on the basis of an illegal order appointing the father guardian of his minor son. If there had been no such order a father, the natural guardian of his son, would not have been able to apply under section 25 for the custody of his son *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (3). The remedy of the father lies through a regular suit. The District Judge passed both orders; one of appointment of the father as guardian and the other under section 25, without jurisdiction. Now that the boy is in the custody of his father the natural guardian, other considerations will arise. I saw the child in Court and it looked happy, so no urgent necessity arises to remove the child from the father's custody and start proceedings of my own motion for the appointment of another guardian and give that guardian temporary custody of the child under section 12. The order of the District Judge appointing the respondent Chotay Lal guardian of his son is not appealed against, so it is not possible for this Court to cancel the order. But the attention of District Judge is drawn to the rulings quoted above. He had no authority to appoint Chotay Lal guardian of his infant son under the Guardian and Wards Act.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 48 Ind. Cas. 60 ; 21 O. C. 194 ; 5 O. L. J. 616.
(2) 24 Ind. Cas. 290 ; 38 M. 807 ; 27 M. L. J. 30; 18 C.W.N. 1089; 1 L.W. 520; (1914) M.W.N. 585 ; 16 M. L. T. 165 ; 20 C. L. J. 253 ; 16 Bom. L. R. 625; 12 A. L. J. 1155 ; 41 I. A. 314 (P. C.).

(3) 37 Ind. Cas 215 ; 40 B. 600 ; 18 Bom. L. R. 592.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1122 OF 1923.

January 31, 1924.

Present :—Mr. Justice Moti Sagar.

MUNSHI—DEFENDANT—APPELLANT
versus
GHANAYA AND OTHERS—PLAINTIFFS
AND *Mussammat* PARTAPI—
DEFENDANT—RESPONDENTS.

Custom—Alienation—Widow, mortgage by—Necessity—Marriage of daughter—Amount of expenditure.

It is a well recognized custom that a daughter should be given some jewellery on the occasion of her marriage, and it is also necessary that the guests who come to the bride's house on that occasion should be properly feasted and entertained. (p 333, col. 1).

A mortgage of her husband's estate, therefore, made by a widow to raise money for these purposes is justified on the ground of necessity. (p. 333, col. 1).

What would be reasonable expenditure for the marriage of a daughter if the father were alive, would be reasonable on the part of his widow after his death if the circumstances of the estate remain the same. (p 333, col. 1).

Gurdit Singh v. *Mehr Singh*, 67 P. R. 1884, followed.

Appeal from the decree of the Sub-Judge, first Class, Hoshiarpur, dated the 25th August 1922.

Lala *Fakir Chand*. for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.— On the 25th of November 1921 *Mussammat* Partapi, widow of one Bhola, mortgaged 30 *kanals*, 5 *marlas* of land in village Sus in the Tahsil and District Hoshiarpur to one Munshi for a sum of Rs. 1,700. The plaintiffs, who are the collaterals of *Mussammat* Partapi's husband, thereupon brought this suit for a declaration that the alienation was without consideration and legal necessity and that it would not affect their reversionary interest. The consideration for the mortgage as recited in the deed was made up of the following items :—

	Rs.	a.	p.
(1) Due to prior mortgagees...	510	0	0
(2) Expenses for registration,...	30	0	0
(3) Left in deposit with the mortgagee for defraying the marriage expenses of *Mussammat* Kisri, the daughter of the mortgagor.	1,160	0	0

The Trial Court dismissed the suit holding that consideration and necessity had been fully established. An appeal was preferred against the decision to the District Judge who was of opinion that a sum of Rs. 1,160 was not a reasonable amount of expenditure to incur on the marriage of a daughter and that half of that sum would have been quite sufficient for that purpose. No objection was raised by the plaintiffs with regard to the other items mentioned in the mortgage-deed, and it was consequently held that they had been raised for a necessary purpose. The appeal was accordingly accepted and a decree awarded to the plaintiffs for the declaration prayed for subject to their paying a sum of Rs. 1,120 to the defendant-mortgagee when succession opened out. The defendant-mortgagee has now come up in second appeal to this Court through Mr. Fakir Chand, and I have heard Dr. Nand Lal on behalf of the plaintiffs-respondents.

After hearing the learned Counsel on both sides I am of opinion, that the learned District Judge was not justified in reducing the marriage expenses to one-half, and that the plaintiffs' suit ought to have been dismissed in its entirety. That the marriage of *Mussammat* Partapi's daughter did in fact take place shortly after the mortgage-deed in question was executed cannot for a moment be doubted. It is also clear from the evidence that the whole of the sum of Rs. 1,160 was actually expended over the marriage of the girl and that the expenditure was personally supervised by the mortgagee with whom the money had been left in deposit. There is also evidence on the record to show that the prices of foodstuffs were very high at the time when the marriage was celebrated, and that an expenditure of Rs. 1,500 to Rs. 2,000 over the marriage of a daughter was not regarded as unreasonable for a person of *Mussammat* Partapi's position and status in life. It has been argued that the fact that the money was applied to a necessary purpose was not sufficient to justify the loan, and that it ought to have been proved that there was not sufficient income available to meet legitimate expenses without charging

the estate. In my opinion, there is more than ample evidence on the record to show that the income of the land was wholly insufficient to meet even the ordinary expenses of *Mussammat* Partapi's husband when he was alive. The husband owned 123 *kanals* of land altogether in this village, out of which he mortgaged 14 *kanals* during his lifetime and which the widow subsequently redeemed by paying off a sum of Rs. 530 to the mortgagees. It is hardly likely that Bhola would have mortgaged this land if the income was sufficient to meet his legitimate expenses. The *patwari* was produced in evidence, and he has stated that the major portion of the land is *barani* and that, though it could be let at the rate of Rs. 4 or Rs. 5 per *kanal*, yet the income actually realized by the widow was not more than Rs. 100 or Rs. 120 a year. It is in evidence that the widow served a notice upon the plaintiffs that they should make arrangements for the marriage of her girl and that she would be compelled to alienate the property if they declined to come to her aid. The plaintiffs admittedly did not pay any attention to this notice, and the widow was consequently obliged to raise money and to make such arrangements as she thought best under the circumstances. The learned District Judge is of opinion that it was absolutely unnecessary for the widow to give any jewellery to her daughter or to expend any money in entertaining the guests who must have come to her house on the occasion of the marriage, and that the expenditure incurred was wholly unreasonable. This view is obviously incorrect. It is a well recognized custom that a daughter should be given some jewellery on the occasion of her marriage, and it is also necessary that the guests who come to the bride's house on that occasion should be properly feasted and entertained. As to what would be a reasonable expenditure by a widow the general rule laid down in *Gurdit Singh* v. *Mehr Singh* (1), is that what would be reasonable for a marriage if the husband were living would be reasonable on the part of the widow after death if the circumstances of the estate remained the same. Having regard to the amount of land possessed by the husband and to his social position in life, I do not think that an expenditure of Rs. 1,160 over the marriage of his only daughter was unreasonable.

(1) 67 P. R. 1884.

The result is that I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 40 OF 1922.

October 30, 1923.

Present :—Mr. Dalal, J. C. and Mr. Wazir Hasan, A. J. C.

Musammat INDAR KUAR—DEFENDANT—APPELLANT
versus
Musammat NAND RANI KUAR—PLAINTIFF—RESPONDENT.

Oudh Estates Act (*I of* 1869), *ss.* 8, 10, 14, 15, 22—*Second summary settlement of* 1858, *effect*—*Lord Canning's Proclamation of* 1858, *effect of*—*Settlement of property after confiscation*—*Exclusive ownership*—*Trust created in favour of another, whether binding*—*Transfer or recognition of antecedent rights*—*Transfer in favour of immediate successor, effect of*—*Hindu law*—*Joint family*—*Separation*—*Unambiguous intention.*

A Talukdar possessed of the legal estates in the Talukdari property may bind himself by equitable obligations to allow beneficial interests in the same property in favour of a designated individual or in favour of a Joint Hindu family of which he himself may be a member and that he does so in the exercise of his powers of alienation *inter vivos* or by making a testamentary disposition. (p. 344, col. 2).

Case-law discussed.

Notwithstanding the strong language of Oudh Estates Act, and in particular the enactment in section 10 that the Courts are to accept the lists framed under the Act as conclusive that the persons included in them are Talukdars or grantees, and, those of section 11; the Courts may nevertheless go behind the Act to the extent at least of recognising the trusts, and may give effect to beneficial titles distinct from the statutory title under the Act.

Section 15 of the Oudh Estates Act as well as section 14 deal with cases of transfers before the passing of the Act as also with cases after the passing of that Act. (p. 347, col. 1).

In the case of a transfer by a *Talukdar*, it is the date of the transfer which counts in determining whether the transferee occupies or not the particular status assigned to him by the provisions of sections 14 and 15 of the Oudh Estates Act.

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Rani Mewa Kunwar v. *Rani Hulia Kunwar*, 1 I. A. 157 at p. 166 ; 12 B. L. R. 312 ; 3 Sar. P. C. J. 314 (P. C), relied on.

The effect of the proclamation of Lord Canning of the 15th March 1858, was to divest all landed property from the proprietors in Oudh and to transfer it and vest it in the British Government

Malka Jahan Sahiba v. *Deputy Commissioner of Lucknow* 6 I. A. 63 ; 3 Sar P C. J. 244 ; Bald. 194, relied on.

An unambiguous and defined intention on the part of one member of a Hindu joint family to separate himself and to enjoy his share in severalty has the effect of creating a division of his interest which till then he held in jointness. (p. 348, col. 1).

A proprietor in Oudh died in 1849 and was succeeded by his two sons B. and G. After consfication of the property under Lord Canning's proclamation, the Second Summary Settlement of the estate was made with B. In 1860 he got the name of G. also entered in the *Khewat* in the column of Zamindar as having equal share with himself and subsequently in the same year, when enquiry was made from him by the Government as to the family custom of inheritance he declared that he and his brother were successors to the heritage in equal shares and that in future the descendants of them both would succeed according to religious ordinance and family usage. In 1867 G applied for partition but under a compromise agreed to accept an annuity. On the passing of the Oudh Estates Act, the name of B was entered in list I and list III prepared under section 8 of the act. B died in 1871 and G succeeded to the *Taluka*. On the latter's death in 1919 a dispute arose between his widow and the daughter of B as to the right to succeed to the estate :—

Held (1) that at the time of the Second Summary Settlement, after confiscation of the estate under Lord Canning's proclamation, B acquired exclusive title to the property.

(2) that, however, B by recognising the title of G. as to one half of the interest in the estate imposed a trust upon himself in favour of the latter to that extent.

(3) that this trust was discharged by the compromise under which G accepted an annuity and relinquished his right to partition.

(4) that the compromise could not be considered as a retransfer by G. in favour of B. It was a recognition of antecedent rights and not a transfer by one brother to the other.

(5) that, therefore, on the date of the passing of the Oudh Estates Act, B was a Talukdar within the meaning of that Act without any equitable obligations attached to the estate and on his death G was his lawful successor under section 22 of the Act and on the death of the latter, his widow was entitled to succeed.

(6) that even if there was a transfer in favour of G. the result would be the same as it would be a transfer in favour of the immediate successor which would not take the estate out of the operation of the Oudh Estates Act under section 15 of the Act.

Per Dalal, J. C.:—Section 15 of the Oudh Estates Act does not apply to an estate not under transfer at the time of the passing of the said Act. Whatever transfers may have been made before the passing of the Act, if at the passing of the Act the property was in possession of the Talukdar unburdened by any trust or vested interests, the provisions of section 15 would not apply.

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated the 27th May 1922.

Messrs. *Piaray Lal Banerji*, *Aditya Prasad Rajeshwari Prasad* and *Bhawani Shankar*, for the Appellant.

Messrs. *Ram Chandra*, *M. Wasim*, *Mahesh Prasad* and *Mahabir Prasad*, for the Respondent.

JUDGMENT.

Dalal, J. C.—My learned colleague will write the main judgment, I desire to summarise briefly my view of the facts of the case and the conclusions to be drawn therefrom according to law. The facts are not intricate but the resultant deductions give rise to controversy. The property in list C is of small value, so it need not be separately considered. All the property in suit may be considered as one. It was the self-acquired property of one Bahadur Singh, who died in 1849 leaving him surviving two sons Bhagwant Singh the father of the plaintiff and Girdhari Singh the husband of the principal defendant *Musammat* Indar Kuar who alone among defendants counts in this litigation. This is the short pedigree :—

Bahadur Singh

Bhagwant Singh =*Musammat* Mahrani wife died 1913	Girdhari Singh =*Musammat* Indar Kuar (Principal deft.)
Musammat Nand Rani Plaintiff	Daughters (Other defendants)

On the 13th February 1856, Oudh was annexed and confiscation of all property was proclaimed in March 1858. The Second Summary Settlement was made with Bhagwant

Singh alone in 1858 (Ex. A22, p. 85, Part III) and a vernacular *Sanad* was granted to him on 27th October 1860 (Ex. A73, p. 23 Part III). During the preparation of the *Khewa* he got the name of his brother Girdhari Singh also entered in the *Khewat* in the column of name of *zemindar*, the entry being "Bhagwant Singh and Girdhari Singh in equal shares." (Ex. 10, page 87, Part III). In 1860 when inquiry was made from Bhagwant Singh as to the family custom of inheritance he declared that he and his younger brother Girdhari Singh were successors to the heritage in equal shares and that in future the descendants of them both shall be the heirs and successors according to religious ordinance and family usage (Ex. 115, p. 132). It is a disputed matter whether on 1st November 1861, a primogeniture *Sanad* was given to Bhagwant Singh or an ordinary one (Ex. 150, p. 26, Part III). Finding will be recorded in its proper place. On 15th July 1867 Girdhari Singh applied for partition of his half share (Ex. 51, p. 213, Part III) and subsequently on 9th August he protested at the application being sent to the British Indian Association (Ex. 52, p. 219) while the matter was pending before that association a compromise was effected between the brothers on 8th September (Ex. 53, p 221) by which Girdhari Singh accepted a money payment of Rs. 1,200 a year until the debt on the property was discharged and subsequently Rs. 2,600 a year. There was a condition that if the amount remained unpaid villages yielding net profits to that amount will be set apart from the *Taluka*. This compromise was approved and Girdhari Singh's suit dismissed by the Association on 12th September (Ex. A1, p. 223, Part III) and the order confirmed by the Financial Commissioner on 7th July 1869, (Ex. A 47, p. 225, Part III). On 12th January 1869 the Oudh Estates Act was passed and Bhagwant Singh's name appeared in List I and List III prepared under section 8 of the Act, that, he was one of the persons considered as *Talukdars* to whom *Sanads* had been or may be given by the British Government declaring that the succession to the estate comprised in such *Sanads* or grants shall thereafter be regulated by the rule of primogeniture. The Lists are printed in Part I of the file at pages 151 and 152 and Bhagwant Singh's name appears in the two lists.

Bhagwant Singh died on 9th December 1871, and for the purposes of this litigation it will not be necessary to examine the two agreements subsuquently arrived at between his widow and *Musammat* Mahrani and his brother Girdhari Singh. If Bhagwant Singh owned the property at his death as a separated Hindu his daughter's present claim will be within limitation because Bhagwant Singh's widow a life-holder died in 1913, within 12 years of the institution of the present suit. If succession to the property was governed by section 22 of the Oudh Estates Act, Girdhari Singh was a successor to the *Taluka* on Bhagwant Singh's death and the plaintiff would have no title to the property whatever the negotiations and agreement between the plaintiff's mother and Girdhari Singh may have been.

The plaintiff's case as argued by her learned counsel Mr. Wasim may be shortly put. Bhagwant Singh and his brother Girdhari Singh succeeded to their father's self-acquired property as joint tenants, that Bagwant Singh obtained the Summary Settlement as head and representative of the joint family made up of himself and his brother, that he remained throughout in possession of the property as manager of the joint family, that in 1867 there was separation in the family and Bhagwant Singh became sole owner of the family property as a separated Hindu and that on his death the plaintiff's mother for her life and the plaintiff after her mother's death became entitled to the property in suit. Even granting that prior to the confiscation the two brothers were joint tenants of the property, though it was self-acquired property of their father, the confiscation put an end to all previous rights *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (1) and there is no reason to suppose that Bhagwant Singh obtained the Summary Settlement as representing or as manager of a joint Hindu family. The settlement was made with him alone. Thus in my opinion the plaintiff's case based on the claim that Bhagwant Singh obtained settlement not in his personal capacity but in his representative capacity cannot stand.

(1) 5 I. A. 1 ; 1 C. L. R 318 ; 3 Sar. P. C. J. 763; Bald. 148 ; Rafique and Jackson's P. C. No. 48 ; 3 Suth. P. C. J. 474 (P.C.).

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This position being a weak one the learned counsel put forward an alternative case under two heads (1) that after the Summary Settlement Bhagwant Singh transferred the property to the joint Hindu family consisting of himself and his brother or (2) that Bhagwant Singh held the property in trust for the joint family. If the case was one of trust the trust discharged itself in 1867, so there is no reason why the property in suit should not be governed by the Oudh Estates Act which was passed in 1869 at a time when no trust existed and Bhagwant Singh was full legal owner of the property unburdened by any trust. To save vested interests at the time of the passing of Act I of 1869, their Lordships of the Privy Council have in repeated cases taken the view of the actual holder being a trustee for the beneficiaries who had acquired vested interest in the property prior to the passing of the Act. Those are the series of cases of Hardeo Bakhsh's property reported in *Thakoor Hardeo Bux* v. *Thakoor Jawahir Singh* (2), *Thakoor Hardeo Bux* v. *Thakoor Jawahir Singh* (3), *Pirthi Pal* v. *Jowahir Singh* (4) and in *Thukrain Sookraj Koowar* v. *Government, Baboo Ajeet Singh* (Bhinga case) (5) the same view of a trust was taken by their Lordships of the Privy Council. In *Hurpurshad* v. *Sheo Dayal* (Maurawan case) (6) their Lordships took the view of transfer, but that was with respect of the self-acquired property of the *Talukdar* which he treated as joint family property (see discussions of the principles of this case, last 12 lines *Thakoor Hardeo Bux* v. *Thakoor Jawahir Singh* (2) The better view, therefore, appears to be that Bhagwant Singh held the property as legal owner with a trust in favour of the joint Hindu family made up of himself and his brother. When the trust was wiped out in 1867 Bhagwant Singh's legal title remained and the property came within the purview of the Oudh Estates Act and Girdhari Singh succeeded to it under section 22 (6) of the Act.

In the case of a transfer, the learned counsel argued that property once transferred would have succession to it governed by section 15 of Act I of 1869 that is by rule of ordinary Hindu law. Secondly, it would not be an estate under section 23 of the Act because after partition Bhagwant Singh's sons if any would have an interest in the propery and Bhagwant Singh would not be deemed by the partition to have acquired a permanent heritable and transferable right in the property. In my opinion section 15 is wrongly applied to property which is not under transfer at the time of the passing of Act I of 1869. All the Privy Council cases quoted above of trust and transfer aimed at preserving the rights which were vested at the time of the passing of the Act. In the present case, when the Act was passed, we find Bhagwant Singh a *Talukdar* of List holding property which was an estate as defined by section 3 and with his name entered in the third list of Talukdars who desired to be governed by the rule of primogeniture. In my opinion, whatever transfers may have been made between 1858 and 1869, that is, after the Summary Settlement and before the passing of the Act, if at the time of the passing of the Act the property is in the possession of the *Talukdar* unburdened by any trust of vested interest the provisions of section 15 will not apply. I take the view that section 15 was enacted to take out of the Act estates which at the time of the passing of the Act were held by persons other than *Talukdars* with whom Summary Settlement was made. The whole object of the Act would be frustrated, if in every case where an estate is in the possession of a *Talukdar* the Court is required to inquire how the property had fared since the Summary Settlement. At the time of Bhagwant Singh's death all the essentials of section 22 were satisfied. Bhagwant Singh was a *Talukdar* whose name was inserted in the third list mentioned in section 8 and he died intestate as to his estate. There is also another point of interest in the present case. Even if it be held that there was a transfer by Bhagwant Singh in favour of joint Hindu

(2) 4 I. A. 178 at p. 181 ; 3 C. 522; 3 Sar. P. C. J. 704 ; 3 Suth. P. C. J. 427 ; Rafique and Jackson's P. C. No. 45 ; 3 Ind. Jur. 337 ; 1 Ind. Dec (N. S.) 917 (P. C.).

(3) 6 I. A. 161 ; 4 Sar. P. C. J. 10 ; Bald. 18 ; 3 Suth. P. C. J. 608.

(4) 14 I. A. 37 ; 14 C. 493 ; 11 Ind. Jur. 232 ; 4 Sar. P. C. J. 758 ; Rafique and Jackson's P. C. No. 97; 7 Ind. Dec. (N.S.) 327 (P.C.).

(5) 14 M. I. A. 112 ; 2 Sar. P. C. J. 705 ; 3 Suth. P. C. J. 1 ; 20 E. R. 728.

(6) 3 I. A. 259; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth P. C. J. 304; Rafique and Jackson's P. C. No. 4 (P. C.).

family, that transfer came to an end on payment of an allowance to Girdhari Singh under the compromise and there was no retransfer of the property to Bhagwant Singh. By agreement between the parties the transfer exhausted its effect so it may be correctly argued that no operative transfer was made even by Bhagwant Singh. It will be remembered that there was no partition between the brothers each taking a certain share of the property.

Another point of view has also to be considered. Even in the case of a transfer there is no positive indication of the transfer as alleged on behalf of the plaintiff to a joint Hindu family. The entries in the *Khewat* and Bhagwant Singh's conduct and declarations may equally amount to a transfer of half the property in favour of his brother who would have succeeded to him according to the provisions of the Act to the estate if he had died without having made the transfer and intestate. As already pointed out there was no retransfer by Girdhari Singh to Bhagwant Singh and succession, therefore, will be governed by the provisions of section 14 and not section 15 of the Act.

There is also considerable validity in the argument of the defendant-appellant's learned Counsel that Bhagwant Singh could not make any transfer prior to the letter of grace and restoration of 19th October 1859. A *Talukdar* was not invested with proprietary title until that letter was issued and there could be no transfer of title prior to that date by a person with whom the Summary Settlement was made. According to that view the proceedings during the preparation of the *Khewat* cannot amount to a transfer, but should be taken as a trust.

The last question is of the *Sanad*. On behalf of the plaintiff it was argued that no *Sanad* with a primogeniture clause was granted because the copy of it at present existing in the office of the Board of Revenue does not contain such a clause (Copy Ex. 150, p. 26.) It is, however, possible that to obtain a receipt of the grantee old printed forms may have been used and the primogeniture clause may not have been entered therein. The entry of Bhagwant Singh's name in List III raises the presumption that a primogeniture *Sanad* was granted to him and the several lists of *Talukdars* for the different offices show that such a *Sanad* was granted to Bhagwant Singh (Ex. A73, p. 23, Part III). It was admitted by the learned Counsel of the plaintiff-respondent that so far as the operation of the Act was concerned the entries in Lists I and III were conclusive evidence under section 10 and that if the Act applied the succession would be governed by the rule of primogeniture. The *Sanad* becomes material only in case it is found that the Act did not apply and succession was governed by the primogeniture clause entered in the *Sanad*. The original *Sanad* has not been produced by either party and each party alleges that the other ought to be in possession. The question of possession is not easy to decide because the plaintiff was related to the grantee by blood while the defendant's husband was the successor to the properties. Either party may very well possess by both parties I have come to the conclusion that the primogeniture *Sanad* was granted to Bhagwant Singh on 1st November 1861. In that case, even if the Act did not apply succession to Bhagwant Singh's property will be governed by the rule of primogeniture.

In every view of the case, therefore, Girdhari Singh was the successor-in-interest of Bhagwant Singh and the plaintiff has no right of succession. I would, therefore, allow the appeal.

Wazir Hasan, A. J. C.—This is an appeal by Rani Indar Kuar, defendant No. I from the decree of the Additional Subordinate Judge of Lucknow, dated the 27th May 1922. The only plaintiff to the suit out of which this appeal arises, was *Musammat* Nand Rani Kuar and she is the chief respondent in the case. Defendants Nos. 2 to 8 are the daughters of Kuar Girdhari Singh, the deceased husband of *Musammat* Indar Kuar, the appellant.

Kunwar Bahadur Singh was the owner of the properties mentioned in Lists A and B attached to the plaint situate in the district of Lucknow and Bara Banki. He died in or about 1849 and was succeeded by his two sons, Kunwar Bhagwant Singh and Kunwar Girdhari Singh. The province of Oudh was annexed by the British Government on the 13th February 1856. Then came the Mutiny of 1857. After the restoration of peace and order Lord Canning, Governor-General of India, issued his famous Proclamation of the 15th March 1858, the

effect of which was "to divest all the landed property from the proprietors in Oudh and to transfer it to and vest it in the British Government." *Nawab Malka Jahan Sahiba* v. *Deputy Commissioner of Lucknow* (7). This was followed by the work of restoration known as the Second Summary Settlement, which was begun on the 1st April 1858 and completed on the 10th October 1859—*Vide* section 3 of Act I of 1869. It is common ground that the Second Summary Settlement of the properties mentioned above was made with Kunwar Bhagwant Singh. By his letter of the 10th October 1859 the Governor-General in Council was pleased "to declare that every *Talukdar* with whom the Summary Settlement has been made since the occupation of province has thereby acquired a permanent hereditary and transferable proprietary right, *viz.*, in the *Taluka* for which he has engaged including the perpetual privilege of engaging with the Government for the revenue of the *Taluka*." Kunwar Bhagwant Singh thus became the proprietor of the properties in suit. We may mention here parenthetically that the properties mentioned in List C were not dealt with separately by either of the parties at the hearing of the appeal before us. Subsequently his name was entered in Lists I and III of the Lists prepared under section 8 of the Act I of 1869. He died on the 9th December 1871. His younger brother, Kunwar Girdhari Singh, succeeded to his estate under clause (6) of section 22 of Act I of 1869. Kunwar Girdhari Singh died on the 6th August 1919 and his widow, Rani Indar Kuar, defendant No. 1 succeeded him under clause (7) of the same section and is in possession of the properties in suit. Kunwar Bhagwant Singh's widow *Musammat* Maharani, died on the 5th December 1913. The plaintiff-respondent is the daughter of Kunwar Bhagwant Singh and *Musammat* Maharani. She sued for possession of the properties in suit and her claim has succeeded in the Court below. Her case is as follows:—Kunwar Bhagwant Singh and Kunwar Girdhari Singh formed a joint Hindu family governed by the *Mitakshara* law and possessed of the properties in suit. At the date of the Second Summary Settlement Kunwar Girdhari Singh was a minor about 10 years of age. Bhagwant Singh obtained the Second Summary Settlement in his name in the capacity of the head of the joint Hindu family and the trustee of the properties belonging to that family. The first regular settlement of 1864 was also made with him in the same character. Kunwar Bhagwant Singh constituted himself by his words and acts a trustee of the joint Hindu family in respect of the properties belonging to it. In the alternative the plaintiff said that the same verbal declarations and acts of Kunwar Bhagwant Singh, which constituted him a trustee of the joint family in respect of the properties in suit, amounted to a transfer by him in favour of the same family. This state of things continued till 1867 when a division of the joint properties took place between the two brothers with the result that Kunwar Bhagwant Singh acquired the properties in suit as his share in the division and Kunwar Girdhari Singh got a cash annuity fixed for him. It is further alleged that the effect of the separation of 1867 was the transfer of Kunwar Girdhari Singh's half share in the joint family properties in favour of Kunwar Bhagwant Singh in lieu of the annuity allotted to the former. According to the plaintiff the final effect of all these events has been that the properties in suit either in whole or at least to the extent of one half are governed in respect of succession by the rules of the *Mitakshara* and that consequently on Kunwar Bhagwant Singh's death his widow, *Musammat* Maharani succeeded her husband as a Hindu widow and on her death on the 5th December 1913 their daughter, the plaintiff-respondent, became entitled to the possession of the properties in suit under the same law. In defence to this claim Kunwar Bhagwant Singh's position as a trustee for or any transfer by him in favour of the joint family was denied, so is the alleged separation of 1867. The title of Kunwar Girdhari Singh under section 22 of Act I of 1869 as well as under the terms of the primogeniture *Sanad* granted to Kunwar Bhagwant Singh was set up.

The learned Additional Subordinate Judge has found that Kunwar Bhagwant Singh constituted himself a trustee in favour of the joint family consisting of himself and his brother, Kunwar Girdhari Singh; that Kunwar Bhagwant Singh transferred the properties in suit to the said joint

(7) 3 I. A. 63; 3 Sar. P. C. J. 244; Bald. 194; Rafique and Jackson's P. C. No. 55 (P.C.).

family ; that a separation took place in the year 1867 ; that Kunwar Bhagwant Singh got the properties in suit as his share in the division of the joint family properties and Kunwar Girdhari Singh transferred his half share in the family properties to Kunwar Bhagwant Singh. He, therefore, held the succession to the properties in suit was governed by the ordinary Hindu Law and not by the provisions of Act I of 1869 and consequently on the death of Kunwar Bhagwant Singh in 1871 his widow, *Musammat* Maharani, was entitled to the estate of her husband and on her death the inheritance devolved upon the plaintiff, as the daughter of Kunwar Bhagwant Singh. As regards the primogeniture *Sanad* his finding is that no such *Sanad* was granted to or received by Kunwar Bhagwant Singh and that the entry of his name in List III was made under a mistake.

The following points were urged in support of the appeal before us :—(1) That there was neither a trust nor a transfer in favour of the joint family ; (2) That if there was any trust or transfer it was in respect of a defined half share in favour of Kunwar Girdhari Singh ; (3) That in the event of there having been a trust or a transfer in favour of the joint family that family continued as such right up to the death of Kunwar Bhagwant Singh and Kunwar Girdhari Singh succeeded to the properties in suit by right of survivorship, in other words, there was no division in 1867 as is alleged by the plaintiff; (4) That the trust, if any, came to an end in 1867 with the result that the legal title which had remained vested in Kunwar Bhagwant Singh all along, prevails ; (5) That at all events Kunwar Bhagwant Singh died possessed of the properties in suit which is an "estate" and that he was a *Talukdar* within the meaning of Act I of 1869 and succession to him and to the estate must be governed by section 22 of that Act ; (6) That a primogeniture *Sanad* was as a matter of fact received by Kunwar Bhagwant Singh, that the entry of his name in List III is conclusive evidence of the fact that he did receive such a *Sanad* and that consequently succession is governed by the terms of that *Sanad*.

(Here the Hon'ble A. J. C. gave a summary of the events bearing on the case from the time of the Second Summary Settlement of 1858 and then proceeded) :—

It would be obvious from the above narrative of the events relating to this *Taluka* that Kunwar Bhagwant Singh acquired a fresh and exclusive title to it under the Second Summary Settlement of 1858 by virtue of the Governor-General's letter of the 10th October 1869. This title was affirmed by the grant of the *Talukdari Sanad* of the 27th October 1869. It was further affirmed by section 3 of Act I of 1869. Kunwar Bhagwant Singh's name was entered in Lists I and III of the Lists maintained under the provisions of section 8 of that Act. He was, therefore, a *Talukdar* within the meaning of the Act and possessed of an estate as defined in section 2 of that Act. *Ex facie* the provisions of section 10 of the Act apply to him. It is common ground that at the date of his death Kunwar Bhagwant Singh was possessed of the *Taluk* in suit. It is also common ground that he died intestate. It follows that on his death the estate should descend according to the provisions of section 22 of Act I of 1869. His rightful heir and successor was his young brother Girdhari Singh under clause 6 of that section. Girdhari Singh at his death satisfied the definition of an heir as given in section 2 of Act I of 1869 and if he died intestate, as we must assume for the purpose of this case that he did, to him again section 22 in the matter of succession would seem to apply. His rightful successor under clause 7 of that section is his widow the defendant-appellant who is admittedly in possession of the estate. On this statement of the case the plaintiff seems to have no *locus standi*. Her case, however, is that Kunwar Bhagwant Singh's title to the estate in suit was made subject to a trust created by him in favour of the joint family consisting of himself and his younger brother, Girdhari Singh. Her further case is that it was also subject to a valid transfer *inter vivos* which he had made in favour of the same family and in either event the property ceased to be an estate and became ordinary joint family property subject to the rule of partition and on partition to the rule of inheritance governing separated property under the *Mitakshara*.

The first question, therefore, for decision in the appeal is : Did Kunwar Bhagwant Singh create any such trust ? There is a catena of decisions of their Lordships of the Privy Council on the question of trust fastened upon the legal estate which a *Talukdar* acquired

under the letter of the Governor-General of the 10th October 1869, under the *Sanad* and under the provisions of Act I of 1869.

The earliest of these decisions is that of *Thukrain Sookraj Koowar* v. *Government, Baboo Ajeet Singh* (*Bhinga case*) (5). This was given before the passing of Act I of 1869. Dealing with the effect of the Second Summary Settlement and the Governor-General's letter in relation thereto Lord Justice James in delivering the judgment of the Privy Council, made the following observation :—" In English language, it gave the registered *Talukdar* the absolute legal title as against the State and against adverse claimants to the *Talukdari*; but it did not relieve the *Talukdar* from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement. In this case the appellant was the acknowledged *cestui que trust* of the registered *Talukdar*, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered."

The next case decided by their Lordships of the Privy Council was that of *Widow of Shunker Sahai* v. *Rajah Kashi Pershad.* (8) This case related to the *Taluka* Sessendee which was one of the five *Talukas* exempted from the general confiscation effected by Lord Canning's Proclamation of the 15th March 1858. Their Lordships observed :—" Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the Summary Settlement, and on other occasions (the former being in the nature of an admission on record) were equivalent to such a deed; and that accordingly the relation of trustee and *cestui que trust* having, so to speak, been established between them, she (the appellant) was entitled to a one-third share of the profits of these villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

The next case is that of *Hurpurshad* v. *Sheo Dayal* (Maurawan case) (6). This case again related to an estate which was exempted from the general confiscation of March 1858. By the 8th paragraph of Lord Canning's Proclamation of the 15th March 1858 it was declared that Chandan Lal, the *zamindar* of Maurawan, who had died in 1854, was thenceforward the sole hereditary proprietor of the lands which he held when Oudh came under the British rule. Subsequently the first as well as the Second Summary Settlement of those lands were made with Gauri Shankar one of the sons of Chundan Lal. Gauri Shankar also received a Talukdari *Sanad* in respect of those properties. In the second schedule annexed to Act I of 1869 the name of Chundan Lal was entered. Their Lordships of the Privy Council held that in consequence of the provisions of section 4 of Act I of 1869 Gauri Shankar must be deemed to have acquired in the properties a permanent heritable and transferabe right and had power by will or alienation *inter vivos* to transfer the same. Claims for partition amongst the descendants of Chundan Lal and his brother were decreed on the grounds (1) that the Summary Settlement, and the *Sanad* were granted by the Government to one member of the family and were not intended to enure to the sole benefit of Gauri Shankar and did not affect the rights of the other members of the joint family. As regards the properties which were granted to Gauri Shankar for loyal services rendered during the Mutiny their Lordships held that such services were presumably rendered with the use of the family funds and consequently those properties also could not be self-acquired property of Gauri Shankar within the meaning of the Hindu Law; and (2) assuming any portion of such properties to have been the self-acquired property of Gauri Shankar, he became permanent owner thereof with power to transfer the same by will or alienation *inter vivos.* On the evidence in that case their Lordships held that Gauri Shankar had in his life-time transferred those properties in 1860 to the family to be held as joint family property. Two observations fall to be made with regard to this decision of their Lordships of the Privy Council upon which greatest reliance is placed by the learned Counsel for the plaintiff-respondent in support of his case. I. That portions of the estate of Maurawan which belonged to the family at the time when Oudh came under the British rule continued to retain its old character of joint family property for the reason that by the 10th paragraph of the Proclamation of Lord Canning the estates mentioned in the 8th paragrapth of that proclama-

(8) 4 I. A 198 ; 8 Sar P. C. J. 289 ; Sup. I. A. 220; 6 [illegible] P. C. J. 4 ; Rafique and Jackson's P. C. No. 28 (P. [illegible]).

tion were exempted from the general confiscation. The result of this exemption obviously was that the proprietary right in that property did not vest in the British Government as it did in other cases but the old title was maintained and this title was subsequently recognised in the proceedings of the settlements and in the *Sanad* granted by the British Government to Gauri Shankar. There was thus a nucleus of the ancestral joint family property with the aid of which subsequent acquisitions were made by the head of the family. Both classes of the property, therefore, were joint family property. And secondly, it was established in that case that Gauri Shankar transferred the property by alienation *inter vivos* to the family. We may at once say that in the case before us the first characteristic just now mentioned as existing in the Maurawan case does not exist in respect of the property now in suit. Assuming but not deciding that previous to the general confiscation of the 15th March 1858 the property in suit was held by the two brothers, Kunwar Bhagwant Singh and Girdhari Singh, as joint family property that family ceased to hold it under any title owing to the confiscation of the 15th March 1858 under which it admittedly fell. On the last mentioned date the title to this property came to be vested in the British Government. As regards the second point adverted to, that is a question to be decided on the evidence in the present case to which we will address ourselves hereafter.

The next case is that of *Thakoor Hardeo Bux* v. *Thakoor Jawahir Singh* (2). The estate involved in this case was one which fell under the ban of the general confiscation of March 1858. It was subsequently settled with Jawahir Singh. He also obtained the *Sanad* in respect thereof and his name was entered in Lists I and III of the lists prepared under the provisions of section 8 of Act I of 1869. Jawahir Singh had, therefore, all the apparent *indicia* of a perfect proprietary title in the estate under section 3 of the Act. Hardeo Bax, one of the members of the family, brought a claim for a declaration of his right in the estate against Jawahir Singh. In delivering the judgment of their Lordships of the Privy Council, Sir Barnes Peacock framed the following questions for decision :—" Is the plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act I of 1869 ? His Lordship then referred to the decision of Lord Justice James in the case of *Musammat Thukrain Sookraj Koowar* v. *Government*, *Baboo Ajeet Singh Bhinga case* (5) already mentioned and then referred to the decision of the Privy Council in the case of the *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (8) also noticed above. With regard to this case his Lordship said : " This case is, therefore, an authority for the proposition that a person who has been registered as a *Talukdar* under Act I of 1869 and has thereby acquired a *Talukdari* right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the Taluka for another, and be liable to account accordingly." Finally the following issue was remitted for trial to the Settlement Court in India,—"Whether the respondent (Jawahir Singh) has in any and what manner agreed or become bound to hold the villages comprised in the Summary Settlement, and *sanad*, or any and what part thereof, or the rents and profits thereof or any and what part thereof, in trust for the appellant and Purbut Singh, or either and which of them." The case was finally disposed of by their Lordships of the Privy Council in 1879 and the judgment of the Judicial Committee was again delivered by Sir Barnes Peacock *vide Thakoor Hurdeo Bux* v. *Thakoor Jowahir Singh* (3). His Lordship held that the facts found coupled with the declarations of the defendant " afford sufficient grounds to justify their Lordships in presuming that up to the time of the quarrel in 1865 it was the intention of the defendant that the villages included in the Summary Settlement and *Sanad* 'should be held'by him in trust for the joint family and as a joint family estate subject to the law of the *Mitakshara*." The suit was commenced long before the passing of Act I of 1869 but was not decided by the Court of first instance until after the passing of that Act. His Lordship, therefore, considered it necessary, " to determine whether Act I of 1869 operated so as to change the relative conditions of the parties, and to put an end to the trust upon which the defendant had previously held the estate," and held that " their Lordships are of opinion that it did not." As regards the villages comprised in the Summary Settlement and the villages

granted in reward for services rendered during the Mutiny his Lordship held that they as well as the defendant fell within the category of section 3 of the Act. It was pointed out that that section " does not state that the *Talukdar* shall be deemed *have* but that he shall be deemed *to have acquired* by the Summary Settlement and *Sanad* a permanent heritable and transferable right in the estate. The right so acquired was subject to the provisions of sections 11 and 15 the Act." His Lordship then observed.—"If, therefore, the defendant had before the passing of Act I of 1869, and at any time after the date of the Summary Settlement and *Sanad*, and after he had thereby acquired the right which, according to the provisions of the third section he must be deemed to have acquired thereby expressly declared that he held and would hold the estate in trust for the joint family as joint family estate governed by the rules of *Mitakshara*, there can be no doubt that the estate would heve been subject to the trust so declared, and that it would not have been converted by Act No. I of 1869 into an estate held by the defendant for his own sole use and benefit discharged from the trust." Reference was then made to sections 13 and 14 of the Act and to the decisions in the case of *Hurpurshad* v. *Sheo Dayal Maurrawan case* (6). As regards the villages acquired from the profits of the estate his Lordship held, that there were no grounds for making any distinction as regards the rights of the parties between those villages and the other two classes of the property. Finally a declaration was granted to Hardeo Bakhsh " that the defendant holds the villages in suit in trust for the joint family, and as a joint family estate governed by the rules of the *Mitakshara*." We desire to make most respectfully one observation with respect to this decision. The reference to sections 11, 13, 14 and 15 of Act I of 1869 clearly indicates to our mind that the finding as to the existence of a trust in favour of the joint family was founded on the ground that the defendant had made an alienation *inter vivos* of the estate by way of a trust in favour of the joint family and thus falls in line with the decisions in cases of *Mussumat Thukrain Sookraj Koowar* v. *Government Baboo Ajeet Singh Bhinga case* (5) and the *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (8) already referred to, all the three cases, therefore resting on the ground that the holder of the legal estate may subject himself to alienations by way of creating beneficial interests in others. *Seth Jaidal* v. *Seth Sita Ram* (9). All that was held in this case was that the registered *Talukdar* had subjected the estate to a family settlement amongst the members of the family and the interest which was declared to be vested in a member of the family under that settlement was not defeated by the subsequent enactment of Act I of 1869.

Thakurain Ramanund Koer v. *Raghunath Koer* (10). The estate of Sihipur in dispute in this case was owned by Nihal Singh. He died in the year 1832 leaving him surviving 5 widows. The first widow succeeded her husband in the possession of the estate. The second widow having predeceased the first widow, the third widow on the death of the first widow succeeded to the estate in pursuance of a will of Nihal Singh and was the first defendant in the suit. The plaintiff was the fourth widow. The Second Summary Settlement was made with Raghunath Kuar, the first defendant, and a *Talukdari Sanad* was granted to her in respect of the same. Her name was also entered in the 1st and 3rd of the Lists prepared under section 8 of Act I of 1869. The plaintiff's claim was based on the provisions of her husband's will. In defence, absolute title arising out of the Summary Settlement, the *Sanad*, and the Oudh Estates Act was set up. In repelling the defence Sir Robert P. Collier, who delivered the judgment of their Lordships of the Privy Council, referred to the previous decisions of the same tribunal in support of the doctrine that notwithstanding the confiscation of the land in Oudh by the Proclamation of Lord Canning, its restoration by his circular letter of the 10th October, 1859, affirming the absolute title of the grantees of Summary Settlements and the granting *Sanad* with the full of power of alienation, confirmed by the Oudh Estates Act of 1869 the legal owner may, either by express agreement or by his conduct, constitute himself in equity a trustee for others as to the whole or part of the beneficial interest. On the evidence in

(9) 8 I. A. 215; 4 Sar. P. C. J. 297; Bald 400 Rafique and Jackson's P. C. No. 65.

(10) 9 I. A. 41 ; 8 C. 769; 6 Ind. Jur. 328 and 332; 11 C.L.R. 149; Rafique and Jackson's P. C 67 and 68; 4 Sar. P. C. J. 316 ; 4 Ind. Dec. (N.S.) 496 (P. C.).

that case their Lordships held that the widow Raghunath Koer had by her acts and declarations treated her husband's will as "directions obligatory in conscience if not in law." It was consequently held that she was bound to carry out the trust so created by her.

Pirthi Pal v. *Jowahir Singh* (4). It was merely a continuation of the former case which had been twice before the Privy Council *vide Hardeo Bux Thakoor* v. *Jawahir Singh* (2), and *Thakoor Hardeo Bux* v. *Thakoor Jowahir Singh* (3). In the case now before their Lordships the contention of Jawahir Singh was that the estate being a *Talukdari* estate was impartible and being entered in List V was subject to the rule of primogeniture, the plaintiff being entitled to a share of the profits. Their Lordships, after referring to their previous decision, held that Jawahir Singh was bound to carry out the trust by allowing the partition to be made.

Shankar Baksh v. *Hardeo Baksh* (11). In this case at the very outset of the judgment their Lordships observed :—Their Lordships have not to deal with the difficult question which has been agitated in so many cases here, whether to use rather a popular than a legal term, equities shall prevail against the form of the *Sanad*. The Counsel for the appellant before their Lordships of the Privy Council admitted that as regards the beneficial interests in the profits there must be participation between the members of the family. He, however, maintained that under the family arrangements the family was still to have a sole head of it and that he would take the title of *Talukdar*, and have the management of the property and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate and that they could not displace the head of the family from that position. With reference to this argument Lord Hobhouse said : It is extremely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership or headship, which could never be displaced or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the common Hindu law of Oudh. Nor is any such thing apparently contemplated by the Oudh Estates Act. Their Lordships do not pronounce an opinion here whether it could legally exist, but assuming that it could, there must be some very clear arrangements between the parties to prove its existence. The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. The rest of the judgment is devoted to the consideration of the question as to what the arrangements between the parties proved. It was held that the arrangements extending over the period before as well as after the passing of Act I of 1869 in spite of the issue of primogeniture *Sanad* proved that the estate was held as an estate of co-sharership by the several members of the family. It was pointed out that the villages Piprawan and Saraian held under the primogeniture *Sanad* were conveyed for consideration to his brothers by Anant Singh who had a title under that *Sanad* to those villages. Anant Singh took a larger share in the whole estate by allowing shares to his brothers in the two villages. The title under the *Sanad* and the *Sanad* and the Act is, therefore, subject to the interests of the other members of the family which they had acquired under the family settlement. The case stands on the same footing as that of *Seth Jaidial* v. *Seth Sita Ram* (9) and *Haidar Ali Khan* v. *Nawab Ali Khan* (12). The judgment in this case, which was delivered by Sir Barnes Peacock as in the majority of the cases mentioned above is a short one but the report of the arguments discloses that all the leading cases on the subject were cited at the hearing of the appeal before their Lordships of the Privy Council. Sir Barnes Peacock said as follows :—"There is nothing in this case to show that the defendant, by any agreement or by any arrangment or other means, became clothed with any trust as regards the lands included in the *Sanad*. The case, therefore, does not fall within the decisions of *Musmmat Thukrain Sookraj Koowar* v. *Government*, *Baboo Ajeet Singh* (Bhinga Case) (5) or the case of *Hurdeo Bux* (3). The defendant is, therefore, entitled as proprietor to the lands included in the *Sanad*.

(11) 16 I. A. 71 ; 16 C. 397 ; 13 Ind. Jur. 93 5 Sar. P. C. J. 299 ; Rafique and Jackson's P. C. No. 108; 8 Ind. Dec. (N. S.) 261 (P. C.).

(12) 17 C. 311 ; 16 I. A. 183; 5 Sar. P. C. J. 458 ; Rafique and Jackson's P. C. No. 114 ; 8 Ind. Dec. (N. S.) 746.

The doctrine of trust was again affirmed in the case of *Hasan Jafar and others* v. *Muhammad Asakri* (13). The *cestui que trust* in that case was Sadik Husain whose interest as a sharer in the estate was admitted by the *Talukdar* Karam Ali at the Summary Settlement. The *Sanad* relating to the estate was granted to Karam Ali alone. At the time of the Summaay Settlement Sadik Husain was absent but Karam Ali gave an undertaking to admit him as a co-sharer if he appeared. The Chief Commissioner authorised the settlement with Karam Ali in reliance on his assurances and representations. "If Karam Ali became a trustee for Sadik Husain on his return the fact that the *Sanad* was granted to Karam Ali alone would not deprive Sadik Husain of his rights. It is not necessary to refer to authority for the purposes of establishing the proposition that the grantee under a *Sanad* of this description takes subject to trusts which have been validly created." said Lord Macnaghten.

The last case in which the point was adverted to is that of *Lal Sheo Pertab Bahadur* v. *Singh Allahabad Bank, Limited* (14). In delivering the judgment of their Lordships of the Privy Council in that case Sir Arthur Wilson made the following observations :—"In a series of cases it has been held that, notwithstanding the strong language of the Act, and in particular the enactment in section 10 that the Courts are to accept the lists framed under the Act as conclusive that the persons included in them are *Talukdars* or grantees, and those of section 11, the Courts may nevertheless go behind the Act to the extent at least of recognising the trusts, and may give effect to beneficial titles distinct from the statutory title under the Act.

In the following cases their Lordships of the Privy Council held that no trust was established and the legal title prevailed in its entirety.

1. *Babu Ram Cingh* v. *The Deputy Commissioner of Bara Banki* (15).

2. *Muhammad Imam Ali Khan* v. *Husain Khan* (16).

3. *Balbhaddar Singh* v. *Sheo Narain Singh* (17).

The above cases establish the proposition that a *Talukdar* possessed of the legal estates in the *Talukdari* property may bind himself by equitable obligations to allow beneficial interest in the same property in favour of designated individual or in favour of a joint Hindu family of which he himself may be a member and that he does so in the exercise of his powers of alienation *inter vivos* or by making a testamentary disposition.

The next question which we should answer is—What does the evidence produced in this case establish ? It has already been pointed out by us in a previous part of this judgment that the effect of Lord Canning's Proclamation was to divest the joint family consisting of Kunwar Bhagwant Singh and his brother Girdhari Singh, of their title as members of that family in the joint family property, if any. The further effect of this confiscation was that the title in that property came to be vested in the Crown. The Crown in the exercise of its prerogative granted the property in its entirety and exclusively to Kunwar Bhagwant Singh by the act of making the Second Summary Settlement with him as declared by the letter of the Governor-General of the 10th October 1859. There is nothing on this record to justify the inference contended for by the learned counsel for the plaintiff-respondent that the engagement with Kunwar Bhagwant Singh was made by the Government in his capacity of a representative of the joint family consisting of himself and his brother Girdhari Singh. Exhibit A19 is the *Qabuliat* executed by Kunwar Bhagwant Singh in relation to the Second Summary Settlement and Exhibit A 22 is the Deputy Commissioner's order conveying the sanction of the Government in respect of the settlement with him. The sanction must have been given sometime before the date of this order, that is, the 7th September 1858. As between the Government and Kunwar Bhagwant Singh the settlement must be deemed to have closed with the

(13) 26 I. A. 229; 26 C. 879 ; 4 C. W. N. 65 ; 7 Sar. P. C. J. 550 ; 18 Ind. Dec. (N. S.) 1163.

(14) 30 I. 209 A : 5 Bom L. R. 833 ; 13 M. L. J. 336; 7 C. W. N. 840; 25 A. 476; 8 Sar. P. C. J. 535 (P. C.)

(15) 17 I. A. 54 ; 17 C. 444 ; 5 Sar. P. C. J. 486 ; Rafique and Jackson's P. C. No. 116; 8 Ind. Dec. (N.S.) 835,

(16) 25 I. A. 161; 26 C. 81; 2 C. W. N. 737; 7 Sar. P. C. J. 432; 18 Ind. Dec. (N. S.) 656 (P. C.).

(17) 26 I. A. 194; 27 C. 344; 7 Sar P. C. J. 625; 14 Ind. Dec. (N. S.) 227 (P. C.).

sanction given to it by the Government. This was settled by the case of *Janki Pershad Singh* v. *Dwarka Pershad Singh* (18). The preparationof the *Khewats* of the villages comprised within the *Taluka* was a sequel to the order sanctioning the settlement. Exhibit 10 is the Khewat of *Mauza* Aseni, by which name the Taluka in the district of Lucknow is called. In this Khewat Bhagwant Singh and Girdhari Singh are recorded as *Zemindars* in equal shares and it is signed by Bhagwant Singh. This exhibit, therefore, proves that Kunwar Bhagwant Singh admitted Girdhari Singh's right to the extent of one half in the 'Taluka of Aseni. The plaintiff's contention is that the entry in the Khewat evidences a transfer by Kunwar Bhagwant Singh of the entire estate, legal as well as beneficial in the Taluka of Aseni to the joint family consisting of himself and Girdhari Singh. We are unable to hold this contention. The entry distinctly says that each is a *Zemindar* in equal shares. There are no words in it connoting undefined interests which members of a joint family would possess in the family property. On the other hand, in our opinion the share of each of the brothers must be taken to have been defined as consisting of equal moieties. In our judgment this entry proves a recognition on the part of Kunwar Bhagwant Singh of Girdhari Singh's interest to the extent of one half in the *Talukdari* property.

Subsequent events tend in the same direction. In Exhibit 114, which was a letter in answer to the inquiry relating to the rule of Gaddinashini, Kunwar Bhagwant Singh stated that he and his younger brother were in possession and that after their death the descendants of both the brothers shall succeed to the possession of the Taluka. This statement of Kunwar Bhagwant Singh is consistent with the view that in future the estate was to descend on the descendants of each as heirs to the separate estate of the propositus, and is opposed to the idea of survivorship. All doubt on this point is removed when we look to the second application of Kunwar Bhagwant Singh dated the 17th May 1860 (Ex. 115). In this application he unequivocally stated that Girdhari Singh and he "are successors to the heritage in equal shares" and with regard to the future descent of the estate he said that "the descendants of us both shall according to our religious ordinance and family usage be our heirs and successors." At the regular settlement Kunwar Bhagwant Singh again recognised the title of his brother Girdhari Singh, as one of his co-sharers and this fact was recorded in the decree in respect of village Sikandarpur (Ex. 28). To the same effect are Exhibits 17 and 29. The same result is borne out by the applications of Girdhari Singh for partition of the estate which he presented to the Financial Commissioner in tha year 1867 (Exhibits 51 and 52). Our conclusion, therefore, is that Kunwar Bhagwant Singh never parted with the legal estates in the whole of the Taluka in favour of anybody but constituted himself a trustee for Girdhari Singh to the extent of one half of the beneficial interest therein. The legal as well as the beneficial interest in the other half remained all along with Kunwar Bhagwant Singh.

It was argued on behalf of the defendant-appellant that Kunwar Bhagwant Singh had no proprietary title in the Taluka prior to the Governor-General's letter of the 10th October 1859 and that consequently he was incompetent to deal with the estate by making a transfer of the beneficial interest in favour of Girdhari Singh. We are unable to accept this argument. It is certainly true that the proprietary title in the estate was declared to exist in Kunwar Bhagwant Singh by the letter of the 10th October 1859, and the Second Summary Settlement was founded on the basis of possession only and was originally contemplated to last for a period of three years. Kunwar Bhagwant Singh, however, acquired possessory title in the estate in virtue of the settlement and it was good for all purposes against the whole world except the Crown. Besides, Kunwar Bhagwant Singh could not be permitted to derogate from his own grant. We think that the doctrine of feeding the grant by estoppel would also apply. As between himself and Girdhari Singh Kunwar Bhagwant Singh was bound in equity to fulfil the obligations which he undertook by recognising the right of his brother, Girdhari Singh, inthe one half of the beneficial interests in the estate.

(18) 20 Ind. Cas. 73; 40 I. A. 170; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M. W. N. 630; 18 C. L. J. 203; 11 A. L. J. 818; 15 Bom. L. R. 853;:16 O. C. 216; 35 A. 391 (P. C.).

The trust thus created in the year 1858 and maintained during the enquiry relating to the rule of Gaddinashini and the regular settlement was, however, redeemed in 1867. By the execution of the trust which Kunwar Bhagwant Singh had imposed upon himself in favour of his brother, Girdhari Singh, the trust must be held to have exhausted itself and thereby to have come to an end. This result was attained by an amicable settlement between the two brothers in that year. By his application of the 15th July 1867 (Ex. 51) and by the application of the 9th August 1867 (Ex. 52) Girdhari Singh, the *cestui que trust*, asked for the separation of his moiety share from the rest of the estate. There can be no manner of doubt that if the desired separation had taken place the trust would have stood discharged. In our opinion the result would be the same if in settlement of his claim in respect of half of the estate Girdhari Singh accepted by a compromise anything less than that. On the 8th September 1867 the dispute initiated by Girdhari Singh was settled by a deed of compromise executed by both the brothers (Ex. 53). Under this settlement Girdhari Singh accepts a progressive annuity and relinquishes all claim as regards the partition of the Taluka. The legal estate, which continued all along according to our judgment in Kunwar Bhagwant Singh was thus freed of the fetters of the trust which he had created in respect of a part of the estate in favour of his younger brother. On the date of the passing of Act I of 1869 Kunwar Bhagwant Singh was thus a *Talukdar* within the meaning of that Act and possessed of an estate within the meaning of the same Act without any equitable obligations attached to that estate and on his death Girdhari Singh was his lawful successor under section 22 of that Act.

The learned counsel for the plaintiff-respondent contended that the effect of the compromise of 8th September 1867 was a retransfer of a one-half share in the estate by Girdhari Singh in favour of Kunwar Bhagwant Singh, which share the former had acquired by a transfer from the latter during the Second Summary Settlement. This contention has partly been negatived by us already, our view being that there was no transfer of the full estate either in favour of the joint family or to the extent of one half in favour of Girdhari Singh. What was transferred to Girdhari Singh was merely a beneficial interest to that extent while the legal estate in the whole of the Taluka remained with Kunwar Bhagwant Singh all through.

The settlement of a dispute between two brothers circumstanced as Kunwar Bhagwant Singh and Girdhari Singh were, cannot be treated as an act of mutual transfer of property between them. Apart from the trust Kunwar Bhagwant Singh had a complete and an exclusive title to the whole of the Taluka in the year 1867. On the other hand, Girdhari Singh based his rights in the controversy of 1867 more on the admissions and conduct of his elder brother, Kunwar Bhagwant Singh, than on anything else as his applications (Exhibits 51 and 52) show. The natural and proper view of the compromise of the 8th September 1867 (Exhibit 53) is that whatever each got under it was in recognition of his antecedent right and not by way of transfer by one to the other. This is the view which has repeatedly commended itself to their Lordships of the Privy Council in respect of family settlements. In this connection we may refer to two decisions of that tribunal in the cases of *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (19) and *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* (20). As a matter of fact the British Indian Association in upholding the compromise expressed the view that "in this *taluqa* no custom of partition has been in vogue" (Ex. A-1) and the final decision of the Chief Commissioner is based on the fact that Girdhari Singh was entitled to maintenance only. Our finding so far recorded is sufficient to dispose of the plaintiff's case but as the matter is in all probablity to be carried in appeal to His Majesty's Privy Council we think we should not part with the case without expressing our own views on other points arising in the appeal.

We will now assume that Kunwar Bhagwant Singh transferred the whole of the estate to the joint family consisting of himself and his brother, Girdhari Singh. In this aspect

(19) 1 I. A. 157 at p. 166 ; 12 B. L. R 312 ; 3 Sar. P. C. J. 314 (P. C.)

(20) 10 Ind. Cas 477; 38 I. A. 87 ; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575 ; 13 Bom. L. R. 427; 10 M. L. T. 25 ; (1911) 1 M. W. N. 432 ; 21 M.L.J. 645 ; 33 A. 356 (P. C.).

of the case we must further assume that Kunwar Bhagwant Singh was competent to do so. The question is—Was this a transfer of the nature contemplated by section 15 of the Oudh Estates Act (I of 1869)? In deciding this question we must not lose sight of the fact that on the date of the alleged transfer the joint family consisted of the *Talukdar* and his younger brother only. It is also clear beyond any doubt that if the *Talukdar* had died without having made the transfer and intestate the person who would have succeeded according to the provisions of the Act to his estate was Girdhari Singh. It was argued that a joint Hindu family has a corporate existence. This may be so but for the purposes of section 15 we must take the individuals who constitute the joint family on the date of the transfer as persons in whose favour the transfer is made otherwise, if we must take into account also the potentialities of the expansion of the family by subsequent births of male members, it would be wholly impossible to determine whether the transferee is or is not "such person" as "would have succeeded according to the provisions of this Act." It need hardly be pointed out that section 15 as well as section 14 deals with cases of transfers made before the passing of the Act as also with cases after the passing of that Act. In the case of *Thakurain Balraj Kunwar* v. *Rae Jagatpal Sing* (21), Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council said: "They (their Lordships) think that the expresssion 'would have succeeded' must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer, or in the case of a gift by Will, at the time when the succession opened." This pronouncement is, therefore a direct authority for the opinion that it is the date of the transfer which counts in determining whether the transferee occupies or not the particular status assigned to him by the provisions of sections 14 and 15 of Act I of 1869. In fact the argument of the learned counsel involves in itself the absurd position that Kunwar Bhagwant Singh was both a transferor and a transferee in so far as his interest as a member of the joint family was concerned. This absurdity is not removed by the fact that that interest was an undefined one. We are, therefore, of opinion that the alleged transfer, if true, did not put the estate or the succession relating thereto outside the purview of the provisions of Act I of 1869. None of the Privy Council cases cited above has decided the precise point which arises for decision in this case. What is the rule of succession applicable to that estate or portion of the estate which is left in the hands of the registered *Talukdar* either after satisfying the trust in favour of any particular individual or on the disruption of the joint family when there was a trust or transfer in favour of such a family? We have already said that the decision of their Lordships of the Privy Council in the case of *Hurpurshad* v. *Sheo Dyal* (6) (*Maurawan Case*) was much relied upon by the learned Counsel for the plaintiff-respondent in support of his argument that the transfer to the joint family placed the estate and the rule of succession relating thereto out of the purview of Act I of 1869 altogether. This would be so if the transfer in that case fell within section 15 of that Act. That it did fall within that section is clear from the judgment of their Lordships of the Privy Council. The basis of the transfer in that case was the will of Gauri Shankar. This will was acted upon in his life-time. That was held to amount to an alienation *inter vivos* and the alienation was held to be valid in view of the provisions of section 15 of the Act. By his will of the 7th February 1860 Gauri Shankar had directed that the ancient custom existing in his family shall be observed in relation to his estates, that custom being "that the eldest member of the family continues to be the head while others remain obedient to him, but every one possesses a share in the *Taluka*. Under the custom of the family the other brothers are at liberty to have their share separated, should they wish it. The head has no power, under the old custom, to alienate the estate without consulting every sharer". Now this was clearly a devise not in favour of any designated person but in favour of the entire joint family as a corporate unit. The report of the case shows that both on the date of this will

(21) 31 I. A. 132; 7 O. C. 248; 26 A. 393; 8 C. W. N. 699; 1 A. L. J. 384; 11 Bom. L. R. 516; 8 Sar. P. C. J. 689 (P. C.).

and on the date of Gauri Sankar's death in March 1863 the family consisted of a large number of persons being the descendants of Chundan and Ganga Pershad—see the pedigree given at page 264 of the report. We have already expressed our opinion that the case before us does not fall within section 15 of Act I of 1869.

We agree with the plaintiff that there was a disruption of the joint family, if any, in the year 1867 and this effect was brought about by the compromise of the 8th September 1867. Girdhari Singh's interests in the joint family property were defined and separated by that compromise. He was to receive a certain annuity out of the profits of the estate and in case of failure of payment of the annuity he was entitled to have villages set apart for the satisfaction of that right. It is beyond doubt that an unambiguous and defined intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which till then he had held in jointness—*Girja Bai* v. *Sadashiv Dhundiraj* (22) and *Kasam* v. *Jorawar Singh* (23). The result of this finding is that we reject the defendant's contention that the family continued to be joint till the death of Kunwar Bhagwant Singh and Girdhari Singh succeeded to the estate by right of survivorship.

The question as to whether a primogeniture *Sanad* was granted to and received by Kunwar Bhagwant Singh is of very little significance in view of our findings already recorded. We think, however, that the question must be decided in favour of the defendant appellant. By section 10 of Act I of 1869 there is the presumption arising from the entry of Kunwar Bhagwant Singh's name in List III that he was a *Talukdar* to whom a *Sanad* had been granted at any time up to the date fixed by section 8 of the Act which declared that the succession to the estate comprised in such *Sanad* shall thereafter be regulated by the rule of primogeniture. By the same section that presumption is conclusive. We must, therefore, hold that the primogeniture *Sanad* was granted to Kunwar Bhagwant Singh. The argument of the learned counsel for the plaintiff respondent is that that presumption can only be raised for the purpose of determining the succession under the Act and the estate now in dispute has, as previously argued, gone out of the Act. We have already negatived the argument that the estate for the purpose of succession has passed out of the provisions of Act I of 1869. On the evidence also we have come to the conclusion that the primogeniture *Sanad* was received by Kunwar Bhagwant Singh. This conclusion is supported by Exhibits 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 7 3|2 and A 52. Exhibits 15 and 150 do not contain the primogeniture clause but this omission is explained by the fact that they appear to be copies of the duplicates of the vernacular *Sanad* retained in the office of the Board of Revenue and the Deputy Commissioner of Lucknow respectively and at the time of making the endorsements of the 1st November 1861 as showing the date on which the *Sanad* was given to Kunwar Bhagwant Singh the primogeniture clause was either inadvertently or deliberately omitted from being inserted in the duplicates kept in those offices. The date of the endorsement, however, clearly points to the fact that it must have been the primogeniture *Sanad* which was given to Kunwar Bhagwant Singh on that date. The date of Exhibit 194 which is the receipt executed by Kunwar Bhagwant Singh in respect of the English *Sanad* is the same. Exhibits 15 and 150 both bear the signature of Mr. Yule, Officiating Chief Commissioner of Oudh. It is a matter of history that Mr. Yule officiated for Sir Charles Wingfield as Chief Commissionerof Oudh in 1861 and almost every *Sanad*, if not all *Sanads*, issued under the signature of Mr. Yule, was the primogeniture *Sanad*. See the observations of their Lordships of the Privy Council in the case of *Thakur Sheo Singh* v. *Rani Raghubans Kunwar* (24). The date of the revised English *Sanad* containing the primogeniture clause is given in column 7 of Exhibit A 56|1 in the following words:—"Secy. C. C.'s No. 3420 dated 16th October 1861." Now this number and date as shown before takes us back to Exhibit 146. The

(22) 37 Ind. Cas. 321; 43 I. A. 151. 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P.C.).

(23) 68 Ind. Cas. 573; 49 I. A. 358; 31 M. L. T. 46; 16 L. W. 223; 5 N. L. J. 209; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.).

result of reading these two exhibits together is that the English *Sanad* which Kunwar Bhagwant Singh received on the 1st November 1861 was the primogeniture *Sanad*.

Lastly, we think that there is a great force in the appellant's contention that in the event of its being held that on the death of Kunwar Bhagwant Singh succession to the estate was not governed by section 22 of Act I of 1869. It was governed by the rule of inheritance laid down in the primogeniture Sanad. If the contention of the plaintiff respondent is correct that the provisions of the Act ceased to regulate the succession to the estate of Kunwar Bhagwant Singh it would seem to follow that it would fall into the lap of the ordinary law to which Kunwar Bhagwant Singh was subject. This ordinary law must be found in the *Sanad* granting the estate to Kunwar Bhagwant Singh and that law was the rule of primogeniture. This conclusion is supported by the recent decision of their Lordships of the Privy Council in the case of *Badri Narain Singh* v. *Harnam Kunwar* (25). According to the same tribunal in the case of *Ghulam Abbas Khan* v. *Musammet Amatul Fatima* (26), the terms of the *Sanad* would not apply to the inheritance of a person who has received the estate either by gift or by bequest from the *Sanad*-holder and is not an heir to the estate within the rule laid down in the *Sanad*. In the present case, however, we are concerned with the rule of descent applicable to the *Sanad*-holder himself. In fact the whole claim of the plaintiff-respondent consists in her alleged right to succeed to the estate of her father, Knuwar Bhagwant Singh after the determination of the intervening estate of the widow.

I would, therefore, allow the appeal and dismiss the plaintiff's suit with costs in both the Courts.

By Court.—The appeal is allowed and the plaintiff's suit dismissed with costs in both the Courts.

N. H. *Appeal allowed.*

(25) 68 Ind. Cas. 1000; 49 I. A. 276; 44 A. 449; 31 M. L. T. 195; 9 O. L. J. 428; (1922) A. I. R. (P. C.) 289; 27 C. W. N. 129; 25 O.C. 313; 21 A. L. J. 13; 9 O. and A. L. R. (P. C.) 49; 44 M. L. J. 337; 37 C. L. J. 306 (P. C.).

(26) 60 Ind. Cas. 987; 48 I. A. 135; 19 A. L. J. 433; 40 M. L. J. 577; 8 O. L. J. 225; 24 O. C. 118; (1921) M. W. N. 349; 43 A. 297; 29 M. L. T. 409; 34 C. L. J. 113; 14 L. W. 680 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 6 OF 1922.

March 3, 1924.

Present:—Mr. Hallifax, A. J. C., and Mr. Kotval, A. J. C.

Pandit KANTICHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Thakur UDAYABHANSHA—PLAINTIFF—RESPONDENT.

Indian Contract Act (IX of 1872) s. 129—Guarantee, continuing, what is—Amount payable by instalments—Hindu Law—Joint family—Pious obligation of sons to pay father's debts, extent of—Liability of father under contract of suretyship—Sons, whether bound to discharge liability.

A guarantee in order to be continuing must refer to a series of transactions of which, when the guarantee is given, some are unknown and indefinite or not certain to come into existence. The fact that the amount guaranteed is payable by instalments does not make the guarantee a continuing one within the meaning of section 129 of the Contract Act. (p. 352, col. 1.)

The sons of a deceased Hindu who formed a joint family with him and come into his share of the joint estate as survivors and not as heirs, are not liable on any contract that he may have made personally. (p. 352, col. 1.)

The liability of a Hindu son to pay his father's debts arises from his religious duty of discharging the father from the sin of his debts. Therefore if there is no debt actually due from the father at his death there is no sin from which there is a duty cast on the son to discharge him. (p. 352, col. 2.)

Where a Hindu dies before his liability under a contract of suretyship arises, his sons are not bound to discharge his obligation arising under the contract after his death. (p. 352, col. 2.)

Appeal against the decree of the District Judge, Chhindwara, in Civil Suit No. 10 of 1921.

Messrs. *M. Gupta* and *J. Sen*, for the Appellants.

Mr. *G. P. Dick*, for the Respondent.

JUDGMENT.—Defendant No. 1 Nandkishor had taken a *theka* of the harra crop of the Partabgarh-Pagara *Jagir* from the Court of

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Wards acting on behalf of the plaintiff Udebhanshaf or two years commencing from the 1st of July 1919 for Rs.18,000.This sum was to be paid in eight instalments of Rs. 2,225 each, on the 15th of the first four months of each of the years 1920 and 1921. Rs. 4,500 were paid in advance and were to be taken in payment of the last two instalments if the first six were duly paid. Kashiram the father of defendants Nos. 2 and 3, who died on the 15th of September 1920 stood surety for the payment of the balance of Rs. 13.500. None of the insalments having been paid the plaintiff claims Rs. 13,500 and interest there on at 6 per cent. per annum from the date of default of each instalment.

The surety bond was executed on the 17th October 1919. It is marked Exhibit P. 3. The theka agreement in favour of the plaintiff, Exhibit P. 2, was executed on the 18th November 1919. The pleas on behalf of defendants 2 and 3 now material are the following:—

(1) There having been a substantial variation of the terms of the original agreement after the date of the contract of guarantee without the surety's consent the surety was discharged.

(2) The guarantee was a continuing guarantee and Kashiram having died on the 15th September 1920 it was revoked in respect of the instalment payable after that date.

(3) Under the Hindu Law the liability of defendants Nos. 2 and 3 came to an end with their father's death.

The trial Court having found against defendants Nos. 2 and 3 on these pleas decreed the plaintiff's claim. Defendants Nos. 2 and 3 appeal and urge the same pleas.

If successful the first plea will discharge the defendants in respect of the whole claim, the second and third only in respect of the instalments due in the year 1921.

The argument with reference to the first plea is based upon a comparison of the terms of the surety bond Exhibit P. 3 and the theka agreement Exhibit P. 2. It is, therefore, necessary to refer to the two documents in detail. Exhibit P. 3 is translated as follows:—

"As Nandkishor son of Gulabchand Bania Thekedar, resident of Bankhedi, district Hoshangabad, has taken a contract of Harra of the Pagara Jagir under the Court of Wards, for the years 1919-20 and 1920-21i. e. from 1st July 1919 to 30th June 1921, for Rs. 18,000 out of which Rs. 4,500 have already been paid in advance, he being ordered to pay the rest by paying the instalment of Rs. 2,225 on 15th January 1920, of Rs. 2,225 on 15th February 1920, of Rs. 2,225 on 15th March 1920, of Rs. 2,225 on 15th April 1920, of Rs. 2,225 on 15th January 1921 and of Rs. 2,225 on 15th February 1921, and as a security for Rs. 13500 has been demanded from the said Nandkishor, I, Kashiram son of Radhakishen Tiwari of Sohagpur, district Hushangabad stand surety for the said Nandkishor, and agree and lay it down in writing that if he fails to pay any instalment or any portion of an instalment to the Court of Wards Harrai Pagara at the fixed time, I, the surety, will pay up the same out of my own pocket, and will be liable also for the loss the Court of Wards Harrai Pagara may suffer on account of the said Nandkishor's failure to pay up the money in time. I also agree that if the Court of Wards Harrai Pagara is put to any loss in consequence of the said Nandkishor's acting against the terms, I will remain liable therefor. I have, therefore, executed this surety bond which is genuine. Dated 17th October 1919, by the pen of Master Umraosinha of Sohagpur.

Kashiram Tiwari of Sohagpur."

The part now material of Exhibit P. 2 is translated as follows:—

"I am Seth Nandkishor son of Gulabdas, caste Bania, residing at Bankhedi Kalan, tahsil Sohagpur, district Hoshangabad. As I have taken a theka of the harrra crop of the Partabgrah-Pagara Jagir, district Chhindwara, for 2 years, *i.e.*, from 1st July 1919 to 30th June 1921 for Rs. 18,000, eighteen thousand, British currency, *i.e.*, at Rs. 9,000 a year, at a public auction, I execute this agreement, that the terms of the *theka* may be duly observed. The terms are given below. the money for the *theka* for two years, one fourth, *i.e.*, 4,500 four thousand five hundred, was paid as an advance to-day into the office of the Court of Wards, Chhindwara, after the close of the auction

sale; and the balance of Rs. 13,500 thirteen thousand five hundred is agreed to be paid as under and will be paid as agreed.

Details of instalments.

2,250 on 15-1-1920	2,250 on 15-1-1921.
2,250 on 15-2-1920	2,250 on 15-2 1921.
2,250 on 15-3-1920	2,250 on 15-3-1921.
2,250 on 15-4-1920	2,250 on 15-4-1921.

18,000.

On default of payment of two consecutive instalments according to the terms of the agreement mentioned, the Deputy Commissioner, Chhindwara, the Court of Wards, *Jagir* Pagara, district Chlindwara, shall have a right to re-auction the harra contract and to recover from the amount of my moveable and immoveable property whatever deficit there may be in the amount of theka. If the amount of instalments be regularly paid on the fixed dates above, the amount of advance shall be credited towards the last two instalments .... I have, therefore, executed this agreement, so that the same may stand as evidence and be of use when necessary. Dated 18th November 1919, by the pen of Seth Nandkishor himself.

Seth-Nandkishor, contractor of Harra, himself."

What is said to be the variation is the term giving the Court of Wards the right to re-auction the theka in default of payment of two consecutive insalments. It is not disputed that this term if it is a subsequent addition without Kashiram's consent to the original contract between the Court of wards and Nandkishor in respect of which Kashiram stood surety would substantially affect the surety's rights and discharge him.

It is said here that the surety bond contains the original terms of the contract. Nandkishor was examined by defendants No. 2 and 3 as a witness on their behalf but he was asked no question as to the alleged variation though he was the *thekedar* and also himself wrote the surety bond.

In the pleadings taken on the 9th September 1921 the defendants' pleader stated :—

"My position is that on 4th September 1919, the terms of contract between the Deputy Commissioner and Nandkishor were settled whereby it was finally decided that Nandkishor was to deposit Rs. 4,500 and give a solvent surety for Rs. 13,500. This Nandkishor agreed to those terms. On this day there was no agreement between the Deputy Commissioner and Nandkishor that the Deputy Commissioner shall have the right of re-sale in default of any instalment. This term was added for the first time when the deed of Ikrarnama was executed on 18th November, 1919; that is on 19th October 1919 when Kashiram stood surety for Nandkishor the term regarding re-sale was not at all in existence and therefore there is a variation between the original contract between Nandkishor and the D. C. on which Kashiram stood surety and the Ikrarnama dated 18th November, 1919".

The plaintiff's case is that the condition of re-sale is a condition usually inserted in agreements taken by the Court of Wards and was an implied term of the contract between the plaintiff and Nandkishor.

The condition as to re-sale is apparently one of a standard set of conditions of agreements to be taken from Thekedars of harra, lac and other produce sanctioned by the Deputy Commissioner in 1911: vide Exhibits P. 16 and P. 17. Exhibits P. 18 to P. 22 are agreements similar to the one in suit executed by Nandkishor. It may be presumed that the agreement to be actually executed by Nandkishor after sanction subject to certain conditions was given to it by the Deputy Commissioner on 4th September, 1919 (vide Exhibit P. 15) was an agreement in the standard form. That the condition regarding re-sale must have been known to the surety to form part of the standard form is apparent from the fact that though it was threatened to be enforced by the notice given to him on the 25th May 1920, (Ex. P. 5) he never suggested that no such condition existed or could be enforced but on the contrary asked for time to pay up the arrears.

We uphold the finding of the lower Court that there was no variation from the original contract in the theka agreement dated the 18th November 1919. The surety bond did not purport to contain the whole of the original agreement as the argument on behalf of the appellants assumes.

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The contention that the guarantee is a continuing guarantee is untenable. The guarantee was given in respect of a single existing transaction, namely the payment of Rs. 13,500. It seems to us that the guarantee to be a continuing guarantee must refer to a series of transactions of which, when the guarantee is given, some are unknown and indefinite or not certain to come into existence. The fact that the amount was payable by instalments does not make it a continuing guarantee as defined in section 129 of the Indian contract Act. Even if it could be held that the guarantee is a continuing guarantee, the circumstances of the case show that the parties to the contract did not contemplate that the surety should be able to revoke it at any time.

But the guarantee undoubtedly came to an end on the death of Kashiram for another reason, so that the question of its being a continuing guarantee or not does not really arise. Kashiram's sons are certainly liable to pay his debts. But as they were members of a joint Hindu family with him and came into his share of the joint estate as survivors and not as heirs, they are not liable under any contract that he may have made personally, and it is not even suggested that he made the contract of suretyship on behalf of the joint family as its Manager. A Hindu son's liability to pay his father's debts arises from his religious duty of discharging the father from the sin of his debts. Therefore if there is no debt actually due from the father at his death there is no sin from which there is a duty cast on the son to discharge him. The father's liability in the present case to pay the first four intalments had come into existence before his death, that is he had incurred the debt in repect of them and defendants Nos. 2 and 3 as the sons are bound to discharge it, but as regards the two instalments which accrued due after his death no debt can be said to have been left owing by the father when he died and no sin incurred from which the son had to release him. Defendants Nos. 2 and 3 are therefore not liable for the amount of the two instalments payable on the 15th March 1921 and the 15th April 1921.

The decree of the lower Court will be modified by substituting the words "limited to Rs. 9,000" for the words "limited to Rs. 13,500" and the figures "690-1-0" for the figures "1,035-2-0" in the order as to costs. The appellants will pay two-thirds of the total costs of this appeal and the respondent the remaining one third.

G. R. D. *Appeal allowed in part.*
Z. K. *Decree modified.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 691 AND 692 OF 1921.

February 6, 1924.

Present :—Mr. Justice Wallace.

SOORAPANENI SEETHARAMA-BRAHMAM—PLAINTIFF—APPELLANT

versus

SOORAPANINI KRISHNABRAHMAM—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (*IX of* 1887) *Sch. II, Art.* 41—*Suit for contribution—Property not held jointly—Suit, whether cognisable by Small Cause Court—Appeal, second.*

Plaintiff and defendants divided their properties though they continued to be held under the same *patta*. Defendants failed to pay up the *Kist* in respect of their property, and the plaintiff, in order to save his own property from sale, had to pay up the arrears of the *Kist*. He sued the defendants for contribution ;

Held, that the suit did not fall within the purview of Article 41 of Schedule II to the Provincial Small Cause Courts Act, in as much as the property was no longer joint, and the suit was, therefore, cognisable by a Small Cause Court and a second appeal was not competent. (p. 351, col. 2).

Srinivasa v. *Sivakolundu*, 12 M. 349 ; 4 Ind. Dec. (N. S.) 593, followed.

Appeals against the decrees of the Court of the Subordinate Judge of Bezwada in A. S. Nos. 14 and 39 of 1920, preferred against the decrees of the Court of the Temporary District Munsif of Bezwada in O. S. Nos. 233 and 217 of 1919, respectively.

Messrs. *G. Lakshmanna* and *A. Satyanarayana*, for the Appellant.

Mr. *V. Suryanarayana*, for the Respondent.

JUDGMENT.—Respondents raise the preliminary contention that the suits are of a Small Cause nature and, therefore, no second appeal lies. The plaintiff's case was that he and defendants had divided their properties, though the property still remained under the same *patta* and that his property was attached for arrears under this *patta* which were due to defendants Nos. 1 to 6 not having paid up the *kist* on their property under the same *patta*, that plaintiff to save his own property, therefore, had to pay up the arrears, and he sued for contribution.

I think it is clear that the suit is not of the nature contemplated by Article 41 of the 2nd Schedule to the Provincial Small Cause Courts Act. Here there was no joint property, since plaintiffs and defendants, on plaintiff's own showing were divided. The mere fact that the *patta* is still joint and, therefore, the liability under it is joint, will not affect the manner in which the property is held. The ruling in *Srinivasa* v. *Sivakolundu* (1) is directly in point.

I hold that the suits were of a Small Cause nature and, therefore, no Second Appeals lie. The Second Appeals are dismissed with costs. In S. A. No. 691 of 1921 the memorandum of objections is not pressed and is dismissed with costs.

V. N. V. *Appeals dismissed.*
Z. K.

(1) 12 M. 349 ; 4 Ind. Dec. (N. S.) 593.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 187 OF 1922.

August 25, 1922.

Present :—Mr. Justice Richardson and Mr. Justice Ghose.

JOTINDRA MOHAN PAL—DECREE-HOLDER—PETITIONER

versus

BHOLA NATH BHAKAT AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Bengal Tenancy Act (*VIII of* 1885), *s.* 170, *scope of—Rent decree—Attachment of holding—Claim, entertainment of.*

A Court executing a decree, purporting to be a decree for rent under the Bengal Tenancy Act, can entertain a claim to the property by a third person, where the property attached is not a tenure or holding. Section 170 of the Bengal Tenancy Act does not apply to such a case. (p 353, col. 2).

Rule against the order of the Munsif, Second Court, Howrah, dated the 15th March 1922.

JOTINDRA MOHAN PAL *v.* BHOLA NATH BHAKAT

Dr. *Sarat Chandra Baksh* (with Babu *Hemendra Nath Chatterjee*), for the Petitioner.

Babu *Nagendra Nath Ghose*, for the Opposite Party.

JUDGMENT.

Ghose, J.—This rule was obtained by the decree-holder against the order of the Munsif of Howrah, dated the 15th March 1922, allowing the claim made by the Opposite Party under O. XXI, r. 58, Civil Procedure Code to the property attached by the decree-holder in execution of a decree for rent which he had obtained against one Abdul Latif for the property in question.

The ground upon which the judgment of the learned Munsif is attacked is that it was beyond his jurisdiction to entertain the claim having regard to section 170 of the Bengal Tenancy Act, as the decree he had obtained was for rent under the Bengal Tenancy Act. The claimant alleged that this property was not a tenure or holding and that the Bengal Tenancy Act was not applicable with reference to a suit for rent brought for the land. The learned Munsif went into evidence for the purpose of ascertaining whether the land was of such a character as to make the provisions of the Bengal Tenancy Act applicable. His finding is to the effect that the provisions of the Bengal Tenancy Act do not apply to the land in question.

It is urged on behalf of the petitioner that the decree being on the face of it a decree for rent, as it is so described, the provisions of the Bengal Tenancy Act would be applicable ; and it is not open to the Court executing the decree to make any enquiry as to the nature of the land and to decide whether the Bengal Tenancy Act would apply with regard to the decree or not. Reliance is placed upon the Full Bench case of *Amrita Lal Bose* v. *Nemai Chand Mukhopadhaya* (1) in support of the contention of the petitioner. In that case, however, the question referred to the Full Bench was whether section 170 of the Bengal Tenancy Act bars the claim to a tenure or holding attached in execution of a decree for arrears due thereon in all cases, or whether the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached. The majority of the Court held that the section bars a claim in all cases where the tenure or holding is attached in execution of a decree. It was not decided, nor could it be decided, having regard to the reference, whether any claim can be entertained where the property attached is not a tenure or holding although the decree is in form a decree for rent under the Bengal Tenancy Act. On the other hand, it has been held in the case of *Sarba Sundari Dasi* v. *Harendra Lal Roy Chowdhury* (2) that when the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property. Reference may also be made to the case of *Bipra Das Dey* v. *Raja Ram Bandopadhaya* (3) for the purpose of showing that the Court executing the decree can go into the question whether the decree was a decree under the provisions of the Bengal Tenancy Act so as to bring into play the operation of section 170 of the Act and prevent a claim being preferred to the property attached. In that case also the decree was in form a decree for rent which was obtained for two holdings and it was held that a claim might be entertained with regard to the property attached in execution of the decree It, therefore, appears to us that the learned Munsif did not act without jurisdiction in entertaining the claim.

The Rule is, therefore, discharged with costs, hearing-fee, five gold mohurs.

Richardson, J.—I agree.

N. C. *Rule discharged.*

(1) 28 C. 382; 5 C. W. N. 474 (F. B.).

(2) 7 Ind. Cas. 490 ; 12 C. L. J. 549.

(3) 8 Ind. Cas. 306 ; 13 C. W. N. 650 ; 36 C. 765.

B. KUMARASWAMI *v.* M. NARAYANA RAO

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 899 OF 1921.

February 6, 1924.

Present :—Mr. Justice Wallace.

BHOGIREDDI KUMARASWAMI—DEFENDANT—APPELLANT

versus

MADDEKARA NARAYANA RAO, AGENT OF BYRAM SHAHE—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Accounts, suit for—Admission that accounts must be taken.

In a suit for the balance due on taking accounts, an admission that accounts must be taken and settled would be a pertinent acknowledgment. (p. 355, col. 2.)

Andiappa Chetty v. *Alasinga Naidu*, 12 Ind. Cas. 378; 36 M. 68 at p. 70 ; 10 M. L. T. 251 ; (1911) 2 M. W. N. 225 ; 21 M. L. J. 1024, followed.

Appeal against the decree of the Court of the Second Additional Subordinate Judge of Guntur, in A. S. No. 46 of 1920 (A. S. No. 274 of 1920 District Court, Guntur) preferred against the decree of the Court of the Principal District Munsif of Tenali in O. S. No. 302 of 1918.

Messrs. *A. Venkatarayaliah* and *L. Venkatanarasiah*, for the Appellant.

Messrs. *T. Ananda Rao* and *Ch. Raghava Rao*, for the Respondent.

JUDGMENT.—The only point argued in this appeal is the question of limitation *viz.*, whether defendants letter Ex. D1 is an acknowledgment saving the bar. It seems to me quite clear from the terms of that letter that the work as per the agreement to be done by defendant had not then been completed and that the accounts had therefore not been finally settled. This is supported by the finding of the District Munsif that the work was not finished till August 1915. This was a case then where the final liability could not be fixed by final accounts until August 1916. Plaintiff's suit was within 3 years of that date.

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As remarked in *Andiappa Chetty* v. *Devarajulu Naidoo* (1)

> "in a suit for the balance due on taking accounts, an admission that accounts must be taken and settled would be a pertinent acknowledgment."

Plaintiff no doubt sues for a definite sum considered by him as due on his accounts but the suit was in substance one for accounts as both parties themselves confessed when they agreed to have it settled by the railway accounts(see judgment of the lower Appellate Court).

I find no substance in this appeal and dismiss it with costs.

V. N. V. *Appeal dismissed.*
Z. K.

(1) 12 Ind. Cas. 378 ; 36 M. 68 at p. 70 ; 10 M. L. T. 251; (1911) 2 M.W.N. 225; 21 M.L.J. 1024.

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 25 OF 1923.

December 8, 1923.

Present :—Mr. Baker, J. C.

RAGHUNATH SINGH—DEFENDANT—APPELLANT

versus

GABDOO—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), Sch. II, Art. I, applicability of—Suit for possession—Dispossession by landlord, whether necessary—Amendment of plaint, when allowed.

Article 1 of Schedule II to the C. P. Tenancy Act of 1920 applies to dispossession of a tenant by any person whether the landlord or not. (p. 357, col. 1)

Plaintiff sued to recover possession of a holding alleging that he was an occupancy tenant of the holding and was dispossesed by the defendant in July 1920. The defendant contended that the plaintiff had been out of possession since 1918 and had surrendered his tenancy and that the defendant had been placed in possession by the *Malguzar*. In the course of the pleadings the plaintiff stated through his pleader that he had been out of possession since the end of 1918 and that the defendant has not actually dispossessed him but that the suit was filed against defendant as he was in wrongful possession. In reply it was pleaded

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that the plaintiff not having been in possession of the land within 2 years from the date of the suit, his claim was barred by limitation under Article I of Schedule II to the C. P. Tenancy Act of 1920. On the date fixed for hearing arguments on the point of limitation the plaintiff applied to amend his pleadings on the ground that he had inadvertently stated that he was dispossessed in 1918 whereas he was dispossessed of 2 fields out of 3 in 1919 and of one field in 1920, and applied to put in copies of *jamabandis* in support of this.

Held that as the plaintiff did not in his plaint rely on the *jamabandis* he could not be allowed to amend his pleadings in order to get out of the effect of his own admission; (p. 356, col. 2)

(2) that under Article 1 of Schedule II to the C. P. Tenancy Act of 1920, the dispossession need not necessarily be by the landlord and that the plaintiff's suit was clearly barred under that Article. (p. 357, col. 1)

Appeal against the decree of the Additional District Judge, Saugor, in Civil Appeal No. 18 of 1923 dated the 3rd July 1923.

Mr. *G. L. Subhedar*, for the Appellant.

JUDGMENT.—This is an appeal against an order of the Additional District Judge, Saugor, setting aside the decree of the Munsiff, Saugor, dismissing the plaintiff's suit as barred by limitation, and remanding the suit for trial on the other issues. The facts are simple. The plaintiff sued the defendant alleging that he was an occupancy tenant of certain holdings and was dispossessed by the defendant in July 1922. The defendant contended that the plaintiff had been out of possession since 1918 (*Sambat* 1975) ,and had surrendered his tenancy, and that the defendant had been placed in possession by the Malguzar.

In the course of the pleadings the plaintiff stated through his pleader that he had paid rent for the holding in suit till the end of the *Sambat* year 1974, that he had been out of possession of the land since the end of *Sambat* 1975 and that the defendant had not actually dispossessed the plaintiff but the suit was filed against him as he is in wrongful possession. The defendant, in reply pleaded that the plaintiff not being in possession of the land in suit within two years from the date of the suit, his claim was barred by limitation under the provisions of the new Tenancy Act. The suit was then fixed for argument on the question of limitation for the 31st of January 1923, on which date the plaintiff applied to amend his pleadings, stating that he inadvertently stated that he was dispossessed in 1975 (1918 A. D.), whereas he was dispossessed of 2 fields out of 3 fields in *Sambat* 1976-77 (1919) and of one field in 1978 and applied to put in copies of *jamabandis* in support of this.

The Trying Judge then passed an order on 12th February 1923, in which for the reasons given he refused to allow the plaintiff to amend his pleadings, holding that the statement in the pleadings was not made inadvertently and that in the plaint the plaintiff did not rely on the *jamabandis* which he now seeks to produce. He, therefore, disallowed the amendment as unfair to the defendant and the suit was dismissed on 22nd February 1923 as barred by limitation.

On appeal the Additional District Judge, Saugor, reversed this finding and remanded the suit for a trial on the merits, holding that Article 1, Schedule II of the new Tenancy Act, did not apply to it. The defendant makes this second appeal.

It is argued that the Additional District Judge has misconstrued the pleadings. On reading the judgment of the learned Judge I am of opinion that this is so. Article 1 of the Second Schedule, Tenancy Act of 1920, prescribes the period of 2 years' limitation from the date of dispossession or exclusion by any person. The defence was based on the provisions of this article and not on the provisions of section 35 of the old Tenancy Act, as the Additional District Judge supposes. The plaintiff's pleading that he had been in possession of the land in suit since 1918 is perfectly clear. He did not in his plaint rely on the *jamabandis* which he now seeks to produce, and I agree with the first Court in holding that he should not be allowed to amend his pleadings in order to get out of the effect of his own admissions. The learned Additional District Judge remarks that the plaintiff says that one Ramlal was in possession and that there are no pleadings on either side as to on whose behalf Ramlal came on the land. The plaintiff has clearly stated in the pleadings that Ramlal was in possession on his behalf ; so he could not take advantage of the possession of Ramlal. The discussion in the judgment of the lower Appellate Court as to the respective rights of Kedarnath Malguzar and Raghubarprasad as mortgagee and as to the dispossession by a person other than the land-

lord is entirely beside the remark. Article 1 of the Second Schedule of the new Tenancy Act is perfectly clear, as it refers to dispossession by any person, whether the landlord or not.

It is not the law that dispossession must be by a landlord. There is plaintiff's own admission that he was excluded from the entire possession of his holding from the beginning of *Sambat* year 1972, and no evidence being necessary he was asked to explain this by the lower Appellate Court. He is unable to explain it and wants to amend his plaint. The lower Appellate Court is in error in supposing that the defendant did not take shelter under Article 1, Schedule II of the Tenancy Act. He distinctly says so on 6th November 1922, the day on which the plaintiff admitted his dispossession. In these circumstances when the plaintiff has distinctly admitted that he had no possession of the land within two years previous to the suit and that he never relied before on the *jamabandis*, the first Court was quite right in refusing to allow the amendment which would have the effect of seriously predjudicing to the defendant. The learned Additional District Judge does not seem to have read the pleadings carefully and his view that the exclusion must be by a person who is recognised by the landlord is obviously wrong in view of the provisions of the new Tenancy Act.

I, therefore, set aside the order of the lower Appellate Court and restore that of the first Court. The plaintiff's suit must be dismissed and he must bear the costs of the defendant throughout.

G. R. D.
K. S. D. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 132 OF 1921.

December 31, 1923.

Present :—Sir Justice Asutosh Mukerjee, Kt., C. S. I., and Mr. Justice Suhrawardy.

LUKHAN CHANDRA MONDAL —PLAINTIFF—APPELLANT

versus

TAKIM DHALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Possession, suit for—Burden of proof—Statement of age of witnesses in head of deposition, whether evidence—Registration Act (XVI of 1908), ss. 3, 17, 49—Amalnamah authorising grantee to take possession, whether requires registration—Admissibility for collateral purpose—Secondary evidence, admissibility of—Document produced in previous litigation—Custody, proof of—Evidence Act (I of 1872), s. 32—Statement contained in plaint in previous suit, admissibility of—Plaintiff not examined—Muhammadan Law—Representation of family, doctrine of, whether recognised—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for possession—Recovery of purchase-money from vendor—Alternative claim—Procedure.

In a suit for possession a plaintiff must succeed on the strength of his own title and is not assisted by any weakness real or apparent, in the case for the defendant. (p. 359, col. 1)

Courts should not rely upon the statements of the ages of witnesses at the head of depositions which do not furnish any evidence on the subject. (p. 359, col. 2)

Maqboolen v. *Ahmad Husain*, 31 I. A. 38; 26 A. 108; 8 C. W. N. 241; 6 Bom. L. R. 283; 8 Sar. P. C. J. 583, (P. C.).

An *Amalnamah* which is neither a lease nor an agreement to lease within the meaning of section 3 of the Registration Act but merely authorises the grantee to take possession and is intended to be followed by a formal *Kabuliyat* is not compulsorily registrable and is admissible in evidence without registration. (p. 359, col. 2)

Dwarka Nath Saha v. *Ledu Sikdar*, 33 C. 502, followed.

Chooni Munder v. *Chundu Lall*, 14 W.R. 178; *Bibee Meheroonnissa* v. *Abdul Gunee*, 17 W. R. 509; *Maharaja Luchmissur Singh* v. *Musammat Dakho*, 7 C. 708: 10 C. L. R. 127; 3 Ind. Dec. (N. S.) 1004; *Lall Jha* v. *Negroo*, 7 C. 717; 3 Ind. Dec. (N. S.) 1009; *Champakiatika Mitra* v. *Nafar Chandra Pal Chowdhury*, 8 Ind Cas. 44. 15 C W. N. 536; 13 C. L. J. 300; *Elahi Baksh* v. *Hukam Baksh*, 20 Ind. Cas. 907; 19 C. L. J. 464; 18 C. W. N. 38, distinguished.

Apart from section 17 (2) (*v*) of the Registration Act, such a document, even if deemed compulsorily registrable, is inadmissible only for the limited purpose mentioned in section 49 (c) of the Act as evidence of a transaction 'affecting' immoveable property comprised therein, and would not be inad-

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missible for the purpose of determining who were the parties to the transaction. (p. 360, col. 1)

Where the original of a document which was produced in a previous litigation cannot be traced but its custody is satisfactorily proved, secondary evidence of the contents of the document is admissible. (p. 360, col. 1.)

Gudadhur Paul Chowdhury v. *Bhyrub Chunder Bhuttacharjee*, 5 C. 918 ; 2 Ind. Dec. (N. S.) 1193; *Trailakia Nath Mundi* v. *Shurno Chungoni*, 11 C. 539; 5 Ind. Dec. (N. S.) 1117 ; *Ehtisham Ali* v *Jamna Prasad*, 64 Ind. Cas. 299 ; 48 I. A. 365; 27 C. W. N. 8 ; 24 O. C. 272 ; 15 L. W. 104 ; 30 M. L. T. 132 ; 9 O. L. J. 71; 24 Bom. L. R. 675 ; (1922) A I R. (P. C.) 56 ; 20 A. L. J. 96 (P. C.), followed.

The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein is of a refined but of a fundamental character, and should not be lost sight of. (p. 360, col. 2.)

Kashinath Pal v. *Raja Jagat Kishore Acharjya Chowdhury*, 35 Ind. Cas. 298 ; 20 C. W. N. 643 ; 23 C. L. J. 583 ; *Ram Parkash Das* v. *Anand Das*, 33 Ind. Cas. 583 ; 43 I. A. 73 ; 43 C. 707 ; 20 C. W. N. 802 ; 14 A. L. J. 621 ; (1916) 1 M. W. N. 406; 31 M. L. J. 1 ; 18 Bom. L. R. 490 ; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267 (P. C.); *Tripurana Seethapati Rao Dora* v. *Rokkam Vencamma Dora*, 66 Ind. Cas. 280; 45 M. 332; 42 M. L. J. 324; 15 L. W. 316 ; 30 M. L. T. 160 ; (1922) M. W. N. 147 ; (1922) A I. R. (M.) 71 ; *Baidyanath Dutt* v. *Aletjan Bibi*, 70 Ind. Cas. 194 ; 36 C. L. J. 9; (1923) A. I. R. (C) 240; *Sarada Prasonna Roy* v. *Uma Kanta Hazari*, 77 Ind. Cas. 450; 57 C. L. J. 233 ; (1923) A. I. R. (C) 485 ; 50 C. 370, referred to.

Where a landlord is alive and no effective attempt is made to examine him. a statement made in a plaint filed by him in a previous rent suit is not admissible in evidence. The plaint would be admissible only in proof of the fact that the landlord did sue on the allegations contained in the plaint. (p. 360, col. 2.)

In Mahomedan Law, there is no representation of the family as under the Hindu Law. (p. 361, col. 1.)

Sukur Mohed v. *Hsmot Mondal*, 79 Ind. Cas. 491; 50 C. 978 ; *Abdul Majeeth Khan Saheb* v. *Krishnamachariar*, 40 Ind. Cas, 210; 40 M. 243 ; 32 M. L. J. 195 ; (1917) M. W N. 346 ; 5 L. W. 767, relied on.

Where in a suit for recovery of joint possession on declaration of title by purchase and for partition an alternative prayer for recovery of the purchase money from his vendors was made by the plaintiff, but no issue was struck on the point and the evidence did not afford proof of the precise amounts paid by him to his vendors. (p. 362, col. 1.)

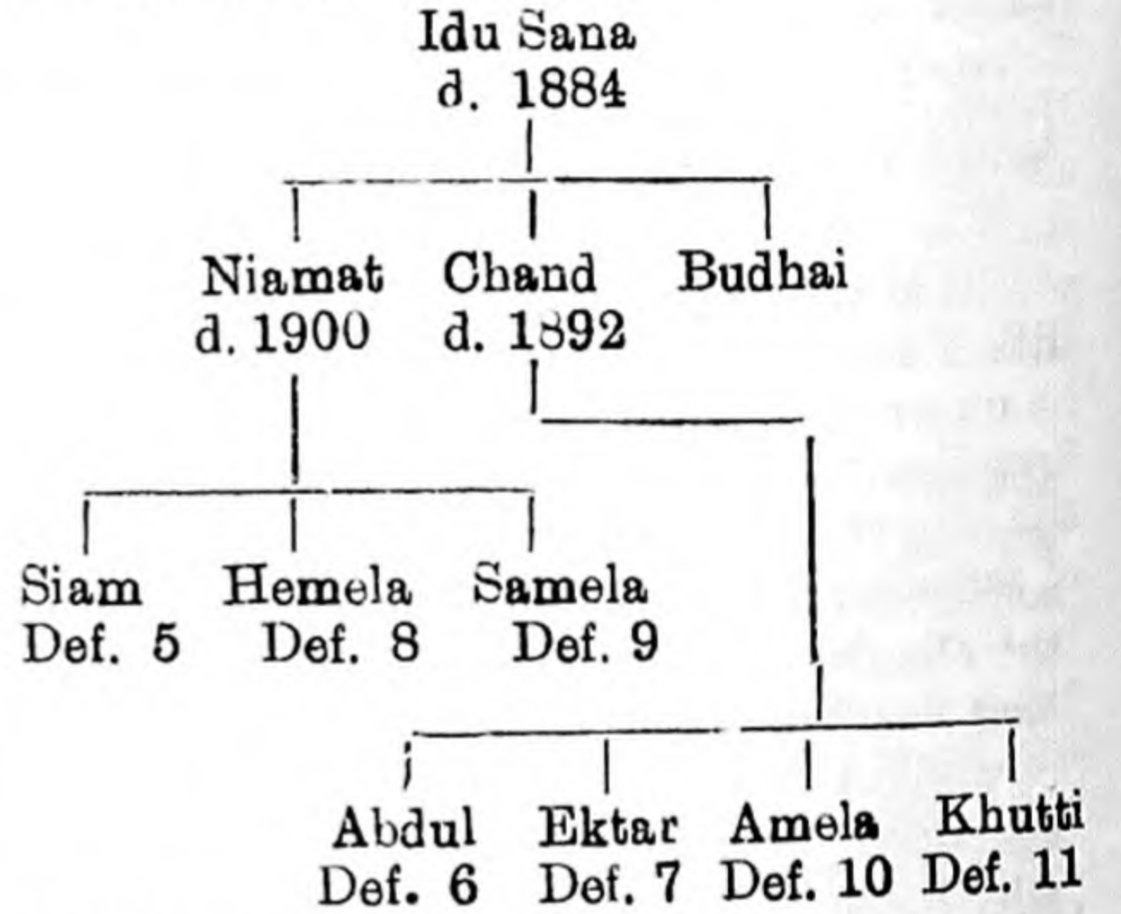
Held, that the proper course was to reserve liberty to the plaintiff to institute a separate suit for restitution against his vendors.

Appeal against the decree of the Subordinate Judge, Khulna, dated the 31st May 1921.

Dr. *Jadunath Kanjilal*, for the Appellant.

Babu *Brojolal Chakraburty* (with him Babu *Promode Kumar Ghosh*,) for the Respondents.

JUDGMENT.—The subject-matter in the litigation, which has culminated in this appeal, is a tenure created on the 25th February 1881, by the proprietor of Chuck Ula Kalijuga appertaining to Tauzi No. 57 of the Collectorate of Khulna. The proprietary interest, which, at that time was vested in Suryyakanta Bai Chaudhuri, has since been transferred to Jogendra Chandra Ghosh and others. The case for the plaintiff is that the tenure was granted to one Idu Sana ; while the case for the defendants is that the grant was made in favour of his son Bhudai Sana. The relationship of the parties will appear from the annexed genealogical table :



Idu Sana left three sons, Niamat Chand and Budhai who inherited the properties left by him in equal shares. Niamat left a son (defendant No. 5) and two daughters (defendants Nos. 8 and 10). Chand left two sons (defendants Nos. 6 and 7) and two daughters (defendants Nos. 10 and 11). The daughters are alleged to have relinquished their interest in favour of their respective brothers, and it may be taken for the purposes of this litigation that whatever estate was left by Idu Sana passed to his grandsons alone. On the 14th November, 1906, Budhai sold the entire tenure to the firstdefendant for a sum of Rs. 1600, on the assumption that his nephews had no interest therein. On the 26th January, 1917, the fifth, sixth and seventh defendants conveyed a two-thirds share of the tenure to the plaintiff for a sum of Rs. 3,000, on the assumption that it was the joint property of their respective fathers and of their uncle. On the 6th November, 1918 the plaintiff instituted the present suit for recovery of joint pos-

session on declaration of title by purchase, for partition, and for incidental reliefs. The plaintiff joined with the prayer for possession, an alternative prayer for recovery of the purchase-money from his vendors, should the Court ultimately hold against him on the question of title. The brothers and sisters of the first defendant were brought on the record as defendants (defendants Nos. 2—4 and 12—15 in order that they might have an opportunity to oppose the claim and might be bound by any decree in favour of the plaintiff. The claim was, however, contested by the first defendant alone, who disputed the title and possession of the plaintiff as well as of his vendors. The principal issues framed on the pleadings were as follows :—

(1) Did Idu Sana or his son Budhai Sana take settlement of the land in suit ?

(2) Is the claim barred by limitation ?

(3) Is the conveyance of the plaintiff a *bona fide* document for consideration ?

The Subordinate Judge has dismissed the suit and has disallowed the claim for possession as well as the alternative claim for refund of the consideration-money. On the present appeal, the conclusions of the Subordinate Judge have been assailed upon every point.

We have to consider in the first place the fundamental question in the suit, namely, whether the settlement of the disputed land was taken by Idu Sana or by his son Budhai Sana. The oral testimony of the persons said to have been present at the time of the actual settlement has been accurately analysed by the Subordinate Judge, and he has held that the evidence given by the principal witnesses for the plaintiff, Abdul Sana and Esen Sardar, to establish that the settlement was made with Idu Sana is wholly unreliable. The oral evidence is full of contradictions, and we are not prepared to dissent from the estimate of its value formed by the Trial Judge. The unsatisfactory evidence brought forward by the plaintiff does not gain in strength by the fact that the defendant has not been able to produce unimpeachable evidence in support of his affirmative case that Idu Sana had died long before 1881 when the settlement took place. The plaintiff must succeed on the strength of his own title and is not assisted by any weakness, real or apparent, in the case for the defendant. We may add that some of the witnesses appear to have very hazy notions of time which make it difficult for the Court to place implicit reliance on them ; but we feel bound to add that the Subordinate Judge should not have relied upon the statements of ages of witnesses at the head of depositions, which, as pointed out by the Judicial Committee, do not furnish evidence on the subject. *Maqbulan* v. *Ahmad Hussain* (1). In this state of the oral evidence the plaintiff is driven to rely upon documentary evidence. In this category, we have the plaintiff in a suit for arrears of rent instituted on the 13th April, 1904, by the landlord Suryyakanta Raichaudhury against Budhai Saha. The second paragraph of the plaint recites that Idu Sana obtained the settlement on the 25th February, 1881, when an *Amalnama* was granted to him. The terms of the *Kabuliat* which was executed by the tenant after he had received the *Amalnama* are then set out in detail, and the area is stated to have been 299 *bighas* by guess. The *Kabuliat* has not been produced, but the *Amalnama* has been received in evidence, subject to objection. This *Amalnama*, it must be mentioned here, purports to be in favour of Budhai Sana and not Idu Sana. In these circumstances, it is not surprising, that there has been some discussion at the Bar as to admissibility of the *Amalnama* and of the plaint.

As regards the *Amalnama* we are of opinion that it was neither a lease nor an agreement to lease within the meaning of section 3 of the Indian Registration Act and that it was consequently admissible in evidence without registration, as explained in *Dwarkanath* v. *Ledu Sikdar* (2), which distinguished the decision of the Full Bench in *Syed Sufdar Reza* v. *Amzad Ali* (3). The document in essence authorised the grantee to take possession, and was intended to be followed by a formal *Kabuliat*; it does not consequently fall within the scope of such decisions as *Chuni* v. *Chundi* (4), *Meherunnessa* v. *Abdul* (5) *Maharaja Lachmiswar* v. *Dakho* (6), *Lall Jha* v. *Negroo* (7),

(1) 31 I. A 38 : 26 A. 103 ; 8 C. W. N. 241; 6 Bom. L. R. 233 ; 8 Sar. P. C. J. 583 (P.C.).
(2) 33 C 502.
(3) 7 C. 703; 4 Shome, L. R. 240; 10 C. L. R. 121; 3 Ind. Dec (N. S.) 1001.
(4) 14 W. R. 178.
(5) 17 W. R. 509.
(6) 7 C. 708 ; 10 C. L. R. 127 ; 3 Ind. Dec (N. S.) 1004.
(7) 7 C. 717; 3 Ind. Dec. (N. S.) 1009.

Champaklatika v. *Nafar* (8) and *Elahi* v. *Hukum* (9). We must further remember that apart from section 17 (2) (*v*) of the Indian Registration Act, the document, even if deemed compulsorily registrable, is inadmissible only for the limited purpose mentioned in section 49 (*c*) namely, as evidence of a transaction "affecting" immoveable property comprised therein. Here the transaction itself is admitted by both sides, the only dispute is, whether it was between *A* and *B* or *A* and *C*. We need not pause to consider whether the use of the document as an aid for the solution of this question may or may not be called "use for a collateral purpose" within the meaning of such cases as *Ulfatun* v. *Hossain* (10), *Bai Golapbai* v. *Datagarji* (11), *Hope Mills* v. *Readymoney* (12) and *Vyravan* v. *Subramanian* (13). If the document be admitted in evidence, there can be no doubt that it militates against the theory put forward by the plaintiff. Consequently a strenuous endeavour has been made to cast doubt upon its genuineness. We are not impressed by this argument. The original was produced in a previous litigation; the certified copy now on the record was taken from it on the 18th February, 1914. The original cannot now be traced, but its custody is satisfactorily proved according to the test formulated in *Gadadhar* v. *Bhairab* (14) and *Troilakhya* v. *Swarna* (15). In such circumstances secondary evidence was plainly admissible; *Ehtishan Ali* v. *Jamna Prasad* (16) and a presumption of genuineness may be made. There is no substance in the suggestion that the terms of the *Amalnama* are not in all respects identical with the contents recited in the plaint dated 13th April, 1904. The variations afford no ground for suspicion, as all the terms could not be expected to be enumerated in an *Amalnama* when a more formal document in the shape of a *kabulait* was intended to be drawn up.

As regards the plaint in the suit for arrears of rent, it was plainly admissible in proof of the fact that the landlord did sue on the allegation that the settlement had been made with Idu Sana; but the plaint is not admissible to prove the statement itself, as the conditions prescribed by section 32 of the Indian Evidence Act do not exist in this case. The landlord was alive, and no effective attempt was made to secure his attendance as a witness or to examine him on commission. The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein is of a refined but of a fundamental character and is yet frequently overlooked; see *Kashinath* v. *Jagatkishore* (17), *Ramperkash* v. *Ananda Das* (18), *Seethapati* v. *Venkanna* (19), *Baidya Nath* v. *Alef Jan* (20), *Sarada* v. *Umakanta* (21). In our opinion, the plaint cannot properly be used to prove the statement made by the superior landlord, and the same remark applies to the plaint dated the 18th April 1911, filed by the Ghoses (the present landlords) in a suit for ejectment instituted by them. In this plaint, the Ghoses asserted that the settlement had been made with Budhai Sana. Between the dates of these two plaints, Suryya Kanta Raichaudhuri, the former landlord, granted a lease on the 14th December 1905, to Dwarkanath Mondal and Dasarath Mandal, after he himself had purchased the tenure at the sale which followed the decree dated 13th September, 1904 in the suit for arrears of rent. This lease, which subsequently became infructuous by reason of reversal of the rent sale, recites that the original settlement had been made with Budhai Sana. The position, consequently, is that in 1904, the

(8) 8 Ind. Cas. 44; 15 C.W.N. 536; 13 C. L. J. 300.
(9) 20 Ind. Cas. 907; 19 C. L. J. 464; 18 C.W.N. 38.
(10) 9 C. 520; 12 C. L. R. 209; 4 Ind. Dec. (N. S.) 995.
(11) 9 Bom. L. R. 393.
(12) 10 Ind. Cas. 748; 13 Bom. L. R. 162.
(13) 56 Ind. Cas. 642; 47 I.A 188; 43M. 660; (1922) M. W. N. 368; 18 A. L. J. 726; 39 M. L. J. 37; 12 L. W. 143; 24 C W. N. 1053; 22 Bom. L. R. 1357; (P. C.)
(14) 5 C. 918; 2 Ind. Dec. (N. S.) 1193.
(15) 11 C. 539; 5 Ind. Dec. (N. S) 1117.
(16) 64 Ind. Cas 293; 48 I. A. 365; 27 C. W. N. 8; 24 Q. C. 372; 15 L. W. 104; 30 M. L. T. 132; 2 Q. L. J. 71; 24 Bom. L. R. 675; (1922) A. I. R. (P. C.) 56; 20 A. L. J. 981 (P. C.).
(17) 35 Ind. Cas. 293; 20 C. W. N. 643; 23 C L. J. 583.
(18) 33 Ind. Cas. 583; 43 I. A. 73; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267 (P. C.)
(19) 66 Ind. Cas. 280; 45 M. 332; 42 M. L. J. 324; 15 L. W. 316; 30 M. L. T. 160; (1922) M. W. N. 147; (1922) A. I. R. M. 71.
(20) 70 Ind. Cas. 194; 36 C. L. J. 9; (1923) A. I. R. (C.) 240.
(21) 77 Ind. Cas. 450; 37 C. L. J. 238; (1923) A. I. R. (C.) 485; 50 C. 370.

landlord came into Court on the allegation that the settlement had been made with Idu Sana, in 1905 the same landlord granted a lease on the assertion that the settlement had been made with Budhai Sana and in 1911 the new landlords maintained that the settlement had been made with Budhai Sana. The Subordinate Judge has correctly held that these conflicting assertions, even if they were regularly admitted in evidence, could not advance the case of the plaintiff. We cannot further overlook that in 1908, when Suryyakanta Rai Chowdhuri sued Budhai Sana and others for arrears of rent, the present first defendant, who was then the second defendant, promptly repudiated the allegation of the landlord and maintained that Budhai Sana and not his father Idu Sana took the settlement. We must hold that the documentary evidence, like the oral evidence, does not prove the case for the plaintiff. This view is materially confirmed when we examine the evidence of possession. The Subordinate Judge, on a detailed analysis of the oral evidence, has pronounced against the contention of the plaintiff that Idu Sana took the settlement, raised the embankments, reclaimed the jungles, brought the lands under cultivation, and that, after his death, his three sons Niamat, Chand and Budhai were in joint possession till the death of Chand. We have closely examined the evidence, and notwithstanding the forcible criticisms of Counsel for the plaintiff, we have come to the conclusion that the view taken by the Trial Judge is correct. Consequently, in so far as possession may be deemed evidence of title, the case for the plaintiff has completely broken down and we accept the view that since the settlement of 1881, Budhai Sana was in sole possession up to the time of the sale to the first defendant in 1906. There is, in our opinion, no escape from the conclusion that the plaintiff has failed to establish his alleged title. We may add that no solid foundation has been laid in the evidence for a possible theory that the settlement was taken in the name of Budhai for the benefit of the entire family, either during the life-time of Idu or after his death. Such a case would contradict and effectively destroy the theory that the settlement was taken by Idu as the head of the family. But, apart from this, the hypothesis would have no chance of acceptance in view of the decision in *Sukur Mahomed* v. *Asmot Mandal* (22), which, notwithstanding the dicta in *Assamathem* v. *Lachmipat* (23) and *Muttyjan* v. *Ahmed Ali* (24), followed *Abdul* v. *Krishnamachariar* (25), and affirmed the doctrine that in Mahomedan Law there is no representation of the family as under the Hindu Law.

In view of our decision upon the question of title, we need not investigate the interesting point of limitation raised in course of argument namely, whether having regard to the character of the lands, which, for many years, formed in the main an unculturable waste, the principles recognised by the Judicial Committee in *Agency Co.* v. *Shortt* (26), *Radhagobind* v. *Inglis* (27), *Rajkumar* v. *Govinda Chandra* (28), *Secretary of State* v. *Krishnamani*, (29) and *Basanta Kumar* v. *Secretary of State*, (30) and other cases which will be found elaborately reviewed by Chatterjee, J. in *Rakhal* v. *Durgadas* (31) should not be applied. In our opinion, the claim for recovery of possession has been rightly dismissed, as the plaintiff has failed to establish his alleged title.

We have finally to consider the alternative claim made by the plaintiff for recovery of the purchase-money from his vendors, who, as we have seen, had no title to the disputed property. The Subordinate Judge has directed that the matter be determined in a separate suit, if occasion should arise. He has held that the plaintiff is a speculative purchaser, who took the conveyance with full knowledge that his vendors were not in possession. He has further held that the evidence does not

(22) 79 Ind. Cas. 591 ; 5 O. C. 978.
(23) 4 C. 142; 2 C. L. R. 223 ; 1 Shome L. R. 219; 2 Ind. Dec. (N.S) 92.
(24) 8 C. 370 ; 10 C. L. R. 346 ; 4 Ind. Dec. (N S.) 237.
(25) 40 Ind. Cas. 212 ; 40 M. 243 ; 32 M. L. J. 195 ; (1917) M. W. N. 346 ; 5 L. W. 767.
(26) (1889) 13 A. C. 793 ; 58 L. J. P. C. 4; 59 L. T. 677 ; 37 W. R. 433 ; 53 J. P. 132.
(27) 7 C. L. R. 364 ; 3 Suth. P. C. J. 809.
(28) 19 I. A. 140 ; 19 C. 660; 6 Sar. P. C. J. 140 ; 9 Ind. Dec. (N. S) 883 (P. C.)
(29) 29 I. A. 104; 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 260 (P.C.)
(30) 40 Ind. Cas. 337; 44 I. A. 104; 44 C. 858; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117 ; 22 M. L. T. 310 (P C.).
(31) 67 Ind. Cas. 678; 26 C. W. N. 724; (1922) A. I. R. (C.) 557.

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afford convincing proof of the precise amount, if any, paid by the plaintiff to his vendors. It is plain that though the alternative claim was put forward in the seventeenth paragraph of the plaint, no issue was raised on the point, and the evidence was not directed to the elucidation of the question, whether there is a covenant for title under section 55 of the Transfer of Property Act and whether in the events that have happened the plaintiff can claim restitution. According to the opinion expressed by Wilson, J. in *Hanuman* v. *Hanuman*, (32) which was affirmed by the Judicial Committee on a different ground, *Hanuman* v. *Hanuman* (33) section 43 of the Code of 1882, now superseded by O. 2, r. 2, of the Code of 1908, would not bar a separate suit; in any event, the claim can, with the leave of the Court, be reserved for investigation in another suit. In view of the course the trial took in the Court below and the state of the evidence on the record, the Subordinate Judge has, we think, properly reserved liberty to the plaintiff to institute a separate suit for restitution against his vendors; and we see no reason to vary that order.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal is dismissed whth costs in favour of the first defendant.

M. B. *Appeal dismissed.*
Z. K.

(32) 15 C. 51; 7 Ind Dec. (N.S.) 620.
(33) 19 C. 123; 18 I. A. 158: 6 Sar P. C. J. 91; 9 Ind. Dec. (N. S.) 527.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE NO. 41-B OF 1923.

November 3, 1923.

Present:—Mr. Baker, J. C.

Messrs. ARJUN KHEMJI AND CO.—APPLICANTS.

Income-Tax Act VII of 1918), *ss.* 12, 17, 18—*Income-Tax Act* (*XI of* 1922) *applicability of Act to proceedings started under Act of* 1918—*Unregistered firm—Loss incurred by partner, whether to be deducted from total taxable income.*

A notice under section 17 (2) of the Income-Tax Act of 1918 was issued to an assessee on 10th June 1921 in respect of the income of the year ending on 15th June 1921. Returns were received on 22nd August 1921 and 23rd March 1922 but were not accepted, and it was recorded on 31st March 1922, the last day on which the Act of 1918 was in force, that notice under section 18 (2) of the Act would issue at some future time. A definite order for the issue of this notice was made on 21st April 1922 and from that day onwards proceedings were conducted under the Income-Tax Act of 1922;

Held, that the Income-Tax Act of 1918 and not that of 1922 was applicable to the proceedings.

Under the Income Tax Act of 1918, if an unregistered firm in which an assessee is a partner incurs a loss, his share of that loss must be deducted from his other income in ascertaining his total taxable income. (p. 363, col. 1.)

Reference dated the 17th February 1923 by the Commissioner of Income-Tax, Central Provinces, against the firm of Messrs. Arjun Khemji and Co., Khamgaon.

Dr. *H. S. Gour*, for the Applicants.

ORDER.—In our previous order dated the 18th of June 1923 in this case we omitted by mistake to answer one of the two questions referred to us by the Commissioner of Income-Tax. The circumstances are some-what peculiar. Two questions referred were: (1) Is this case governed by Act VII of 1918 or by Act XI of 1922? (2) Under the Act by which it is governed, if an unregistered firm in which the assessee is a partner incurs a loss, is his share of that loss to be deducted from his other income in ascertaining his total taxable income? It may be mentioned that the Act of 1918 makes no distinction between registered and unregistered firms, and it is not easy to reconcile the contention that under that Act losses in all firms must be excluded from consideration with the admission made in another reference at the same time that the new Act expressly lays down that losses in registered firms must be taken into consideration.

The assessment proceedings began on 10th June 1921 with the issue of a notice under section 17 (2) of the Act of 1918; and were concerned with the income of the year ending on 15th June 1921. The returns were received on 22nd August 1921 and 23rd March 1922. They were not accepted, and it was recorded on 31st March 1922, the last day on which the Act of 1918 was in force, that notice under section 18 (2) of that Act would issue at some future time. A definite order

for the issue of this notice was made on 21st April 1922 and from that date onwards the Act of 1922 was applied in every particular, even in the appeal to the Commissioner of Income Tax and in the subsequent application to him to make the reference to this Court with which we are now dealing.

In the reference it is stated that the Commissioner is of opinion, as advised after the passing of his appellate order that the case should have been decided under Act VII of 1918 and not under Act XI of 1922 as it was, but he does " not now wish to press this legal point " and leaves it for decision to this Court. We lost sight of this matter and wrongly assuming that the case was admitted to be governed by Act XI of 1922, an assumption partly caused if not justified by the invariable reference to the firm in question as an unregistered firm, we stated an opinion that under that Act the losses as well as the profits must undoubtedly be taken into consideration.

But in another reference heard along with this, and very much confused with it thereby, we stated an opinion that under Act VII of 1918 the losses of such a firm could not be taken into consideration because, as we mistakenly thought, the profits were not. The Commissioner of Income Tax thereupon asked us for an expression of opinion on the question which we had omitted to answer. We have only to say in direct answer to that question that the case is undoubtedly and admittedly governed by Act VII of 1918.

That, however, is not the end of the matter. It has been strenuously urged on behalf of the Commissioner, both in this case and in the application for a review of the opinion expressed in the other case heard with it, that under Act VII of 1918 no deduction can be made from total taxable income of an assessee for losses incurred by him as a member of a firm other than his main business. The position is entirely untenable, as is now pointed out in our order of this date in the other case (*Seth Balkishan Nathari* v. *Commissioner of Income Tax* (1), and we feel bound to express surprise at an attempt being made even to take it up, and much more at the strenuous efforts made to maintain it. Our answer to the question referred to us is that the case is governed by Act VII of 1918.

Z. K. *Reference answered.*

(1) 78 Ind. Cas. 572.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 194 OF 1921.

September 13, 1923.

Present :—Mr. Justice Kumaraswamy Sastri and Mr. Justice Waller.

V. A. SUBBA ROW—PLAINTIFF —APPELLANT

versus

PONNAMMAI NADATHI *alias* PAKKIAMMAI NADATHI (DEAD) AND OTHERS— —DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 83—Mortgage—Redemption—Deposit in Court—Sub-mortgagee, position of—Mortgagee whether includes assigns—Deposit to account of mortgagee and Sub-mortgagee, validity of.

The word mortgagee in section 83 of the Transfer of Property Act includes the legal representatives and assigns of the mortgagee. (p. 364, col. 1.)

A sub-mortgage is an assignment of the mortgage and having regard to the remedies of the sub-mortgagee, a deposit by the mortgagor of the mortgage money in Court does not contravene the provisions of section 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites the sub-mortgage in his petition and the Court directs notice to issue to the mortgagee and the sub-mortgagee and the money, owing to disputes between the mortgagee and sub-mortgagee, is not paid out. (p. 365, col. 1 and 2.)

The fact that the mortgagee and the sub-mortgagee have disputes *inter se* either as to the validity of the sub-mortgage or as to the amount due thereunder will not affect the mortgagor. (p. 365, col. 1.)

Nagathal v. *Arumugam Pillai*, 44 M. L. J. 862 ; 17 L. W. 154 ; 32 M. L. T, 371 ; (1923) A. I. R. (M.) 354, followed.

Madhavi Amma v. *Kunhi Puthamma*, 23 M. 510; 8 Ind. Dec. (N. S) 758 ; *Dabendra Mohan Roy* v. *Sona Kunwar*, 26 A. 231; A.W.N. (1901) 21 ; 1 A. L. J. 5, distinguished.

A sub-mortgagee is a necessary party to a suit for redemption.

Narayana Mudali v. *Raghavammal*, 18 M. L. J. 462.

A claim by a sub-mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original mortgagee's rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage debt, it will operate as a complete assignment, and if for any lesser sum, as an assignment *pro tanto*. (p. 364, col. 2.)

Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly

in A. S. No. 163 of 1920 (A. S. No. 429 of 1919 on the file of the District Court, Tinnevelly) preferred against the decree of the Court of the Additional District Munsif of Tinnevelly, in O. S. No. 515 of 1917.

Mr. S. *Ramaswamy Aiyar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—This Second Appeal arises out of a suit by appellant to redeem a mortgage executed by him in favour of the husband of the 1st defendant who died leaving the 1st defendant, his widow, and defendants Nos. 2 and 3 his minor daughters. The first defendant in 1909 and after her husband's death sub-mortgaged the property and the 4th defendant claims to be entitled to the amount due on the sub-mortgage. The contention of defendants Nos. 1 to 3 is that the sub-mortgage originally created by the 1st defendant was a nominal transaction. The District Munsif found that the sub-mortgage was a genuine transaction supported by consideration but the Subordinate Judge on appeal reversed the decree on this point. In 1917 the appellant filed O. P. No. 33 of 1917 and deposited in Court the amount due on the mortgage. It is not disputed that the amount deposited was the amount legally payable on the mortgage. He seems to have stated that there was a sub-mortgage and that the 4th defendant claimed under it. Notice was issued to defendants Nos. 1 to 3 and to the 4th defendant that the sub-mortgage was nominal and that the 4th defendant was not entitled to any portion of the money deposited in Court, the money was not paid to anybody but remained in Court. It was after decree in the suit (O. S. No. 515 of 1917) ordered to be paid out by the District Munsif to the 4th defendant who drew this sum.

The first question is whether the deposit made under the provisions of section 83 of the Transfer of Property Act in O. P. No. 33 of 1917 was a proper one. Section 83 of the Act enacts that a mortgagor may, at any time before a suit for redemption is barred, deposit in a Court having jurisdiction to the account of the mortgagee the amount remaining due on the mortgage. There can be little doubt that the word mortgagee includes the legal representatives and assigns of the mortgagee. It is argued that a sub-mortgagee is not an assign and that a deposit of the money as payable both to the legal representatives and the sub-mortgagee is not a proper deposit.

We are unable to uphold this contention. Fisher in his Law of Mortgage observes "Mortgages are frequently transferred by way of sub-mortgage. In that case the sub-mortgage is a compound mortgage consisting of a mortgage of a chose in action, (*viz.*, the original mortgage debt) and of the property which is security for the original mortgage debt." In cases of suits where there is a sub-mortgage the decree has to direct an account of what is due on the original mortgage and of what is due on the sub-mortgage and payment of what is due on the sub-mortgage not exceeding the sum due on the original mortgage and the residue, if any, to the original mortgagee. Form No. 9, Appendix D to the Civil Procedure Code refers to suits by a sub-mortgagee against the original mortgagor and mortgagee and shows that an account has to be taken on the above footing. Ghose in his work on the law of mortgage in India observes "Debts secured by mortgage are also frequently assigned by way of security. Such transactions are known as sub-mortgages and may be evidenced merely by a deposit of title deeds. The sub-mortgagee by virtue of the assignment is not only entitled to the usual remedies against his own mortgagor but also against the original mortgagor." It is clear that a claim by a sub-mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original mortgagee's rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage-debt it will operate as a complete assignment, and if for any lesser sum, as an assignment *pro tanto*.

We have not been referred to any case where a deposit in Court under section 83 of the Transfer of Property Act has been held to be bad owing to the assignee of the mortgage being stated as the person entitled to the money. Where a person having notice of an assignment pays the money into the Court and names only the original mortgagee who has parted with his rights as the person entitled to receive the sum deposited we do not see how he can if the money is taken away resist a suit by the assignee of the mortgage

before such deposit (See *Narayana Mudali* v. *Raghavammal* (1). A sub-mortgagee will be a necessary party to a suit for redemption and we think that a deposit will not be bad merely because the petition states the persons entitled on the original and sub-mortgages and the Court issues notices to them. The case will of course be different if the mortgagor alleges claims of persons not the legal representatives or assings of the mortgagee for the purpose of seeing that the money is not drawn out or of supporting the case of persons with no title.

We do not think that *Madhavi Amma* v. *Kunhi Puthamma* (2) and *Debendra Mohan Roy* v. *Sona Kunwar* (3) referred to by the respondent apply to the case of sub-mortgages. They were cases where strangers having no right in the mortgage were mentioned as persons entitled to the money deposited.

The fact that the mortgagee and sub-mortgagee have disputes *inter se* either as to the validity of the sub-mortgage or the amount due thereunder will not affect the mortgagor. Where the fact of a sub-mortgage is 'not disputed it is no part of the business of the mortgagor to decide whether the sub-mortgage is real or nominal. In the case of legal representatives it has been held in *Nagathal* v. *Arumugam Pillai* (4) that any dispute that may arise between the heirs as to their shares will not affect the mortgagor making the deposit and we can see no reason why a similar rule should not apply where disputes arise as to the right to the money between the mortgagee and the sub-mortgagee from him. A person executing a sub-mortgage and giving an apparent title should not cast on the mortgagor a stranger the duty of deciding who is entitled. To hold otherwise would in effect deprive the mortgagor of the rights given to him by section 83 where a mortgagee disputes the effect of his own act in executing a document which on the face of it creates rights in another to the mortgage money.

We are of opinion that a sub-mortgage is an assignment of the mortgage and that having regard to the remedies of the sub-mortgagee a deposit in Court does not contravene the provisions of section 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites the sub-mortgage in his petition and the Court directs notice to issue and the money is owing to disputes between the mortgagee and his sub-mortgagee, not paid out.

The next question is as to the liability of the defendants for *mesne* profits. The 2nd and 3rd defendants are minor daughters and they cannot be liable for *mesne* profits owing to any wrongful act of their mother; so far as the 1st and 4th defendants are concerned it is immaterial to the plaintiff whether the 1st defendant continued in possession or parted with it to somebody else. 1st defendant died pending Second Appeal and her Legal representatives are brought on record. If she created a sub-mortgage it was her duty to get back possession and hand it over to the mortgagor. The 1st defendant is found by the Subordinate Judge to be in possession. So far as the rate of *mesne* profits is concerned there is no dispute. We think that defendants Nos. 2 and 3 as legal representatives of the 1st defendant and out of her assets and 4 are jointly liable to pay the amount decreed for the *mesne* profits.

As regards the amount deposited in Court in O. P. No. 33 of 1917 which has been drawn by 4th defendant we think that on the findings of the Subordinate Judge the 4th defendant is liable to pay the sum to the 1st defendant. As we hold that the deposit was valid there is no reason why the plaintiff should pay the sum over again. There will be a decree in favour of the 1st defendant against the 4th defendant for recovery of the amount drawn by him.

The decree of the Subordinate Judge will be modified as decided above. As the appellant has succeeded in all the grounds urged respondents No. 1 and 4 will pay his costs of the appeal and in the Courts below.

V. N. V. *Appeal allowed.*

(1) 18 M. L. J. 462.
(2) 23 M. 510; 8 Ind. Dec. (N. S.) 758.
(3) 26 A. 291; A. W. N. (1901) 21; 1 A. L. J. 5.
(4) 79 Ind. Cas. 40; 44 M. L. J. 362; 17 L. W. 154; 32 M. L. T. 371; (1923) A. I. R. (M.) 354.

SULTAN SINGH *v.* MURLI DHAR

LAHORE HIGH COURT.

FULL BENCH.

MISCELLANEOUS APPLICATION
NO. 412 OF 1923.

April 2, 1924.

Present :—Sir Shadi Lal, Kt., Chief Justice,
Mr. Justice Broadway and
Mr. Justice Harrison.

Rai Bahadur Lala SULTAN SINGH
—PETITIONER
versus
MURLI DHAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109 (a)—'Final order,' what is—Order remanding case for trial on remaining issues, whether 'final order.'

In determining the question whether an order is a 'final order' within the meaning of section 109 (*a*) of the Civil Procedure Code, regard must be had to the immediate effect on the suit sought to be appealed against and not to the effect which a decision in favour of the applicant would have, if the proposed appeal to the Privy Council were successful.

An order is a 'final order' within the meaning of section 109 (*a*) of the Civil Procedure Code only if it decides, or has the effect of deciding a cardinal issue in the suit, that is an issue going to the foundation of the suit, and thus disposes of the rights of the parties in the litigation, it being permissible for this purpose to examine not only the order but also the circumstances of the case with a view to ascertaining the effect of the order on the suit. (p. 373, col. 2.)

An order made by the High Court reversing the decree of the Trial Court dismissing the suit on a preliminary point, and remanding the case for trial on the remaining issues, is not a 'final order' within the meaning of section 109 (*a*) of the Civil Procedure Code. (p. 374, col. 1.)

Case-law discussed.

Application under O. XLV, r. 2, Civil Procedure Code, for leave to appeal to His Majesty in Council in case reported in 73 Ind. Cas. 302.

Mr. *Shamair Chand* and Mr. *Sagar Chand*, for the Petitioner.

Mr. *Kanwar Dalip Singh* and Mr. *Ram Lal*, for the Respondents.

ORDER.

Broadway, J.— Three days before his death, which occurred on the 21st January 1907, one Balkishen Das, B.A., executed a Will of which he appointed Baldeo Pershad and Rai Bahadur Sultan Singh the executors.

Under the terms of this Will the creation of trusts was contemplated.

The plaintiffs, certain Khatris of Delhi, having obtained the sanction required by section 92 of the Civil Procedure Code, instituted a suit against the said executors, charging them with having failed to carry out the trusts and having misapplied the trust funds, asking for their removal and preparation of a scheme of management etc., and claiming rendition of accounts.

The defendants contested the suit on various grounds and one of the issues settled was "Have the plaintiffs an interest in the trust"? The learned District Judge, without going into the merits of the case, decided this issue against the plaintiffs and dismissed the suit. The plaintiffs appealed to the High Court and a Division Bench consisting of Mr. Justice Harrison and myself, held that the plaintiffs had an interest entitling them to sue, accepted the appeal and remanded the suit to the Trial Court for disposal on the merits. The defendants then applied to this Court for leave to appeal to His Majesty in Council against this order of remand. Objection was taken to the grant of the necessary certificate on the ground that the order sought to be appealed against was not a 'final order' within the meaning of that expression in section 109 (*a*) of the Civil Procedure Code.

For the applicants-defendants it was contended that an order was a 'final order' and therefore appealable, whenever the decision of the, Trial Court, if upheld by the Judicial Committee would finally dispose of the main issue in a suit--a contention that appeared to be supported by the decision in *Khagendra Nandan Asram* v. *Sahayram Chakravarty* (1). On the other hand it was argued that an appeal was competent only *when the order sought to be appealed against* finally decided the rights of the parties in the suit—a view supported, *inter alia*, by *Mohammad Karim Khan* v. *Sadiq Hussain* (2). Owing to this apparent conflict of authorities Mr. Justice Harrison and I referred the matter

(1) 62 Ind Cas. 776; 25 C. W. N. 896.
(2) 71 Ind.Cas. 339 ; 10 O. L. J. 289 ; (1924) A.I. R. (O.) 81.

to a Full Bench for decision as to which of those two views should be adopted by this Court, and whether the order in the present case was a 'final order' carrying with it the privilage of an appeal.

These questions have been argued before this Bench, by Mr. Shamair Chand for the applicants—defendants and Mr. Dalip Singh for the opposite party (plaintiffs).

Mr. Shamair Chand contended that the test to be applied was that enunciated by the Calcutta High Court in *Khagendra Nandan Asram* v. *Sahayram Chakravarty* (1) and urged that the order in this case was a 'final order' inasmuch as if their Lordships of the Privy Council were to restore the decision of the Trial Court on the issue in question, the suit would come to an end. In addition to *Khagendra Nandan Asram* v. *Sahayram Chakravarty* (1) he cited the following authorities as supporting his contention :—*Rahimbhoy Habibbhoy* v. *Turner* (3), *Saiyid Murzhar Hassein* v. *Bodha Bibi* (4), *Santi Lal* v. *Raj Narain* (5), *Chandra Kunwar* v. *Chaudhri Narpat Singh* (6), *Hyder Mehdi* v. *Badshah Khanam* (7), *Baij Nath Goenka* v. *Ramashwas Singh* (8), *Sathappa Chetty* v. *Subramaniam Chetty* (9), *Ananda Gopal Gossain* v. *Nafar Chandra Pal Chowdhury* (10), *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11), *Sanyasi Charan Mandal* v. *Kishna dhan Banerji* (12).

On the other hand Mr. Dalip Singh contended that orders of remand dealing with questions relating to the frame of the suit or jurisdiction or *locus standi* were merely interlocutory, directing procedure, and decided no issue that could be regarded as a cardinal one, and that to decide whether an order was appealable the test applicable was the one laid down in *Mohammad Karim Khan* v. *Sadiq Hussain* (2). Applying that test, he then urged that the order in the present case was not a 'final order' within the meaning of section 109 (a) of the Civil Procedure Code.

He criticised the authorities cited by Mr. Shamair Chand, claimed that *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11) supported his own contention and referred to *Sahan Singh* v. *Jahandad Khan* (13), *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (14), *Radha Kishan* v. *Collector of Jounpur* (15), *Habi bunnissa* v. *Munawarunissa* (16), *Baij Nath-Dass* v. *Sohan Bibi* (17), *Ahmad Husain* v. *Gobind Krishna Narain* (18), *Nuri Mian Ganges Sugar Works Ltd.* (19), *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan* (20), *Mujtaba Husain* v. *Jamal-ud-Din* (21), *Kausella* v. *Ram Sarup* (22), *Shankar Bharati* v. *Narasimha Bharati* (23), *Krishna Prasad Singh* v. *Motichand* (24), *Krishna Chandra Ghosh* v. *Ram Narain Singh* (25), *Raja Tussuduk Rasul Khan* v. *Farzand Hasain* (26), *Birendra Nath Roy* v. *Nripendra Nath Roy* (27), *Nayari Venkata-*

(3) 15 B. 155 ; 18 I. A. 6 : 15 Ind. Jur. 35 : 5 Sar. P. C. J. 639 ; 8 Ind. Dec. (N. S.) 104 (P. C.).
(4) 17 A. 112 ; 5 M. L. J. 20 : 22 I. A. 1 ; 6 Sar. P. C. J. 580 : 8 Ind. Dec. (N. S.) 397 (P. C).
(5) 79 Ind. Cas. 87 ; 21 A. L. J. 686 ; 9 O. & A. L. R. 882 ; 45 A. 741 ; (1924) A. I. R. (A.) 119.
(6) 29 A. 184 ; 9 Bom. L. R. 267 ; 2 M. L. T. 100 ; 17 M. L. J. 103 : 5 C. L. J. 115 : 11 C. W. N. 321 ; 4 A. L. J. 102 (P.C.).
(7) 49 Ind. Cas. 520 ; 21 O. C. 336 ; 6 O. L. J. 70.
(8) 45 Ind. Cas. 192; (1918) Pat. 81 ; 3 P. L. J. 339 ; 5 P. L. W. 45.
(9) 71 Ind. Cas. 334 ; 16 L. W. 718 ; 43 M. L. J. 758 ; 31 M. L. T. 385 ; (1922) A. I. R. (M.) 510.
(10) 35 C. 618 ; 12 C. W. N. 545 ; 8 C. L. J. 168.
(11) 56 Ind. Cas. 302 ; 47 C. 918 ; 24 C. W. N. 721 ; 18 A. L. J. 591 ; 22 Bom. L. R. 606; 39 M. L. J 27 ; 12 L. W. 15 ; 2 U. P. L. R. (P. C.) 94 ; (1920) M. W. N. 407 ; 28 M. L. T. 87 ; 14 S. L. R. 191 ; 47 I. A. 124 (P. C).
(12) 67 Ind. Cas. 124; 49 C. 560 ; 30 M. L. T. 228; 20 A. L. J. 409 : 24 Bom. L. R. 700 ; 35 C. L. J. 98 ; 42 M. L. J. 41 ; (1922) M. W. N. 364 ; (1922) A. I. R. (P. C.) 237 ; 26 C. W. N. 954 ; 16 L. W. 536 ; 49 I. A. 108 (P. C.).

(13) 52 P. R. 1907 ; 34 P. L. R. 1908.
(14) 23 A. 152; 2 Bom. L. R. 978 ; 27 I. A 209 ; 5 C. W. N. 52 (P. C.).
(15) 23 A. 220 ; 28 I. A. 28 ; 5 C. W N. 153 (P. C.)
(16) 25 A. 629; A. W. N. (1903) 159.
(17) 3 Ind. Cas. 967 ; 31 A. 545; 6 M. L. T. 94 ; 6 A. L. J. 786.
(18) 9 Ind. Cas. 932 ; 93 A. 391 ; 8 A. L. J. 192.
(19) 32 Ind. Cas. 360 ; 38 A. 150 ; 14 A. L. J. 50.
(20) 54 Ind. Cas. 501 : 42 A. 174 ; 18 A. L. J. 83 ; 1 U. P. L. R. (A.) 168.
(21) 1 A. L. J. 26.
(22) 5 A. L. J. 57; A. W. N. (1907) 291.
(23) 69 Ind. Cas. 80 ; 47 B. 106 ; 24 Bom. L. R. 925 : (1922) A. I. R. (Bom.) 383.
(24) 19 Ind. Cas. 296; 40 C. 635 ; 17 C. W. N. 637 (1913) M. W. N. 487; 11 A. L. J. 517 ; 17 C. L. J. 573; 15 Bom. L. R. 515 ; 14 M. L. T. 87 ; 25 M. L. J. 140 ; 40 I. A. 140 (P. C.).
(25) 21 Ind. Cas. 480 ; 18 C. L. J. 124.
(26) 2 C. W. N. ccol (301) (P. C.).
(27) 46 Ind. Cas. 681 ; 22 C. W. N. 640.

ranga Raw Garu v. *Raja Keesara Venkatarama Narasimha Rao Garu* (28), *Daubu* v. *Tafazul Hussain* (29), *Prakash Chandra Sarkar* v. *Brindaban Chandra Sarkar* (30) and *Sri Krishna Das* v. *Benares Hindu University* (31).

Of the authorities cited at the Bar the most important are the pronouncements of their Lordships of the Privy Council reported in *Rahimbhoy Habibbhoy* v. *Turner* (3), *Saiyid Muzhar Hassain* v. *Bodha Bibi* (4) and *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand*, (11) and I shall refer to them at some length.

In *Rahimbhoy Habibbhoy* v. *Turner* (3), the plaintiff in the suit alleged that the defendant was accountable to him upon several claims.

The defendant alleged that he had legal defences to every one of those claims, and that *he was not accountable at all.* It had been held that the legal defences set up were valid as to some of the claims, and invalid as to others' "and therefore that the defendant must account." The decree did not, in so many words, declare the liability of the defendant but it "directed accounts to be taken which he was contending ought not to be taken at all".

It was held that the form of the decree was "exactly as if it affirmed the liability of the defendant to something on each one of these claims, if only the arithmetical result of the account should be worked out against him".

Lord Hobhouse then goes on to say "Now that question of liability was the sole question in dispute at the hearing of the cause and it is the cardinal point of the suit.....The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final..... that is finally determined against him and therefore.....the decree is a final one within the meaning of section 595 of the Code" (section 109 (*a*) of the present Code).

(28) 21 Ind. Cas. 842 ; 38 M. 509; 14 M. L. T. 560; (1914) M. W. N. 64 ; 26 M. L. J. 96.

(29) 45 Ind. Cas. 290 ; (1918) Pat. 1; 4 P. L. W. 342.

(30) 67 Ind. Cas. 991 ; (1922) Pat. 296 ; 4 U. P. L. R. (Pat.) 93; 3 P. L. T. 781; (1922) A. I. R. (Pat.) 611.

(31) 60 Ind. Cas. 208 ; 23 O. C. 324.

In *Saiyid Muzhar Hasein* v. *Bodha Bibi* (4) the plaintiff rested her claim on a certain document which she alleged operated as a will and under which certain of the defendants had acquired the properties in suit which they had conveyed to her.

On the evidence led the Trial Court found that no valid will had been made and dismissed the suit. On appeal the High Court decided the validity of the will in favour of the plaintiff, and, purporting to act under section 562 of the Civil Procedure Code (O. XLI, r. 23 of the present Code) remanded the cause for disposal of the remaining issues. A subsequent application for a certificate to appeal to the Privy Council was refused on the ground that the order was not a final one.

Special leave to appeal was applied for and granted. The reasons for granting leave were given by Lord Hobhouse who said ....."The next (defence) went to the foundation of the plaintiff's claim, being a denial that Ibn Ali made any valid gift to the grantors of the plaintiff.....The Subordinate Judge took the evidence and heard the case. He decided against the plaintiff on the question of Ibn Ali's will which defeated the suit, and made it necessary to give judgment on the other issues. The plaintiff appealed from this decree, and the High Court decided that Ibn Ali had made a valid gift ; and they remanded the case under section 562 of the Civil Procedure Code to be disposed of on the other issues according to law." He then points out that leave to appeal had been refused by the High Court on the ground that the remand was under section 562 of the Civil Procedure Code and that it was "the established practice of the Court to treat such orders of remand as not being final orders", and proceeds "Probably the practice referred to is quite correct. But there the remand contemplated by section 562 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. That is not the present case. . . . To establish the will of Ibn Ali was the first step in the plaintiff's case, and on her failing to do that, her whole suit failed. But that does not make the point a preliminary point decided so as to exclude essential evidence. Nor does it appear that any such evidence was excluded."

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He then holds that the remand order fell more properly under section 565 and, referred to *Rahimbhoy Habibbhoy* v. *Turner* (3), held that "In this case the will of Ibu Ali is the cardinal point of the suit, and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make."

It will be seen that in each of these cases what was looked at was the order against which an appeal was sought, and in each of them it was held that the said order was final because it decided the cardinal point in the suit what remained to be done being regarded as subordinate.

In *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11) suits for alleged breaches of certain contracts for the sale of cotton had been instituted. Each contract contained an arbitration clause, and the defendants applied for a stay of proceedings under section 19 of the Indian Arbitration Act, 1899, with a view to the issues being referred to arbitration under the clause.

The Trial Court granted the application but on appeal the Judicial Commissioners of Sind set aside the orders of the stay. Leave to appeal was granted by the Judicial Commissioners on the ground that if the stay applied for had been granted it would have finally terminated the suits. At the hearing of the appeal a preliminary objection was raised as to whether the orders appealed against were 'final orders' within the meaning of section 109 (*a*) of the Civil Procedure Code. The objection was allowed by the Board, Viscount Cave saying that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Court in the ordinary way."

Coming now to the other cases cited; in *Santi Lal* v. *Raj Narain* (5) leave to appeal was granted in the following circumstances:—

Certain persons had obtained a mortgage decree in their favour and in execution of this decree had exhausted all the property covered by the decree without having satisfied their demand. They applied to the first Court for the preparation of a decree covering the unsatisfied balance under the provisions of O. XXXIV, r. 6 of the Code of Civil Procedure. The judgment-debtors objected that the application for a decree under the aforesaid rule and order was barred by limitation. The Execution Court allowed the objection and dismissed the application. On appeal the High Court held that the application was within time and ordered that the application should be readmitted and disposed of in accordance with law, under the circumstances this order amounted to a direction that a decree under O. XXXIV, r. 6 of the Civil Procedure Code should be prepared, the details being left for the execution Court to settle.

Saiyid Muzha Hossein v. *Bodha Bibi* (4) was referred to and it was held that the order in question disposed of one substantial objection raised by the judgment-debtors to the decree-holder's application and that even if the said order was not a final one leave to appeal should be accorded.

In *Khagendra Nandan Asram* v. *Sahayram Chakravarty* (1) the *placitum* probably goes beyond what was intended to be laid down in the judgment. A suit had been dismissed on the ground that the trial of the question raised in it was barred by the result of a decision in an earlier suit which had been pending when the present suit was instituted. The opposite view was taken by the High Court and the case was remanded for trial on the merits. *Saiyid Muzha Hossein* v. *Bodha Bibi* (4) and *Ananda Gopal Gossain* v. *Nafar Chandra Pal Chowdhury* (10) were referred to and leave to appeal was granted on the ground that "the decision of the High Court was in respect of a cardinal issue in the suit and therefore was a final decree for the purpose of appeal to His Majesty in Council."

I do not think *Chandra Kunwar* v. *Chowdhuri Narpat Singh* (6) affords any assistance. The main question appears to have been whether one Raja Makand Singh, was the son of Raja Partab Singh. The first Court held that he was not as the evidence showed that he was the adopted son of Raja Kishen Singh and the suits were dismissed. This finding was reversed on appeal by the

High Court who remanded the cases, under section 562 of the Civil Procedure Code to the Trial Court for a decision on the other issues. It is not clear what these other issues were, but the finding arrived at was obviously one which went to the root of the cases. An appeal was preferred to the Privy Council and the report does not show that the finality of the order was questioned.

In *Hyder Mehdi* v. *Badshah Khanam* (7) the suit was based on a bond. The defendant pleaded limitation as one of the main defences. The first Court gave effect to this plea and dismissed the suit. On appeal the suit was held to be within time and the suit remanded, under O. XLI, r. 23, for trial on the merits. Leave to appeal was granted on the ground that as the plea of limitation was the main and substantial defence the order was a final one and leave to appeal should be granted. In his concurring judgment Daniels, A. J. C., points out that limitation was "the only defence which goes to the root of the claim" *Baijnath Goenka* v. *Ramashwar Singh* (8) is a decision of the Patna High Court in which, while Miller, C. J. held that the order was final and, appealable, Chapman J. was of opinion that the order was interlocutory, merely directing procedure.

"Sir Dawson Miller considered that it was not easy and perhaps impossible to reconcile the numerous decisions that have been given with regard to the meaning of the words decree or final order and similar expressions in the different High Courts of this Country", but referred to *Rahimbhoy Habibbhoy* v. *Turner* (3) and came to the conclusion that the decision of the High Court in execution proceedings amounted to a "decree" as defined in section 2 (2) of the Civil Procedure Code.

Sathappa Chetty v. *Subramaniam Chetty* (9) is a decision of the Madras High Court. A suit for dissolution of partnership and taking of accounts was dismissed as being barred by limitation. On appeal the High Court reversed the finding and remanded the case to the Trial Court with a direction to frame a preliminary decree and take further proceedings according to law. Leave to appeal to the Privy Council, was granted on the ground that the order was final inasmuch as it finally disposed of the rights of the parties. *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11) was followed.

Ananda Gopal Gossain v. *Infar Chandra Pal Chowdhury* (10) it was held that the cardinal point in the suit was whether a notice issued under section 167 of the Bengal Tenancy Act has been properly served. The Trial Court had dismissed the suit holding it had not, the High Court took a different view and held it had been properly served and remanded the case to be tried out on the remaining issues. Leave to appeal was granted.

Sanyasi Charan Mandal v. *Krishnadhan Baneri* (12) does not carry the matter any further. Leave to appeal had been granted by the High Court and a preliminary objection was taken at the hearing that the order under appeal was not final as it directed the taking of accounts without a finding as to the liability to account. The objection was disallowed without any discussion and it would appear that this case would clearly come within the purview of the discussion in *Rahimbhoy Habibbhoy* v. *Turner* (3).

In *Sohan Singh* v. *Jahandad Khan* (13) a suit had been dismissed on the ground that the plaintiff had no *locus standi* to sue. The decision was reversed on appeal by the Chief Court and the case remanded for a decision on the merits. Leave to appeal to His Majesty in Council was refused as it was held that the order sought to be appealed was not a final one as it did not determine the suit.

In *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (14) the High Court had held that an order by an Execution Court disallowing mesne profits for a period of more than 6 years was a final order open to appeal and this view was upheld by the Privy Council. Lord Hobhouse says in the course of his judgment "His (the Execution Court's) decision is a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account and is appealable....." An obvious reference to *Rahimbhoy Habibbhoy* v. *Turner* (3) which was however, not specifically cited.

In *Radha Kishan* v. *Collector of Jaunpur* (15) a decree had been granted *ex-parte* and

an application under section 108 Civil Procedure Code 1898 had been summarily dismissed. The High Court set aside the dismissal of the application to set aside the *ex parte* decree and remanded the case, under section 562 Civil Procedure Code, to be disposed of on the merits. Leave to appeal was granted and it was held by their Lordships of the Privy Council, on an examination of the order and the judgment on which it was based that "the true intendment" of the order was that the first Court was to decide the application under section 108 Civil Procedure Code anew and in accordance with law and that, therefore, the appeal to the Board was incompetent, the order not being a 'final order.'

In *Habibunnissa* v. *Munawarunnissa* (16) the suit had been dismissed as barred by time. The High Court had reversed this decision and holding the suit to be within limitation, had remanded the case under section 562 Civil Procedure Code for decision on the merits. An application for leave to appeal was refused it being held that an order of remand under section 562 Civil Procedure Code was not appealable to His Majesty in Council though it may possibly be so if it had the effect of deciding finally the cardinal point in the suit. *Saiyd Muzhar Hassein* v. *Bodha Bibi* (4) was referred to.

In *Baij Nath Dass* v. *Sohan Bibi* (17) one *Must.* Sohan Bibi had brought a suit for a declaration that a transfer of certain property effected by a compromise and a decree be declared to be null and void so far as she herself was concerned, upon the death of one *Must.* Manki Balm, the widow of one Babu Paris Chandar.

It had been found that *Must.* Manki Balm had validly adopted *Must.* Sohan Bibi's father. *Must.* Manki Balm had compromised a suit against her by which compromise certain property had been transferred. A decree had been passed on this compromise. It was this compromise and decree, and the transfer effected thereby that were attacked in this suit which had been dismissed by the Trial Court on the ground that *Must.* Sohan Bibi was not entitled to maintain it and that it was barred by limitation. The appellate Court while affirming the adoption differed as to the right to sue and limitation and remanded the suit.

A certificate was refused on the ground that the question of adoption was not " the cardinal point " in the cases and that the order sought to be appealed had determined only a part of the case leaving other matters still to be determined. *Saiyid Muzhar Hossein* v. *Bootha Bibi* (4) was discussed at length and distinguished. The view taken appears to have been that an order of remand which decides only one of the important issues in a suit cannot be a 'final order'.

In *Ahmad Hussain* v. *Govind Krishna Narain* (18) the suit had been dismissed by the Trial Court as barred by section 43 of the Civil Procedure Code (now O. II, r. 2). The High Court found that the suit was not concluded by section 43 Civil Procedure Code and remanded the case for a decision on the facts. Leave to appeal was refused after a consideration of *Saiyid Muzhar Hossein* v. *Bodha Bibi* (4) it being held that the order was an interlocutory one.

In *Nuri Mian* v. *Ganges Sugar Work Ltd.* (19) the Ganges Sugar Works Company applied under para. 17 of the second Schedule to the Civil Procedure Code to file an alleged contract to submit to arbitration. The Trial Court dismissed the application on the sole ground that the agreement was invalid, not being under the seal of the Company. The High Court reversed this decision and remanded the case under O. XLI, r. 23 of the Civil Procedure Code for trial on the other issues. An application for leave to appeal to His Majesty in Council against the order of remand was made and was refused by a Full Bench of the High Court. It was recognised that the expression 'final order' was not clear and that the cases in the various High Courts where the question as to what was a 'final order' had been discussed and decided were conflicting. The application was dealt with on its own circumstances and it was held that although the decision of the High Court was upon a very important issue in the suit, it did not finally decide the dispute between the parties as there were still other defences set up which remained to be decided and the order of remand was, therefore, not a 'final order'.

In *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan* (20) the issue decided by the order of remand in favour of the plaintiffs was that the suit was not barred by the rule of *res-judicata.* Leave to appeal to the Privy Council was refused and it was held that

appeals to His Majesty in Council in matters interlocutory in their nature should only be allowed to be preferred when the decision puts an end to the litigation and finally decides the rights of the parties.

In *Mujtaba Husain* v. *Jamal-ud-Din* (21), a suit for a declaration that certain property was endowed for the purposes of a mosque and for other charitable purposes was dismissed on the ground that it came within the purview of secton 539 of the Civil Procedure Code 1882, (now section 92) and the consent necessary thereunder had not been obtained. On appeal the High Court held that section 539, Civil Procedure Code, 1882, did not apply and no consent was necessary. The suit was remanded for disposal on the merits. An application for leave to appeal to His Majesty in Council was refused, it being held that no cardinal issue *i.e.* no issue going to the foundation of the suit, had been determined by the order in question which was, therefore, not a 'final order' giving a right to appeal.

In *Kausalla* v. *Ram Sarup* (22) two of the pleas raised were that the suit was barred by limitation and also by the rule of *res-judicata*. The Trial Court overruled the plea as to limitation but gave effect to the plea of *res-judicata* and dismissed the suit. On appeal the High Court affirmed the decision as to limitation but held the plea of *res-judicata* was bad and remanded the case under section 562 of the Civil Procedure Code. An application for leave to appeal to His Majesty in Council was refused on the ground that the order of remand did not have the effect of determining a cardinal point in the suit. Reference was made to *Raja Tussuduk Rasul Khan* v. *Farzand Hasain* (26) where a plea of limitation was decided in favour of the defendants but reversed on appeal. Leave to appeal to the Privy Council had been refused and special leave to appeal was applied for. Their Lordships of the Privy Council refused the application holding the order was not a 'final order'.

In *Shankar Bharati* v. *Narasimha Bharati* (23) a decree had been passed on a compromise. On appeal the High Court sent down certain issues for findings, and after the findings were returned set aside the decree and remanded the suit to be proceeded within the ordinary course as if there had been no compromise. Leave to appeal to the Privy Council was refused on the ground that the order of remand was not final, as it did not put an end to the litigation between the parties or dispose so substantially of the matter in-issue between them as to leave merely subordinate or ancillary matters for decision.

In *Krishna Prasad Singh* v. *Moti Chand* (24) the question now under discussion was not before the Judicial Committee and the case affords no assistance.

In *Krishna Chandra Ghosh* v. *Ram Narain Singh* (25) an order deciding that the suit as framed was not barred by the Chota Nagpur Tenancy Act and remanding the suit for trial on the merits was held by the High Court not to be a 'final order'.

In *Birendra Nath Roy* v. *Niupendra Nath Roy* (27) the plaintiff had sued the defendants in their individual capacity for possession of certain property and for a declaration of his rights. The Trial Court dismissed the suit apparently on the ground that the defendants could not be sued in their individual capacity. The High Court set aside the order of dismissal and remanded the suit for a retrial directing that the defendants "should be sued personally as well as executors" and one of them "as the residuary legatee and heir of Jogendra Nath." The substance of the order was looked at and it was held that the order was neither a decree nor a "final order" within the meaning of section 109 (a) of the Civil Procedure Code.

In *Nayari Venkataranga Row Garu* v. *Raja Keesraa Venkataram Narasimha Rao* (28) orders of the High Court deciding, in one case that the pleadings held insufficient by the Trial Court were sufficient and in the other that the application of section 43 of the former Code in bar of the suit was wrong, and remanding the cases for trial on the merits, were held to be merely interlocutory and therefore not appelable.

In *Dauby* v. *Tafazul Hussain* (29) it was held that the order of the High Court setting aside a decision of the Trial Court that the trial of the suit was barred by the rule of *res-judicata* and remanding the case for a trial on the merits was not a final order inasmuch as it only decided one of the questions in dispute between the parties and did not conclude the case.

the suit. It will be observed that the question in each case is whether an issue, upon which the High Court has pronounced its opinion, is or is not a cardinal point in the case, and it is not always easy to answer this question. It seems to me that the determination of the matter depends not only upon the nature of the issue itself, but also upon its importance as compared with that of the other points arising in the suit. The test laid down by the Privy Council is, by no means, a certain one, and it is on account of this uncertainty that the High Courts in India have expressed divergent opinions as to whether an order of remand determining a question such as that of the limitation of a suit constitutes a final order as contemplated by the section.

There can be little doubt that a matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue, which does not dispose of the rights of the parties, belong to that category. There may, however, be other issues in a case which deal with the rights of the parties, but I do not think that every one of them can be held to be a cardinal point. It is impossible to lay down any hard and fast rule which would solve the problem in every case, and it is the duty of the Court to determine in each case whether the order sought to be appealed against comprises a decision on a crucial issue which goes to the root of the case, or whether it is a mere interlocutory order.

Now, the only matter decided by the High Court in the present case, is that the plaintiffs have established their *locus standi* to bring the action. No decision on the rights of the parties has yet been given, and I consider that an issue of that character, deciding purely a preliminary point and not dealing with the merits of the dispute, cannot be regarded as the principal matter in controversy between the parties within the meaning of the rule laid down by the Privy Council.

My answer to the question submitted to the Full Bench is that the order of remand in this case is not a final order, and that the test of finality is whether the order, as made, finally disposes of the rights of the parties.

Harrison, J.—I agree and have nothing to add.

Z. K. *Application refused.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 209-B OF 1922.

April 14, 1923.

Present :—Mr. Prideaux, A. J. C.

BANOOBI—APPLICANT

versus

YAKUBKHAN—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. VI, r 17—Ex parte proceedings—Amendment of plaint—Notice to defaulting defendant—Interlocutory orders—Revision—general rule.

If a party does not appear after being duly summoned, he is not entitled to any fresh notice during the pendency of the suit and has no right to impeach an order of amendment of plaint passed *ex parte* against him. (p 375. col. 2).

It is not usual to interfee in revision in the case of interlocutory orders against which though no appeal may lie, their correctness can be challenged in an appeal against the final decree in the suit. (p. 376, col. 1).

Application for revision of the order of the Additional District Judge, Akola, dated 3rd November 1922, in Civil Suit No. 2 of 1921.

Mr. *S. B. Gokhale*, for the Applicant.

Mr. *A. V. Khare*, for the Non-applicant.

ORDER.—The case from which this application for revision arises proceeded *ex parte* against Banoobi the present applicant. After the case had been heard and adjourned for argument the plaintiff applied for an amendment of the plaint which has been allowed. Banoobi complains that this was done without issuing notice to her which is a fact. But it seems to me that if a party does not appear after being duly summoned he or she is not entitled to any fresh notice during the pendency of the suit, otherwise it would have to be held that the change in the aspect of any suit or the introduction of pleadings going beyond the facts mentioned in the plaint would be sufficient cause to cancel *ex parte* orders passed and to give a defaulting defendant another opportunity of appearing. I do not think applicant has any ground of complaint in not being noticed for the hearing in which the

question of allowing or disallowing the amendment was to be argued.

As regards the merits of the case, I have to-day decided in another revision case arising from the same suit, namely *Anwar Khan* v. *Yakab Khan* (1) in which Banoob's brother Anwarkhan is the applicant that no ground for interfering with the discretion exercised by the presiding Judge in allowing the amendment exists. I need not repeat all the arguments used in that case beyond stating that it is not usual to interfere in revision in the case of interlocutory orders against which though no appeal may lie their correctness can be challenged in an appeal against the final decree in the suit. For these reasons I dismiss this application with costs. I fix pleader's fee at Rs. 15.

G. R. D. *Application dismissed.*

(1) 79 Ind. Cas. 911.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2042 OF 1923.

August 6, 1923.

Present :—Mr. Justice Spencer and Mr. Justice Devadoss.

K. P. S. KARUTHAN CHETTIAR—PETITIONER

versus

R. M. M. RAMAN CHETTY—RESPONDENT.

Provincial Insolvency Act (V of 1920), *s.* 78—*Limitation Act (IX of* 1908), *s.* 5—*Applicability of s.* 78 *to insolvency proceedings initiated before the new Act of* 1920.

Section 78 of the Provincial Insolvency Act of 1920 did not create for the first time or take away any substantive right but it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act, so that section 78 is applicable to insolvency proceedings initiated before the Act of 1920. (p. 377, col. 1.)

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to appeal to the High Court against the order of the District Court of Ramnad at Madura, in C. M. P. No. 63 of 1919, in I. P. No. 27 of 1913 (on the file of the Official Receiver's Court, Ramnad, in I. P. No. 15 of 1913, on the file of the District Court of Ramnad at Madura.).

Mr. *C. S. Venkatachariar*, for the Petitioner.

Mr. *L. A. Govindaraghava Aiyer*, for the Respondent.

FACTS.—In proceedings in insolvency after adjudication of a person as insolvent, a creditor filed a petition under sections 42 and 43 of the Provincial Insolvency Act alleging that the action of the insolvent in filing the Insolvency petition was fraudulent, that he had deliberately suppressed books of accounts and had falsely stated they did not exist or were destroyed. The prayers were to annul the adjudication under section 42 and to take action under section 43 and sanction the prosecution of the insolvent.

The District Court, however, dismissed the petition holding that the petitioner was only a creditor and not a person interested within the meaning of sections 42 and 43 and had no *locus standi* to maintain the petition.

The order was passed in September 1920 after the new Insolvency Act V of 1920 had come into force.

An appeal was filed to the High Court *Karuthan Chettiar* v. *Raman Chettiar* (1) against the said order. No leave to appeal was, however, obtained. Two days before the appeal came in for actual hearing, in view to possible objections on the ground that there was no right of appeal without leave obtained against the order refusing to interfere under sections 35 and 69 of the new Act corresponding to sections 42 and 43 respectively of the old Act, the present petition C. M. P. No. 2042 of 1923 was filed asking for leave to appeal and for excusing the delay under section 78 of the new Provincial Insolvency Act.

(1) 79 Ind. Cas. 340 ; 45 M. L. J. 804 ; (1923) M. W. N. 838 : 18 L. W. 837 : 33 M. L. T. 188 : (1924) A. I. R. (M.) 185.

SULTAN SINGH v. MURLI DHAR

In *Prakash Chandra Sarkar* v. *Brindaban Chandra Sarkar* (30) the order sought to be appealed to the Privy Council had been passed on a petition of revision, the decision of the Execution Court being affirmed. Leave to appeal was refused the principle followed being that the order was not final as it did not finally determine the rights of the parties in controversy in the suit.

In *Mohammad Karim Khan* v. *Sadiq Hussain* (2) during the pendency of a suit for pre-emption the plaintiff pre-emptor gifted the property, on the ownership of which he based his claim to pre-empt the property sold to his son. The gift included a right to continue the pending suit for pre-emption. The son applied to be added or substituted as a plaintiff but the Trial Court held that the right of pre-emption was not transferable and the donee could not continue the suit. He also held that the donor had lost his right of pre-emption by transferring the property, the ownership of which had given him that right and dismissed the suit. On appeal these findings were set aside and the case remanded to the Court below for trial on the merits. An application was made for leave to appeal to His Majesty in Council against this order of remand but was refused on the ground that the order in question did not finally decide the rights of the parties in the litigation which did not depend mainly on the determination or the right of the donee to sue but depended largely on the determination of the other issues raised in the defence.

In *Sri Krishna Dos* v. *Benares Hindu University* (31) applying the definition given in *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11) that "an order is final if it finally disposes of the rights of the parties", it was held that an order deciding that an incorporated body is a judicial person legally competent to discharge the functions of an executor and, as such, to apply for probate, but without deciding whether it is entitled to the grant of probate, was not a final order within the meaning of section 109 (*a*) Civil Procedure Code.

After a careful consideration of these authorities I have arrived at the conclusion that the pronouncements of their Lordships of the Judicial Committee in *Rahimbhoy Habibbhoy* v. *Turner* (3), *Saiyid Muzhar Hosein* v. *Bodha Bibi* (4), *Radha Kishan* v. *Collector of Jaunpur* (15), and *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11) make it abundantly clear that Mr. Shamair Chand's contention is untenable, and that the determining factor is not the effect on the suit a decision in favour of the applicant would have if the proposed appeal to the Privy Council were successful, but the immediate effect on the suit of the order sought to be appealed against. I also consider that it had been laid down by these pronouncements that an order is a "final order" within the meaning of section 109 (*a*) of the Civil Procedure Code only if it decides, or has the effect of deciding, the cardinal issue in the suit, (that is an issue going to the foundation of the suit) and thus disposes of the rights of the parties in the litigation, it being permissible to examine not only the order but, the circumstances of the case with a view to ascertaining the effect of the order on the suit. I take this to be the view of the majority, if not of all, of the authorities examined above, and I think the probability is that it would be possible to reconcile the different views taken by the small minority if all the facts of those cases were known. This view is also in consonance with the English authorities on the point.

In *Issacs and Son* v. *Salbstein* (32) it was laid down that the nature of the order in each case would determine whether it was final or interlocutory, and that if the order finally disposed of the rights of the parties it should be treated as a final order, but if it did not, it was an interlocutory order from which an appeal was not entertainable.—See also *Salaman* v. *Warner* (33) and *Bozson* v. *The Altrincham Urban District Council* (34) referred to by Viscount Cave in *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11).

In *Standard Discount Co.* v. *La Grange* (35), Britt. L.J. says "No order, judgment, or other

(32) (1916) 2 K. B. 139 ; 85 L. J. K. B. 1433 ; 114 L. T. 924 ; 60 S. J. 444 ; 32 T. L. R. 370.
(33) (1891) 1 Q. B. 794 ; 60 L. J. Q. B. 624 ; 39 W. R. 547.
(34) (1903) 1 K. B 547 ; 72 L. J. K. B 271 ; 51 W. R. 337 ; 67 J P. 307 ; 19 T. L. R. 266 ; 1 L. G. R. 639.
(35) (1878) 3 C. P. D. 67 at p. 71 ; 47 L. J. C. P. 8; 37 L. T. 372 ; 26 W. R. 25.

proceeding can be final which does not at once affect the status of the parties for which ever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff."

My answer to the first part of the reference, therefore, is that it is the nature of the order sought to be appealed against, that determines the right to appeal, and that an order is a "final order" within the meaning of section 109 (*a*) of the Civil Procedure Code only if it puts an end to the litigation between the parties or disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. Having regard to the above it follows that my answer to the second part of the reference is in the negative as the order sought to be appealed against does not decide the rights of the parties in the litigation.

I would, therefore, refuse the application with costs.

Shadi Lal, C.J.—This application for leave to appeal to His Majesty in Council arises out of an action brought by certain Khatris of the town of Delhi for the administration of a trust alleged to have been created for public purposes of a charitable nature. The plaintiffs claimed to have an interest in the trust, and after reciting that they had obtained the consent, in writing of the Collector for instituting the suit, they asked the Court to grant them the various reliefs specified in sub-section (1) of section 92 of the Civil Procedure Code. The suit was resisted on several grounds which need not be set out here in *extenso*. It is sufficient to say that the pleadings of the parties gave rise to seven issues, of which only the following two are material for the purposes of this application :—

(1) Is the sanction of the Collector defective?
(2) Have plaintiffs an interest in the trust?

Now, the Trial Court while holding that the consent of the Collector was not open to any valid objection, dismissed the suit in *limine* on the ground that the plaintiffs did not have such an interest in the trust as would entitle them to maintain the suit. On appeal by the plaintiffs a Division Bench of the High Court dissented from this conclusion, and decided that the plaintiffs had established such interest in the trust as was contemplated by section 92. The learned Judges, accordingly, set aside the decree dismissing the suit, and remanded the case for trial on the remaining issues. The defendants have made the present application for leave to appeal to the Privy Council, and the question debated, before us is whether the order of the High Court amounts to a 'final order' as contemplated by section 109 of the Civil Procedure Code. The learned Counsel, on both sides have invited our attention to a large number of decided cases in support of their respective contentions, but they admit that there is a conflict of judicial authorities in India as to the test to be applied in deciding whether a particular adjudication is or is not final order for the purposes of appeal to His Majesty in Council.

The controversy is practically confined to the determination of the question whether an order made by a High Court reversing the decree of the Trial Court dismissing the suit on a preliminary point, and remanding the case for decision on the remaining issues, should or should not be treated as a final order within the meaning of section 109. Now, there are two views on the subject. According to one view, which appears to have been adopted by the Calcutta High Court, the test is whether the decision of the Trial Court, if restored by the Privy Council, would put an end to the suit altogether. If this view is to prevail, almost every order of remand reversing the dismissal of a suit on a preliminary point would be appealable to the Privy Council. The other view is that no order can be treated as final unless it finally determines the rights of the parties.

I consider it unnecessary to refer to all the judgments cited at the Bar, because the principle to be deduced from the judgments of the Privy Council in *Rahimbhoy Habibbhoy* v. *C. A. Turner* (3) and *Saiyid Mazhar Hussain* v. *Mst. Bodha Bibi* (4) and *Ram Chand Mauji Mal* v. *Govardhan Das, Vishan Das Ratna Chand* (11) is to the effect that an order comprising the decision of the High Court upon a cardinal issue in a suit that issue being one that goes to the foundation of the suit, and one that can never, while that decision stands, be disputed again, is a final order for the purposes of appeal to His Majesty in Council, notwithstanding that there may be subordinate inquiries yet to be made in disposing

the suit. It will be observed that the question in each case is whether an issue, upon which the High Court has pronounced its opinion, is or is not a cardinal point in the case, and it is not always easy to answer this question. It seems to me that the determination of the matter depends not only upon the nature of the issue itself, but also upon its importance as compared with that of the other points arising in the suit. The test laid down by the Privy Council is, by no means, a certain one, and it is on account of this uncertainty that the High Courts in India have expressed divergent opinions as to whether an order of remand determining a question such as that of the limitation of a suit constitutes a final order as contemplated by the section.

There can be little doubt that a matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue, which does not dispose of the rights of the parties, belong to that category. There may, however, be other issues in a case which deal with the rights of the parties, but I do not think that every one of them can be held to be a cardinal point. It is impossible to lay down any hard and fast rule which would solve the problem in every case, and it is the duty of the Court to determine in each case whether the order sought to be appealed against comprises a decision on a crucial issue which goes to the root of the case, or whether it is a mere interlocutory order.

Now, the only matter decided by the High Court, in the present case, is that the plaintiffs have established their *locus standi* to bring the action. No decision on the rights of the parties has yet been given, and I consider that an issue of that character, deciding purely a preliminary point and not dealing with the merits of the dispute, can not be regarded as the principal matter in controversy between the parties within the meaning of the rule laid down by the Privy Council.

My answer to the question submitted to the Full Bench is that the order of remand in this case is not a final order, and that the test of finality is whether the order, as made, finally disposes of the rights of the parties.

Harrison, J.—I agree and have nothing to add.

Z. K. *Application refused.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 209-B OF 1922.

April 14, 1923.

Present :—Mr. Prideaux, A. J. C.

BANOOBI—APPLICANT
versus
YAKUBKHAN—NON-APPLICANT.

Civil Procedure Code (Act V of 1908)—O. VI, r. 17—Ex-parte proceedings—Amendment of plaint—Notice to defaulting defendant—Interlocutory orders—Revision—General rule.

If a party does not appear after being duly summoned, he is not entitled to any fresh notice during the pendency of the suit and has no right to impeach an order of amendment of plaint passed *ex-parte* against him. (p. 375, col. 2)

It is not usual to interfere in revision in the case of interlocutory orders against which though no appeal may lie, their correctness can be challenged in an appeal against the final decree in the suit. (p. 376, col. 1)

Application for revision of the order of the Additional District Judge, Akola, dated 3rd November 1922, in Civil Suit No. 2 of 1921.

Mr. *S. B. Gokhale*, for the Applicant.

Mr. *A. V. Khare*, for the Non-applicant.

ORDER.—The case from which this application for revision arises proceeded *ex parte* against Banoobi the present applicant. After the case had been heard and adjourned for argument the plaintiff applied for an amendment of the plaint which has been allowed. Banoobi complains that this was done without issuing notice to her which is a fact. But it seems to me that if a party does not appear after being duly summoned he or she is not entitled to any fresh notice during the pendency of the suit, otherwise it would have to be held that the change in the aspect of any suit or the introduction of pleadings going beyond the facts mentioned in the plaint would be sufficient clause to cancel *ex parte* orders passed and to give a defaulting defendant another opportunity of appearing. I do not think applicant has any ground of complaint in not being noticed for the hearing in which the

question of allowing or disallowing the amendment was to be argued.

As regards the merits of the case, I have to-day decided in another revision case arising from the same suit, namely *Anwar Khan* v. *Yakab Khan* (1) in which Banoob's brother Anwarkhan is the applicant that no ground for interfering with the discretion exercised by the Presiding Judge in allowing the amendment exists. I need not repeat all the arguments used in that case beyond stating that it is not usual to interfere in revision in the case of interlocutory orders against which though no appeal may lie their correctness can be challenged in an appeal against the final decree in the suit. For these reasons I dismiss this application with costs. I fix pleader's fee at Rs. 15.

G. R. D. *Application dismissed.*

(1) 79 Ind. Cas. 911.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 2042 OF 1923.

August 6, 1923.

Present :—Mr. Justice Spencer and Mr. Justice Devadoss.

K. P. S. KARUTHAN CHETTIAR—PETITIONER

versus

R. M. M. RAMAN CHETTY—RESPONDENT.

Provincial Insolvency Act (V of 1920) s. 78—Limitation Act (IX of 1908) s. 5—Applicability of s. 78 to insolvency proceedings initiated before the new Act of 1920.

Section 78 of the Provincial Insolvency Act of 1920 did not create for the first time or take away any substantive right but it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act, so that section 78 is applicable to insolvency proceedings initiated before the Act of 1920 (p. 377, col. 1)

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to appeal to the High Court against the order of the District Court of Ramnad at Madura in C. M. P. No. 63 of 1919 in I. P. No. 27 of 1913 (on the file of the Official Receiver's Court, Ramnad in I. P. No. 15 of 1913 on the file of the District Court of Ramnad at Madura.)

Mr. *C. S. Venkatachariar*, for the Petitioner.

Mr. *L. A. Govindaraghava Aiyer*, for the Respondent.

FACTS.— *Karuthan Chetty* v. *Raman Chetty* (C. M. P. No. 2042 of 1923 : 45 M. L. J. 844) is connected with *Karuthan Chetty* v. *Raman Chetty* (C. M. A. No. 69 of 1921 : 45 M. L. J. 804) sent in December, 1923.

In proceedings in insolvency after adjudication of a person as insolvent, a creditor filed a petition under sections 42 and 43 of the Provincial Insolvency Act alleging that the action of the insolvent in filing the Insolvency petition was fraudulent, that he had deliberately suppressed books of accounts and had falsely stated they did not exist or were destroyed. The prayers were to annul the adjudication under section 42 and to take action under section 43 and sanction the prosecution of the insolvent.

The District Court, however, dismissed the petition holding that the petitioner was only a creditor and not a person interested within the meaning of sections 42 and 43 and had no *locus standi* to maintain the petition.

The order was passed in September 1920 after the new Insolvency Act V of 1920 had come into force.

An appeal was filed to the High Court *Karuthan Chettiar* v. *Raman Chettiar* (1) against the said order. No leave to appeal was, however, obtained. Two days before the appeal came in for actual hearing, in view to possible objections on the ground that there was no right of appeal without leave obtained against the order refusing to interfere under sections 35 and 69 of the new Act corresponding to sections 42 and 43 respectively of the old Act, the present petition C. M. P. 2042 of 1923 was filed asking for leave to appeal and for excusing the delay under section 78 of the new Provincial Insolvency Act.

(1) 79 Ind. Cas. 340 : 45 M. L. J. 804 ; (1923) M. W. N. 838 : 18 L. W. 837 : 33 M. L. T. 188 ; (1924) A. I. R. (M.) 185.

JUGAL KISHORE NARAYAN SINGH *v.* BHATU MODI

ORDER.—The application has been made nearly 3 years after the order sought to be appealed against was passed.

It is contended that section 5 of the Indian Limitation Act cannot be applied, because section 78 of Act V of 1920 conferred a new right after the inception of these insolvency proceedings. We consider that this section did not create for the first time or take away any substantive right, but that it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act.

We have, therefore, power to excuse delay, and the fact that leave to appeal was not necessary under the old Act (III of 1907) is a sufficient reason for doing so.

Leave to appeal is granted under section 75 (3) of Act V of 1920.

V. N. V. *Petition allowed.*

PATNA HIGH COURT

APPEAL FROM APPELLATE ORDER
No. 248 OF 1922.

May 2, 1923.

Present :—Sir Justice B. K. Mullick, Kt., and Mr. Justice Macpherson.

JUGAL KISHORE NARAYAN SINGH AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

BHATU MODI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Landlord and Tenant—Decrees for rent against tenant—Sale in execution of first decree subject to liability for the second—Execution of second decree, whether can proceed.

After a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it cannot ordinarily be again sold in execution of any other decree for rent due by the same tenant, except in cases when the execution Court, allows the holding to be sold subject to a liability to satisfy another outstanding decree. (p. 378, col. 1)

Haradhan Chatteraj v. *Kartik Chandra*, 6 C. W. N. 877, referred to.

The landlord obtained a rent decree against the tenant for a certain number of years; subsequently he obtained another decree for another period of years. In execution of the first decree he brought the holding to sale and it was sold subject to a liability to satisfy the other decree. He then instituted another execution case for the realisation of the second decree and asked for the attachment of other property of the tenant:

Held, that the judgment-debtor should have objected at the outset to the irregular sale and not having done so, the decree-holder could not be estopped from proceeding with the execution. (p. 378, col. 2.)

Appeal from an order of the District Judge, Monghyr, dated the 29th August 1922, confirming an order of the Subordinate Judge, Monghyr, dated the 20th December 1921.

Mr. *K. P. Jayaswal*, for the Appellants.

Mr. *A. B. Mukharji*, for the Respondents.

JUDGMENT.

Mullick, J.—This case illustrates the difficulties which arise when in execution of a decree for arrears of rent the Court sells the holding subject to a liability for the arrears of years other than those in suit. The matter was considered in this Court in *Saiyid Muhammad Jawad Hussain* v. *Maharaja Kumar Gopal Narain Singh* (1), and it would seem that here the irregularity has resulted in a loss against which the judgment-debtor can get no relief.

The facts are that on the 30th July 1910 the landlord obtained a rent decree, against the tenant for the years 1314, 1315 and 1316 F. S. for a sum of Rs. 641-11-0. He brought a second suit for the years 1317 to 1320 which was decreed on the 29th August 1914 for a sum of Rs. 935-13-0. In execution of the first decree he then brought the holding to sale in May 1915 and it must now be taken as established that it was sold subject to a liability to satisfy the second decree. The landlord then instituted execution case No. 23 of 1921 for the realisation of the second decree and asked for the attachment of properties other than the holding but the Subordinate Judge by his order dated the 20th December 1921 held that as the decree-holder was himself the auction-purchaser and had bought the holding

(1) 80 Ind Cas. 223 ; 2 P. L. T. 248.

subject to the liability to satisfy the second decree the debt was satisfied and the execution could not proceed.

In appeal the learned District Judge held on the 29th August 1922 that there was an equitable estoppel in the case and that the proper course was for the deree-holder to sell the holding first and then if the decree remained unsatisfied to proceed against the other properties of the judgment-debtor.

The present second appeal is filed against the District Judge's order.

Now it is settled that after a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it can not ordinarily be again sold in execution of any other decree for rent due by the same tenant. An exception, however, has been made in cases where the execution Court, though irregularly, allows the holding to be sold subject to a liability to satisfy another outstanding decree; in such cases the auction-purchaser is concluded by *res-judicata* and the landlord is competent to proceed in the first instance against the holding and to call upon the auction-purchaser to discharge the liability which he has undertaken. That was the principle of the decision in *Haradhan Chatteraj* v. *Kartik Chandra* (2), on which the respondent now relies; but that case has no application at all where the decree-holder is himself the purchaser. I take it that the judgment-debtor could not have resisted the attachment of other properties if after the sale the decree-holder had changed his mind and declined to proceed against the auction-purchaser. The law gives the decree-holder an option and I cannot see how any estoppel arises. But it is contended that there was some representation by the decree-holder by reason of which the tenant was induced to change his position. Now the representation must be a statement of fact and not of a proposition of law, and it is clear that the decree-holder has said nothing which he now desires to repudiate. If the representation was that there was a second decree outstanding then there was nothing incorrect in that statement and no question of a change of position by reason of such a representation can arise. If the representation was that the property was in law liable to be again sold in execution of the second decree that was a statement of a proposition of law and cannot raise an estoppel, and even if the decree-holder had gone so far as to represent that he would not execute the second decree at all except by the sale of the holding (which is not found in this case) the decree-holder would not be estopped by the mere expression of such an intention. It is said that the judgment-debtor might, if he had been aware that the decree-holder would exercise his option as against the other properties, have applied to get the sale set aside under O. XXI, r. 89 Civil Procedure Code. The reply is that the decree-holder has no responsibilty in the matter. It may be that the judgment-debtor has been beguiled into a sense of security, but after all that is his own fault. He should have objected at the outset to the irregular sale and not having done so he must suffer the consequences.

The result is that the appeal will be decreed with costs in this Court and the Courts below.

Macpherson, J.—I agree.

K. S. D. *Appeal allowed.*

(2) 8 C. W. N. 877

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 788 OF 1922.

January 7, 1924.

Present :—Mr. Justice Krishnan.

ABDUL JAFFAR SAHIB AND OTHERS —DEFENDANTS—APPELLANTS

versus

K. VENUGOPAL CHETTIAR AND OTHERS —PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872) s. 253—Partnership—Death of partner—Partnership continued—Accounts of old partnership, suit for—Limitation.

When a partner dies, the partnership comes to an end under the Contract Act. But if the remaining partners continue the business then for the purpose of ascertaining what share those remaining partners brought into the new partnership, an account may have to be taken of the old partnership and there will be no question of limitation in such a case for the account of the old partnership is taken not for the purpose of enforcing any claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. (p. 379, col. 1)

Ahimhsa Bibi v. *Abdul Kadir*, 25 M. 26, followed.

ABDUL JAFFAR SAHIB v. VENUGOPAL CHETTIAR

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 196 of 1921 (A. S. No. 331 of 1920 on the file of the District Court of North Arcot) preferred against the decree of the Court of the District Munsif, Tiruvannamalai in O. S. No. 534 of 1918.

Mr. *S. T. Srinivasagopalachariar*, for the Appellants.

Messrs. *N. Swaminatha Iyer* and *K. G. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—In this case the plaintiff brought a suit for dissolution of partnership, for the taking of accounts and for recovery of money due to him as profits. It would appear that the plaintiff, the 2nd, 3rd and 4th defendants and the 1st defendant's father had a partnership in bamboo trade from 1912 to 1913. The 1st defendant's father died in that year and that of course in law amounted to a dissolution of the partnership. Nevertheless the same bamboo trade was carried on by the 2nd and 3rd defendants along with 1st defendant who was the son of the deceased man and plaintiff was also added as a partner. It is a question in this case whether the plaintiff came in as a partner or only as a sub-partner of defendants Nos. 1 and 3 alone. The Subordinate Judge has found that in taking the plaintiff into the firm of defendants Nos. 1 to 3, the defendants Nos. 1 and 3 who alone entered into the contract with the plaintiff under Ex. A really acted on behalf of the firm including the 2nd defendant and I think I must accept that finding as a finding of fact and hold that the plaintiff became not a sub-partner but a partner in the second partnership which continued till 1917. The plaintiff is now suing for the accounts to be taken not only of the trade from 1913 to 1917 but also of the trade in 1912-1913. It is contended before me that the claim to take accounts of 1912-1913 partnership is barred by limitation and those accounts should be excluded from the decree. No doubt when a partner dies, the partnership comes to an end under the Contract Act. But nevertheless as was held in the case in *Ahinsa Bibi* v. *Abdul Kader Sahib* (1) if the remaining partners continue the business, for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that, for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. In that view there will be no question of limitation preventing the accounts of the old partnership being taken. I think that principle applies to this case. No doubt here one of the partners, 1st defendant in the second partnership, is a newly added partner. Nevertheless he was the son of his father who was the previous partner, and apparently the father's share was treated as the son's in the new partnership The father's other heirs if any are now barred from claiming any share in the profits of 1912-1913 trade and the 4th defendant also who went out from the partnership in 1913 will also be barred from claiming a share in the trade but as between the various persons who are now members of the new partnership, there will be no bar of limitation for the purpose of taking accounts of 1912-1913 partnership. As regards the share itself of the plaintiff, the agreement under Ex. A was that he should be given a two annas share in the rupee of the profits. It is contended by the learned Advocate for the appellants that it means a two annas share only in the profits of defendants Nos. 1 and 3 and as they are getting only an eight annas share, it means only one anna share in the whole of the profits. I do not think that that contention is right, more especially as I find that the plaintiff became really a partner of the firm including the 2nd defendant and as it is clear that what was intended was that out of the total share of the profits the plaintiff should have a two annas fraction, and when accounts are taken and the profits are ascertained the plaintiff will be given that share as decreed by the lower Appellate Court.

It is also contended that there is no finding that the accounts of the previous partnership of 1912-1913 were not taken and settled and therefore I should call for a finding on that point before I decide that the case in *Ahinsa Bibi* v. *Abdul Kader* (1) quoted above applies. I do not think that that is correct, for the Subordinate Judge says expressly in paragraph

(1) 25 M. 26.

KEDAR NATH *v.* JAGANNATH SINGH

3 of his judgment that the plaintiff alleges in his plaint a continuance of the same business and that he and his witnesses prove that plaintiff's accounts of such business were not settled. That I think is a clear finding on the point, and it will be erroneous to call for a fresh finding on a point like that. All the points taken in Second Appeal failing, the Second Appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1671 OF 1922.

April 24, 1924.

Present :—Mr. Justice Neave.

KEDAR NATH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
JAGANNATH SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901) s. 233 (k)—Partition proceedings—Suit to modify partition record, maintainability of.

A partition record is analogous to a decree defining the rights of parties given *inter partes* and operates as *res judicata*. (p 381, col. 1.)

A suit by a person who was a party to a partition proceeding to have the result of the partition as entered in the partition record modified on the allegation that there has been a mistake, is barred by the provision contained in section 233 (k) of the U. P. Land Revenue Act. (p. 381, col. 1.)

Case-law discussed.

Appeal from the decree of the District Judge, Bareilly, dated the 26th of July 1922.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows :—

In 1913 the plaintiffs were recorded as co-sharers of 1 *biswa*, 3 *biswansis* odd. Jagan Nath and others, the *pro forma* defendants, were recorded as co-sharers of 18 *biswansis* odd. Partition proceedings were instituted in 1913 at the instance of another co-sharer, but the plaintiffs and Jagan Nath both applied to have their shares made into separate *pattis*. It is not now disputed that in drawing up the partition proceeding a mistake was made and that the share of the plaintiff was wrongly diminished by six *biswansis* which were added to the share of Jagan Nath. The partition was confirmed in 1914, and a new *Khewat* prepared in accordance with it. The *pro froma* defendants have since sold their share to the defendants appellants, including the six biswansis wrongly added to it. The present suit was brought by the plaintiffs in 1921, after the defendants appellants had obtained mutation, on the allegation that owing to a fraud committed by the *patwari* and Jagan Nath and others, the *fard taqsim* had been wrongly drawn up. The plaintiffs had not discovered the mistake till the mutation proceedings were begun.

Both the Courts have found that there was no fraud. The partition proceeding in which the mistake occurred, was signed by all the co-sharers including the present plaintiffs.

The main defence set up was that the suit was barred by section 233 (k) of the Land Revenue Act. This was repelled by both the Courts below, who found that this section had no application.

In appeal the same plea is taken and the learned Counsel for the appellant relies on several rulings of this Court and in particular *Roghubir Singh* v. *Tulshi Ram*, (1) in which it was held that a suit for correction of mistakes made in a partition *khewat* was barred by the principle of *res judicata*, as the plaintiff ought to have raised this question in the partition proceeding. One of the main grounds on which the decision was based was that the appellant had had ample opportunity for putting forward any objections, but did not do so.

Section 233 (K) of the Land Revenue Act provides that no person shall institute any suit in the Civil Courts with respect to partition or union of *Mahals*, except as provided in sections 111 and 112, that is, unless he has already made an objection before the Collector, who has directed him to proceed to the Civil Court, or unless the Collector has decided

(1) 29 Ind. Cas. 222 ; 13 A. L. J. 518.

on such objection himself. It is contended that in the present case the partition proceeding must under section 114 of the Land Revenue Act have been submitted to the Collector for confirmation and that before it was finally confirmed the plaintiffs had the opportunity of discovering the mistake and applying for its correction.

The learned advocate for the respondents contends that the plaintiffs had no reason to suppose that any mistake had been made. Their own application and that of Jagan Nath each contained a correct description of the respective shares. He further relies on two Full Bench rulings of this Court: *Shambhu Singh* v. *Daljit Singh*, (2) *Kalka Prasad* v. *Mon Mohan Lal*. (3) In both of these the facts were similar but one important detail, which distinguishes the case of *Shambhu Singh* v. *Daljit Singh* (2) from the present case, is that it was found that no notice had been given of the partition to the rightful owner of the land. Both these cases were considered later by a Full Bench of this Court in *Bijai Misir* v. *Kali Prasad*, (4) In this latter case it was held by a majority of the judges that, where the appellants were parties to a partition and the property in dispute was the subject matter of that very proceeding, the case was a very clear instance to which section 233, Clause K applied and that the suit was barred by reason of the prohibition contained in that section.

It seems to me that the present suit is an attempt to set aside the partition and is barred by section 233 (K). The plaintiffs were evidently guilty of extreme carelessness at the time of partition and the error, which has occurred in the partition proceeding, is due to their lack of attention at the proper time. As has been pointed out by the Board of Revenue in *Shibia* v. *Umrao Singh* (5), the partition record is analogous to a decree defining the rights of parties given *inter parties*. The plaintiffs' case is a hard one, but they have no one but themselves to thank for the position in which they find themselves.

The appeal is allowed with costs in all Courts including in this Court costs on the higher scale.

Z. K. *Appeal allowed.*

(2) 38 Ind. Cas. 19; 38 A. 243; 14 A. L. J. 293
(3) 83 Ind. Cas. 56 ; 14 A. L. J. 373 ; 38 A. 302.
(4) 41 Ind. Cas. 912 ; 39 A. 469 ; 15 A. L. J. 496.
(5) Sel. Dec. No. 6 of 1918.

PRIVY COUNCIL.

APPEAL FROM BOMBAY HIGH COURT.

February 1, 1924.

Present :—Lord Atkinson, Lord Wrenbury and Lord Phillimore.

RAMJIVAN NEVATIA—APPELLANT

versus

H. BHIKAJI & CO.—RESPONDENT.

Vendor and purchaser—Contract for purchase of goods—Goods to bear specified numbers—Numbers not descriptive of quality—Vendor forwarding goods of required quality bearing different numbers—Purchaser, whether can refuse acceptance

The defendants contracted to purchase from the plaintiffs some bales of longcloth of their manufacture of a particular quality and bearing certain specified numbers. The plaintiffs forwarded cloth of the required quality and description but bearing different numbers and explained that there was a clerical error in the contract and that the numbers entered in the contract should have been those marked on the goods. The defendants, however, refused acceptance of the bales and terminated the contract. Thereupon the plaintiffs sold the goods at a loss and sued them for recovery of the balance of the amount. It was found that the numbers on the cloth had nothing to do with its quality nor was the cloth sold in the market by its numbers. The fact was that the purchaser of the cloth from the manufacturers could get any numbers put upon it that he pleased, and they indicated to him the width of the pieces in each bale but when the bales passed out of his hands they became merely reference numbers :—

Held that as the numbers put on the goods did not give any warrant or indication of their quality or description, the defendants were not entitled to refuse goods bearing different numbers and were bound to make good to the plaintiffs loss caused by their breach of the contract.

Facts would appear from the following judgment appealed against the Bombay High Court :

Macleod, C. J.—This is an appeal from the decision of Kajiji, J., dismissing the plaintiffs' suit which was filed to recover damages for breach of contract.

On August 1st, 1918, the defendants entered into a contract with the plaintiffs' for the purchase of ninety-two bales of the Hinganghat Rekhchand Mills under manufacture.

RAMJIVAN NEVATIA *v.* BHIKAJI AND CO.

The description of the goods as entered in the contract Exh. A is as follows :—

Bales 15 Pieces No. 732 lbs. 5-14.
Bales 29 Pieces No 736 lbs. 6-11.
Bales 10 Pieces No. 139 lbs. 7-4.
Bales 38 Pieces No. 141 lbs. 7 10.

It was stated in the contract as follows :—

"Delivery thereof is to be taken from August to October 1918 as the same may arrive manufactured. These goods are sold to you on the terms of the contract of the merchant from whom we have purchased. No objection shall be taken if these goods arrive late or early by a month. Rate thereof per lb. is Rs 2-3-0. Shahi (allowed) is at Rs. 1-0-0 per bale."

The broker who negotiated the contract was Ratansey.

From time to time the plaintiffs sent delivery orders under the contract for eleven bales No. 732, twenty-nine bales No. 736 and one bale numbered 741 and the defendant took delivery of these bales and paid for them. On November 9, plaintiffs sent a further delivery order for thirty-four bales but the defendants delayed to take delivery. On November 28, the plaintiffs sent another delivery order for seventeen bales being the balance of the contract goods. On November 29, the defendants wrote that out of the bales tendered for delivery only four bales bearing the No. 732 were contract goods, of the remaining bales ten bore the No. 739 and thirty-seven the No. 741 and they declined to take delivery of those bales. They also asked for a refund of the price of one bale No. 741 taken delivery of. The plaintiffs replied that there was a clerical error in the contract, the numbers 139 and 141 having been entered in mistake for 739 and 741. On December 5, the defendants wrote cancelling the contract in regard to forty-seven bales. The plaintiffs thereafter sold the bales at a loss and they claimed the difference between the contract price and the price realised Rs. 11,746-1-9.

The issues raised at the hearing were :—

(1) Whether the defendants were bound to take delivery of ten bales bearing No. 739 and thirty-seven bales No. 741 referred to in para. 8 of the plaint ?

(2) Whether the plaintiffs were entitled to any and if so what damages ?

The defendants in their written statement counter-claimed for damages owing to the plaintiffs having failed to deliver four bales No. 732, ten bales No. 739 and thirty-seven bales No. 141 and also for the price of the one bale No. 741 which they had paid for through inadvertence.

The counter-claim does not seem to have been pressed and was dismissed. The defendants have not appealed against this dismissal.

The plaintiffs alleged that when the defendants took delivery of one bale numbered 741 under the delivery order of October 22, they made inquiries regarding the number as the contract number was 141 and it was explained to them that there had been a clerical error, that the defendants were satisfied with the explanation and thereafter took delivery of the bale.

The learned Judge has disbelieved the plaintiffs' evidence on this point, but if the defendants attached much importance to numbers it is difficult to think that they would not have at once taken objection to No. 741. I shall consider this hereafter. But the learned Judge said :—

"To my mind there must be some importance attached to these numbers. They are not there merely to signify to the original purchasers from the mill Messrs. Ghya & Co. that 739 has reference only to the width of the long-cloth and that the last two digits have no (*sic*) reference to the width or length. None of these witnesses could say what they were there for ?...To my mind it is really too absurd if I may be allowed to say so that these numbers have no bearing in the market. They do have some bearing perhaps very little. It is after all really descriptive of the goods and to a certain extent of the quality of the goods because it is admitted that long-cloth of this very mill of the same size in width and length but bearing different numbers could be of the same quality and *vice versa* and it could also be of different quality. If that is so then Nos. 139 and 141 and any other number would be really descriptive of the goods."

With all due respect I should have thought that the logical conclusion from the above premises would be that the numbers were not descriptive.

It seems to me that the real question at issue is whether the defendants were entitled under the terms of their contract to have each bale and the pieces therein stamped with its particular number according to the numbers mentioned in the contract and to decline to take delivery of any bale not so numbered.

The particulars in the contract are very meagre. The words "92 bales of Hinganghat Mills" do not convey the description of the goods. But the goods are sold by the pound so it may be presumed that the goods were all of the same quality. The fact that for each number a different weight (which must have meant weight per piece) was assigned would show that the pieces in the bales varied in dimensions. To a layman these figures might not convey much information but it must be presumed that they were sufficient to those engaged in the trade to let them know what goods were being dealt in.

The contract stated: "These goods are sold to you on the terms of the contract of the merchant from whom we have purchased." The defendants, therefore, were entitled to have inspection of that contract, and if they did not take inspection, they must be considered as having constructive notice of it.

It is necessary, therefore, to consider the previous contracts relating to these goods. On July 31, the plaintiffs had purchased them from Chhaganlal Bhaidas. The contract is Exh. N. It was effected through the same broker Ratansey. The particulars are the same; only the Nos. 739 and 741 appear instead of 139 and 141. The weight of pieces in bales numbered 732 is stated to be lbs. $3\frac{3}{4}$ 2|16 but this is clearly an error for lbs $5\frac{3}{4}$ 2|16. The contract states "we have sold the said goods on the conditions contained in the statement of account of the merchant from whom we have purchased the said goods." The price was Rs. 2-2-0 per lb. Chhaganlal Bhaidas had bought these goods through the same broker from Mathuradas Dwarkadas on July 26. The contract is Exh. M. The price was Rs. $2\frac{3}{4}$ annas per lb. The goods were sold on the conditions stated in H. Bhikaji's contract.

Mathuradas Dwarkadas had bought these 92 bales together with twenty-nine more bales making in all 121 from the plaintiffs in this case on July 9, through the same broker at Rs. 1-15-3 a lb. The contract is Exh. I. The particulars are more complete. The goods are described as "New Cloth." The number of pieces in each lot of bales is mentioned and after the bale number certain figures appear which admittedly represent the width and length of each piece.

The last clause of the contract is "These goods are sold to you by our purchasing the same from Messrs. Ghya & Co. in accordance with the terms of their contract."

The plaintiffs had bought these goods from Ghya & Co. on June 26 together with forty more bales throgh the same broker at Rs. 1-13-6 per lb. under a contract Exh. H. The particulars are the same except that the goods are described as "Long cloth." Messss. Ghya & Co. had purchased 201 bales from the mills on June 22. under a contract which is Exb. L. The goods are described as "cloth of your Mills." Particulars are given of the goods, number length in yards, the breadth in inches the rate per piece, the number of pieces in each bale. the weight per piece and the rate per pound which was Rs. 1-11-0.

It may be noted in passing that in six weeks the price had been raised on the consumer by eight annas a pound which would be distributed between these various middlemen. The defendants themselves sold the ninety-two bales on August 13, to Gopaldas Virji through the same broker Ratansey and another broker Bhuramal. The error in the numbers was repeated, and it was because Gopaldas refused to take delivery of the bales numbered 739 and 741 when tendered to him in November that the defendants cancelled their contract with the plaintiffs. I do not think, however, we are concerned with Gopaldas' refusal to take delivery from the defendants.

The terms and conditions referred to in Exh.A must refer to the terms relating to rebate, brokerage, and the payment of interest which appear in Exh. N.

Now if the defendants had called for Exh.N they would have at once noticed the discrepancy in the numbers, though the particulars would have given them no further information beyond what was afforded by the particulars in their own contract. But the defendants, as far as I can gather, do not ask us to believe that the numbers 139 and 141 described the quality of the goods, and could

not have done so, because it is obvious on the face of the contracts that the goods were all of the same quality whatever number might appear on the bales. Nor for the same reasons can it be suggested that the goods were sold in the bazaar by their numbers. There was evidence that these numbers had acquired a particular reputation in the bazaar so that a purchaser would ask for No. 732 or No. 139 in order to secure cloth of a particular description. As a matter of fact the numbers mentioned in all these contracts had no reputation and contained no information for purchasers in the market. The goods were long cloth, a very general description. To those engaged in the trade the weight per piece and the price would convey all the information which was required. But it was contended that the defendants having purchased bales numbered 139 and 141 if they wanted all the particulars regarding width and length and pieces per bale would have to go to the mills, and therefore the number was an essential part of the contract. But this argument can be of little weight because if they had gone to the Mills they would have ascertained that the bales tendered bearing numbers 739 and 741 contained the cloth they had contracted to buy.

The defendants, therefore, must be thrown back upon the case set up by them in their written statement that they had contracted for bales bearing particular numbers and any bales tendered bearing different numbers were not contract goods.

I will now deal with the evidence given by the witnesses with regard to the numbers placed on these bales. To begin with it is obvious that the plaintiffs' Mehta who wrote out Exh.A wrote 139 and 141 by mistake for 739 and 741. If the Mehta had been available he would have been called, but his present whereabouts could not be traced. However Ratansey was the broker in all the previous contracts and whether he negotiated for their sale by their numbers or not, it cannot be denied that the same goods were being passed from one buyer to another. The plaintiffs were selling these goods and no others, and the particulars for Exh. A must have been taken from Exh. M.

This is the broker's account of the negotiations for the contract Exh. A :

"Negotiations were going on for purchase of these goods with defendants' Munim Sabdevbhai. For these goods manufactured by Hinganghat Mills. Defendants wanted Hinganghat Mill goods of quality mentioned in the contract. I did not write out the contract...I gave insstructions to the plaintiff to send a man to get defendants' signature. Afterwards I asked if it was signed and Nathuram said it was. Defendants did not ask me for any numbers. I gave no numbers to the defendants. Defendants wanted to buy the goods when they were with Mathuradas...I did not mention the numbers to any party. I did not know the numbers by heart."

In cross-examination he said :

"If number is put it indicates same (some?) thing. If contract with one number is sold it depends upon the purchaser to take goods with other Mill number. If the quality is the same he cannot refuse to take goods bearing other number...Whilst I was negotiating for the contract I used to say long cloth of the Mills. Particular description of the goods was to be written in the written contract. If defendants' purchasers were willing to accept goods bearing 739 and 741 then only defendants were bound to accept."

That would seem to be a question of law about which the witness could not express an opinion. In re-examiaation he said :

"Rate was fixed per pound. Nothing more was said about quality except longcloth of Hinganghat Mills.

Sahdev Puranmal, who entered into the contract for the defendants, said in cross-examination :—

"I signed [the contract] without seeing Exh. M. It is not true that Exh. M. was shown to me. Broker showed me the numbers on a piece of paper. I had never purchased goods of Hinganghat Mills. I had not sufficient experience at the time when broker gave me 139. I thought it was longcloth. I did not understand it was of particular quality. Number of pieces would be written in the contract. I did not know how many pieces there would be in a bale No. 139. I was conconcerned with longcloth of Hinganghat Mills. What I was concerned with was that it must bear that number."

To the Court he said :

"When we get delivery orders from plaintiffs we make copies on our forms and send them to our purchaser. If bales are to remain in our godowns then we check."

In plaintiffs' delivery order Exh. B of 21st October 1918, for twelve bales, one bale is numbered 741. Defendants copied this into their delivery order to Gopal Exh. B. Similarly when they received the delivery orders of the 7th and 9th containing bales numbered 732 and 741 they entered the same numbers on their delivery orders.

It may be noted that in Exh C. the yards of each piece are mentioned and the number of pieces in each bale. In Exh. D. only the number of pieces is mentioned.

The evidence of Mr. Dastur, Manager of the Hinganghat Mills, proves how a number comes to be put on a particular bale manufactured for a customer by the Mills. He said

"We give the numbers mentioned in the contract according to the requirements of the merchants. The numbers do not represent any quality."

In cross-examination he said :

"We put on any number that the merchants want us to put on except the numbers which may have been given to another merchant... The lengths and breadths of the goods we manufacture are not constant but are according to the directions given by the merchants."

Makanji Bhaidas, a partner in Ghya & Co., said :

"In June 1918 we agreed to buy cloth from the Hinganghat Mills. I negotiated for the purchase...The figure 7 indicates that goods are manufactured by Rekhchand Mill. 24 in 724 shows that the width is 23, Goods of all these numbers are of the same quality"

To the Court he said :—

"Retail sale is always per piece. Purchasers ask for goods by numbers also, and the name of the Mills."

In cross-examination he said :

"These numbers indicate special quality of goods which we asked them to manufacture... These numbers do not indicate the number of pieces in each bale ..Apart from the Mill numbers there is nothing to indicate the particular quality I have ordered. I say that all goods of the same weight coupled with the numbers are of the same quality. Piece weighing lbs. 5. 14 oz. of the Mill will not be of the same quality as a piece weighing lbs. 5. 14 oz of No. 732"

This answer is unintelligible. In re-examination he said :

"Mal number shows length and width, it would show to me but not to a stranger. If a person came and asked me for longcloth, of 139, and 141 I would not understand anything by it."

Further questions were allowed to be put in cross-examination but the answers clearly show that they were questions irrelevant to the real issues which only tended to confuse the witness.

Now it is clear from the evidence of these two witnesses that the numbers put by the Mills on the bales at the request of the original purchasers would convey no meaning to an outsider. To Ghya & Co they indicated the width of the pieces in each bale. When the bales passed out of their hands they were merely reference numbers. It would have been just the same if the numbers had been 501 and 502. There was no evidence that it was recognised in the market that the last two digits in the number of a bale would indicate the width of each piece.

The defendants rely on certain answers given by the plaintiff's Mehta Hurgovan Jaivanram a boy of 22 years of age who would not know much about the questions which were put to him in cross-examination no doubt in a leading form. He certainly did say "the numbers denote the quality" but this was obviously absurd. He also said :

"If we have contracted to purchase goods of one number we would not accept goods of another number. Number is not of much importance. We attach more importance to the weight of the piece of cloth. If the weight is more the length and width is more. If the weight is the same still it can be of different quality."

In fairness he might have been asked whether if the price was the same per pound the quality would be different.

The evidence of Purshottam Damji. a salesman in the Morarji Gokuldas Mills, is of no assistance. His answers clearly show the confusion which was created throughout the case by the failure to distinguish between numbers which have obtained a reputation in the

market and numbers which are placed on goods for reference purposes. The evidence of Bhogilal Devchand is in favour of the plaintiffs.

Narrondas Purshottam, a piece-goods merchant doing a large business, said in answer to Mr. Coltman:

"If I had agreed to purchase long-cloth No. 732 and if 842 were offered to me I would not accept. Number is part of quality of goods coupled with weight. Number is given to indicate quality, to show quality number is given. I know No. 5009, it indicates current quality of goods."

In re-examination he said:

"Quality is ascertained from weight. No. 732 is not current quality of goods."

The same confusion is apparent. Of course if number indicates quality then goods bearing No. 732 cannot be of the same quality as those bearing No. 842 Again if No. 5009 represents certain goods well known by that number they can be bought by that number and goods bearing another number will not be the same. But this answer is significant: "If only number is given I would understand nothing in country goods." That is clear because the mills put any numbers on the goods which the purchaser from them asks them to put on. It is only occasionally that goods with particular number acquire a reputation and thus come to be known by that number.

The only witness called by the defendants was Gopal Virji and no questions were put to him with regard to the numbers.

Now it seems obvious to me that what the defendants thought they were buying when they signed the contract, whether the brokers mentioned the numbers or not, was so many bales of long cloth of the Hinganghat Mills, in four lots the weight per piece in the bales of the respective lots varying, and as the price was uniform that would indicate that in each lot the dimensions of the pieces varied. They would know that bales of country goods always had some sort of number and it may also be conceded that they may have known that in some cases numbers are of importance. But in this particular contract they must have known that the numbers would mean nothing. If they had really wished for further information as to the contents of the bales they would have got it at once from the purchasers. But evidently having bought to sell again they did not trouble to obtain that information. It was only after the panic in the market in October 1918 when Gopal raised the objection about the numbers and refused to take delivery that they were forced to raise the same objection against the plaintiffs.

The defendants then can only succeed on the case set up by them in their written statement that they had contracted to buy bales with a particular number on them and that a tender of bales bearing a different number would not be a good tender under the contract. If the number is an essential part of the contract then it does not matter what it indicates. If A agrees to buy from B a bale of certain goods stipulating it must have a particular number on it then he is entitled to refuse a bale bearing a different number. It is no answer for B to say, in all other respects, the bale is according to the contract. It may be difficult to ascertain the dividing line in the case of contracts like the one in suit. In the contract different numbers are assigned to each lot; at any rate that indicates that the contents of the bales in each lot differ in some respects, though how they differ is not indicated. Ghva & Co. alone held the key to that. If the Mills had put different numbers on the bales to those ordered they might have raised objections. But these considerations would not apply when the goods passed out of their hands.

On the best consideration I can give to the evidence I have come to the conclusion that the defendants attached no importance to the numbers mentioned in the contract. At the most they were entitled to point out to the plaintiffs that the numbers in the delivery order did not correspond with the numbers in the contract which might well indicate that the goods tendered were not contract goods. The onus would thus lie on the plaintiffs to show that the goods tendered were contract goods. This is exactly what the plaintiffs say did happen when the defendants first discovered a wrong number in the delivery order of October 22. The learned Judge says:

"Now it seems to be absolutely inconceivable how the defendants' munim who in his turn had sold these very goods to Gopal Virji and when the contract between the defendants

and Gopal Virji had again the same numbers 139 and 141 could agree to accept bales which were still to be manufactured and delivered with Nos. 739 and 741 without consulting Gopal, for it must be remembered that the objections taken by the defendants' munim as regards the one bale bearing No. 741 were taken at the instance of Gopal who was not willing to accept that bale."

That is not borne out by the evidence at all. The plaintiffs' case is that the defendants noticed in the delivery order of October 22 that one bale was numbered 741. Gopal raised no objection to that bale until November 29 when he wrote through his solicitors to the defendants :—

"Our clients have just ascertained on examination that one of the bales of which your clients have given delivery comprises pieces bearing No. 741."

On the same day defendants wrote to the plaintiffs complaining about the numbers for the first time and asking for a refund of the price of the one bale No. 741 contained in the delivery order of October 22. The plaintiffs replied on the 30th setting up the case they sought to prove in Court that the defendants had satisfied themselves about the mistake on October 22. There is nothing inconceivable therefore in the defendants making inquiries and being satisfied on October 22 on reference to the plaintiffs that there was a clerical error in the contract and that they really had got the goods they had contracted to purchase. By the end of November it is common knowledge that prices had fallen by a very large amount and it was quite impossible for Gopal to realise except at a considerable sacrifice. It was not unnatural that he should take advantage of the mistake in the numbers to repudiate his contract with the defendants and defendants were forced to adopt the same course with regard to their contract with the plaintiffs. But we are not concerned in this case with the contract which the defendants entered into for the sale of these ninety-two bales and any consequences which resulted from the defendants continuing the error in that contract would be too remote as between the plaintiffs and the defendants. I do not think the plaintiffs' liability could be extended beyond the obligation to assist the defendants if it were necessary in showing that the goods delivered were the goods contracted for in spite of the difference in the numbers, which was the extent of their liability in the suit contract.

I think, therefore, it was not an essential part of the contract in suit that these bales should bear numbers 139 and 141, that the defendants were entitled to an explanation when bales numbered 739 and 741 were tendered and that the plaintiffs have given a satisfactory explanation by showing that the goods tendered were the goods contracted for.

The appeal must be allowed and the plaintiffs held entitled to damages with regard to the forty-seven bales numbered 739 and 741 on the basis of the prices realised by their sale. The claim with regard to the four bales numbered 732 must be disallowed. The plaintiffs must get their costs in the Court below and in this Court.

Messrs. *Dunne K. C.* and *Jardine*, for the Appellant.

Sir *George Lowndes, K. C.* and Mr. *Raikes*, for the Respondent.

JUDGMENT.—Their Lordships have carefully considered this case during the adjournment, and they do not think it necessary to call upon counsel for the respondents. They think it is clear upon the facts that the first purchaser of these goods can get any number put upon them which he pleases, that is to say, that the owner of goods in the hands of a millowner can have this done. When the numbers are attached to the goods in that way, the view their Lordships entertain is correctly expressed in the judgment of the High Court printed at p. 45 of the record : —

"The numbers put by the mills on the bales at the request of the original purchasers would convey no meaning to an outsider. To Ghya and Company they indicated the width of the pieces in each bale. When the bales passed out of their hands, they were merely reference numbers. It would have been just the same if the numbers had been 501 and 502. There was no evidence that it was recognised in the market that the last two digits in the number of a bale would indicate the width of each piece."

In their Lordships' view, the numbers, when so put on, indicate really nothing except the fact that the purchaser has purchased

these particular goods. They do not give any warranty or indication of the quality or description.

Their Lordships will, therefore, humbly advise His Majesty that the appeal fails; that the decree of the High Court should be affirmed and this appeal dismissed with costs.

N. H. *Appeal dismissed.*

Messrs. *Hallowes & Carter*, Solicitors, for the Appellants.

Messrs. *T. L. Wilson & Co.*, Solicitors, for the Respondent.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1591 OF 1922.

January 11, 1924.

Present :—Mr. Justice Spencer.

SUNKARI SITAYYA—DEFENDANT—APPELLANT

versus

MUDARAGADDI SANYASI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

[*Civil Procedure Code (Act V of 1908), s. 64—Transfer of Property Act (IV of 1882), ss. 53, 54—Execution of decree—Attachment—Agreement to sell by judgment-debtor prior to attachment—Specific performance, decree for, after attachment, effect of—Remedy of creditor.*

Where a judgment-debtor agrees to sell certain property prior to an attachment effected by the decree-holder and the purchaser obtains possession of the property under a decree for specific performance of the agreement, after the attachment, the attachment cannot prevail against the rights of the purchaser under his decree for specific performance, and the only manner in which the decree can be questioned by the attaching decree-holder is by a suit under section 53 of the Transfer of Property Act. (p. 389, col. 1).

Rebala Venkata Reddi v. *Mangadu Yellappa Chetty*, 38 Ind. Cas. 107; 5 L. W. 234; *Chamiyappa Tharakan* v. *Rama Iyer*, 62 Ind. Cas. 121; 40 M. L. J. 65 at p. 76; (1921) M. W. N. 53; 44 M. 232; *Kasi Visvanatha Chettiar* v *Ramaswami Athitha Nadar*, 48 Ind. Cas. 128; 35 M. L. J. 441; 8 L. W. 582; 24 M. L. T. 477; *Narayana Aiyar* v. *Biyari Bivi*, 68 Ind. Cas. 673; 41 M. L. J. 557; 14 L. W. 524; (1921) M. W. N. 808; 45 M. 103; (1922) A. I. R. (M.) 221, relied on.

Kurri Veerareddi v. *Kurri Bapi Reddi*, 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.); *Vizagapatam Sugar Development Company* v. *Muthurama Reddi*, 76 Ind. Cas. 886; 45 M. L. J. 528 (F.B.), referred to.

Appeal against the decree of the District Court, Vizagapatam, in A. S. No. 140 of 1922 presented against the decree of the Court of the District Munsif, Vizagapatam, in O. S. No. 575 of 1920.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *K. N. Rajagopala Sastri*, for the Respondents.

JUDGMENT.—The plaintiff in execution of a money decree against the 1st defendant attached certain lands and a house and house-site as belonging to his judgment-debtor. That was on the 15th December 1918. Previous to this on 15th May 1916 there was a contract between the 1st defendant and the 2nd defendant to sell the same property to the 2nd defendant. After the attachment the 2nd defendant put in a claim-petition which was allowed. The plaintiff thereupon brought this suit to set aside the order upon the claim petition, and it has been decreed by the first Court and confirmed in appeal by the District Judge. After the attachment had been made, the 2nd defendant brought a suit for specific performance and got an order for sale from the Court and delivery of possession. The question raised in the second issue is whether the 1st defendant had any subsisting interest in the property which was attached, in other words, whether the attachment can prevail against the 2nd defendant's decree by which he got possession of the land in pursuance of the contract for sale. The Courts below held that the contract for sale did not create any title in the 2nd defendant and following the decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (1), they set aside the order on the claim petition and declared that the properties were liable for attachment. The decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (1) is based on the last sentence of section 54, Transfer of Property Act.

> "It (a contract for the sale of immoveable property) does not, of itself create any interest in or charge on such property."

These words are capable of being understood in more senses than one. One implication therefrom is that such contracts do not require registration. This decision has recent-

(1) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395, (F. B.)

ly been overruled by a decision of a Full Bench in *Vizagapatam Sugar Development Co.*, v. *Muthurama Reddi* (2). The principle governing the present case has been stated in *Reba'a Venkata Reddi* v. *Mangadu Yeilappa Chetty* (3), where the learned Judges point out that in English law a Judgment-creditor has no rights as against a transferee of property in pursuance of a contract entered into before the attachment. They say that it does not seem to be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it. This case has been referred to with approval in *Chamiyappa Tharakan* v. *Rama Iyer* (4). It is obvious that the plaintiff could by no manner of means attach a greater interest than what his judgment-debtor possessed at the date of attachment. The plaintiff cannot even lay claim to the rights of a *bona fide* purchaser without notice of prior obligations attached to the land purchased (Section 3 Transfer of Property Act) as in this case there has been no sale in open market. Section 64 of the Civil Procedure Code lays down that where an attachment has been made, any private transfer or delivery of the property attached is void as against all claims enforceable under the attachment. The 2nd defendant's title does not rest upon a private transfer but upon a decree of Court based on the contract to sell and is comparable to the case of a decree based upon an award which we held in *Kasi Viswanatha Chettiar* v. *Ramaswami Athitha Nadar* (5) which was followed in *Narayana Aiyar* v. *Biyari Bivi* (6) should prevail over a purchase under an attachment prior to the award.

The plaintiff in this suit was not a party to the suit for specific performance and it is open to him to impugn that decree as being based on fraud or collusion. His proper course would be to file a suit under section 53 of the Transfer of Property Act to have the transfer avoided as being intended to defeat or delay creditors. In his plaint he has not put his case quite on that ground. But he has alleged that the contract of sale was invalid as being executed with the evil intention of avoiding the plaintiff's debts, and the first issue in the suit raises the question whether the decree for specific performance was obtained fraudulently. As the Courts below have not decided this issue and have disposed of the question erroneously upon the preliminary point arising out of the second issue, their decrees must be set aside and the suit remanded to the District Munsif's Court for disposal upon the first and other issues as yet undecided. Costs of the second appeal and costs in the Courts below will be costs in the cause.

Z. K. *Suit remanded.*

(2) 76 Ind. Cas. 886 ; 45 M. L. J. 528 (F. B.)
(3) 88 Ind. Cas. 107 ; 5 L. W. 284.
(4) 62 Ind. Cas. 121; 40 M. L. J. 65 at p. 76; (1921) M. W. N. 53 ; 44 M. 282.
(5) 48 Ind. Cas. 128 ; 35 M. L. J. 441 ; 8 L. W. 582; 24 M L T. 477.
(6) 68 Ind. Cas 678 ; 41 M L J. 557 ; 14 L. W. 524 ; (1921) M. W. N. 808; 45 M. 103 ; (1922) A. I. R. (M) 221.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 346-B OF 1922.

November 17, 1923.

Present :—Mr. Kinkhede, A. J. C.

LAXMAN—PLAINTIFF—APPELLANT
versus
JANOO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s, 11—Res judicata between Co-defendants, requisites of—Mortgage—Prior and subsequent mortgagees—Intermediate mortgagee, failure of to appear and contest suit by prior mortgagee, effect of—Priority.

In order that a decision should operate as *res judicata* between co-defendants two conditions must be fulfilled, first, there must be an active controversy against each other between the co-defendants and secondly, the controversy *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff. (p. 391, col. 2).

Case-law discussed.

Where a prior mortgagee takes a subsequent mortgage in renewal of the prior mortgage and sues on the basis of both of them claiming to be redeemed by an intermediate mortgagee and the latter omits to appear and assert his own priority over the plaintiff. and does not raise any contest in the suit he is not thereby precluded from suing to work out his own rights on foot of his mortgage in a subsequent suit of his own. (p. 392, col. 2).

Sri Gopal v. *Pirthee Singh*, 24 A. 429; 4 Bom. L.R. 827: 6 C. W. N 889; 29 I. A. 118; 8 Sar P. C. J. 298 (P. C); *Gopal Lal* v. *Banarasi Pershad Chowdhury*, 31 C. 428; 8 C. W. N. 385, distinguished.

LAXMAN *v.* JANOO

Appeal against the decree of the District Judge, East Berar, Amroati, in Civil Appeal No. 170 of 1921, dated the 31st March 1922.

Sir *B. K. Bose* and Mr. *P. N. Rudru*, for the Appellant.

Mr. *D. T. Mangalamoorti*, for the Respondents.

JUDGMENT.—I think this second appeal must succeed. The Courts below have entirely misconceived the law applicable to the facts of the case.

One Manaji son of Ramji executed a mortgage dated 20th February 1905 in respect of his property in favour of plaintiff Laxman son of Atmaram Mali. The latter on 19th February 1920 instituted the present suit for foreclosure on foot of that mortgage. He has joined as co-defendants several persons who were interested in the mortgaged property. Amongst such co-defendants is one defendant No. 4 Narayan Baliram Ganorkar.

The aforesaid Manaji and his brother relatives with one Dallaji as their surety had executed a mortgage dated 26th May 1902 in favour of Baliram Ramchandra and Fida Ali of Chandur for Rs. 2000 inclusive of Sawai. The surety paid off the mortgage-debt. An account was subsequently made as between the surety's widow and legal representative Punai, and the mortgagors, and on 2nd March 1907 Rs. 5,775 were found due. For securing this sum a registered mortgage-deed was executed that day by Manaji and some others in the name of *Mt.* Punai. Gangaram was the son of Punai and was the real owner of the mortgage. They both died and the mortgages dated 26th May 1902 and 2nd March 1907 devolved on Gangaram's two daughters by name Tari and Chandri. They assigned their rights to one Gajanan Pandurang Joshi who instituted suit No. 1 of 1915 in the Court of the Additional District Judge, Amraoti, on foot of the assignment. The present plaintiff was defendant No. 11 in that suit. He was impleaded in his capacity of a subsequent mortgagee but although the reality of his mortgage was challenged in the plaint still plaintiff claimed a decree against him. The present defendant No. 4 was also a co-defendant No. 8 in that suit. The defendant No. 11, however, did not appear, and allowed the case to proceed *ex parte* against him. On 7th May 1915 a preliminary decree for foreclosure was passed in that suit by the Additional District Judge giving to the defendants Nos. 8 and 11 along with some other defendants an opportunity to redeem the property mortgaged within six months. That decree was declared as satisfied by the payment made by defendant No. 8 *i. e.*, the present defendant No. 4 and the property was declared as redeemed from the mortgage in favour of Gajanan by passing final decree of satisfaction on 21st February 1919 (*Vide* Exhibit IV D-I).

It is with the pleas of defendant No. 4 that this appeal is principally concerned. His pleas as embodied in paragraphs 1 and 3 of his written statement dated 1st March 1921 were as under :—

1. That the plaintiff be called upon to make clear the rights of the defendants Nos. 3 to 13 vaguely alleged in para 2 (*g*) of the plaint.
2. that the plaintiff was joined as a subsequent incrumbrancer in civil Suit No. 1-15 on the file of the Additional District Judge Amraoti. He failed to redeem the mortgage and final decree was passed in favour of the defendant. Thus he cannot set up his mortgage which is lost and he cannot sue on it."

The plaintiff in reply stated that defendant No. 4 was in possession of some of the mortgaged survey numbers under two sale-deeds dated 11th March, 1905 from Manaji. It was admitted that the present plaintiff was impleaded as a party defendant in the prior suit No. 1-15 but plaintiff denied knowledge of the fact whether the final decree for foreclosure was passed in that suit in favour of present defendant No. 4 and that if any was passed it was not legal and binding on the plaintiff. Mr. Jawahirlal Sub-Judge did not examine the defendant No. 4 closely. He should have been asked to state distinctly whether the final decree passed in his favour was one for foreclosure or for satisfaction and what position he proposed to take with reference to it if it was a decree entering full satisfaction merely. He simply framed the preliminary issue, "Is the plaintiff's suit not maintainable? and in a very summary judgment threw out the case on the ground that the present plaintiff not having appeared and set up his mortgage in the former suit or claimed to redeem the mortgage

on which that suit was based he was precluded from enforcing his own mortgage. He cited *Shri Gopal* v. *Parthi Singh* (1) as an authority in support of his view.

The appeal preferred to the Court of the District Judge was also unsuccessful on the ground that it was the present plaintiff's duty to appear and establish the reality of this mortgage transaction in the former suit and that plaintiff having failed to urge his mortgage then, was barred by the principles of *res judicata* embodied in explanation 4 of section 11 of the Civil Procedure Code and that defendant No. 4 who was a co-defendant with the present plaintiff in the former suit was entitled to the benefit of the plea of *res-judicata* based upon the decision in that suit. The District Judge accordingly dismissed the appeal.

I think both the Judges have taken a mistaken view of the law. It is rightly contended that in deciding this question of *res judicata* the following principle laid down by Wegram V. C. in *Cottingham* v. *Earl of Shrewsbury* must be followed: —"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case and the co-defendants will be barred. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be barred as between each other by any proceedings which may be necessary to the decree the plaintiff obtained." The embodiment of this rule *Cottingham* v. *Earl of Shrewsbury* by West. J in the leading case of *Ramachandra Narayan* v. *Narayan Mahadeo* (3) has not been regarded as settled law "where an adjudication between defendants is necessary to give the appropriate relief to plaintiff there must be such an adjudication and in such a case the adjudication will be *res judicata* between defendants as well as between plaintiff and defendants. But for this effect to arise there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants, *inter se*. Without necessity the judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim made against them as a group." This principle was quoted with approval by Sir Stanley Ismay, J. C., in *Moolchand Daulat* v. *Moolchand Khubchand* (4) and has been followed in several decisions of the Indian High Courts. The first requisite then is that there should be active controversy against each other between the parties arrayed on the same side: Per Muttusami Ayyar *Venkayya* v. *Narasamma* (5). Secondly the adjudication *inter se* between the defendants should be necessary to give the appropriate relief to the plaintiff per West, J. in the above case and Wigram V.C. in *Cottingham's case* and Jessel M R. in *Venon* v. *Crawford* (6) and *Muhammad Ahmad* v. *Zahur Ahmad* (7). There was no conflict of interest even between the plaintiff in the former suit, and the present plaintiff as defendant No. 11 in the former suit, in view of the plaintiff's own willingness to allow defendant No. 11 a right to redeem as a subsequent mortgagee. In fact the plaintiff himself cited the mortgagee Laxman as P W. 3 and proved his interest and accepted the preliminary decree that was passed in his favour on 7th May 1915 which calls upon the present plaintiff among other persons to redeem the mortgage sued upon. Moreover the present defendant No. 4 who was defendant No 8 in the former suit did not urge in that suit that defendant No. 11 should not be allowed to redeem the then plaintiffs' mortgage on the ground that his mortgage was bogus. There was thus no active controversy either between the then plaintiff and the present plaintiff on the one hand or between the then defendants No. 8 and defendant No. 11 *inter se*; much less was there any adjudication *inter se* between the said co-defendants. If Narayan Baliram (defendant No. 8) was so very particular about excluding Laxman (defendant No. 11) from the benefits of the decree passed in that suit, he should have taken care to get his name excluded not only from the preliminary decree but also from the final decree of satisfaction

(1) 24 A. 429 : 4 Bom. L. R 827 ; 6 C. W. N 889 ; 29 I. A. 118 ; 8 Sar. P. C. J. 293, (P.C.).
(2) (1848) 3 Hare 627; 67 E. R. 530.
(3) 11 B. 216 at p. 220; 11 Ind Jur. 301; 6 Ind Dec. (N. S.) 142.
(4) 16 C. P. L. R 42.
(5) 11 M 204 at p. 20 : 4 Ind. Dec. (N S.) 142.
(6) (1877) 6 Ch. D 29 ; 46 L. J. Ch. 729 ; 37 L. T. 322 ; 26 W. R. 49.
(7) 67 Ind. Cas. 528 ; 44 A. 334 ; 20 A. L. J. 193 4 U. P. L. R. (A.) 55 ; (1922) A I. R. (A.) 19.

passed at his own instance in the case (Ex. IV D-1). The very fact that he allowed his name to stand in the final decree for satisfaction clearly indicates that there was no conflict of interest between them too. Nor was any adjudication as between co-defendants *inter se* necessary for the purpose of giving the plaintiff the appropriate relief. No issues were framed as between the co-defendants *inter se* I fail to see how the present plaintiff's omission to assert his right as a subsequent mortgagee in the former suit to redeem the prior mortgage can operate as a bar to his enforcing his rights under his own mortgage as against persons who claim to be either interested in the mortgage security or in the right of redemption particularly when that mortgage has not been foreclosed but redeemed by one co-defendant out of a group of several co-defendants.

As pointed out in *Madhorao Ghatate* v. *Tukaram Bapu* (F. A No. 63 of 1922) by a Bench of this Court what we have to see in such cases is "whether in the previous suit" the particular question was *directly and substantially in issue* between the present plaintiff and the present defendants." Under rule 1 (1) of O, XIV Civil Procedure Code the issue could arise only if a fact was asserted by one party and denied by the other. The failure of the present plaintiff to appear and contest the then plaintiff's right to foreclose the property on foot of his own mortgage must be treated under r. 5 of O. VIII, Civil Procedure Code as an admission of that right. Based upon that admission a decree was passed by the Court directing the present plaintiff to redeem the prior mortgage involved in that suit. There was thus no matter in dispute between the plaintiff in that suit and the present plaintiff, or between the latter and the other co-defendants. No doubt where any contest arises between a puisne mortgagee plaintiff and a prior mortgagee defendant or there is a contest between a mortgagor and a prior mortgagee who are co-defendants, which it is necessary to decide in order to give relief to plaintiff, such contest should be adjudicated upon in the decree framed with reference to the adjudication: c. f. *Srinivasa Rao* v. *Yamunabai Ammal* (8). But where the rights of parties to the suit are admitted on all hands and further the person claiming relief himself asks for a relief subject to such admitted right (here the right of a subsequent mortgagee to redeem) there is no contest, and no necessity for any adjudication, much less, for an adjudication defining the rights of the co-defendants *inter se*, and consequently no bar of *res judicata*. If the plaintiff in the former suit instead of asking merely for foreclosure of the property on foot of his mortgage, had insisted upon claiming a decree for foreclosure of the property *free of the present plaintiff's mortgage* on the ground that it was bogus and the present plaintiff had remained absent and omitted to set up his mortgage lien and resist such a claim and the Court had passed a decree directing foreclosure *free of the said mortgage* then only the present plaintiff might have lost his right to sue on its basis, otherwise not. On this ground all the cases relied on by the lower Courts are distinguishable from the facts of the present case. In *Sri Gopal* v. *Prithi Singh* (1), the representatives of the mortgagee under a mortgage of 1876 claimed priority over all the earlier mortgages of 1872 and 1874 on the ground that the money was borrowed to pay off incumbrance created before 1871. They failed in this contention but got a decree entitling them to sell the property *free from encumbrances* after paying off *inter alia* the bond of 1871. The representatives of the intermediate mortgages of 1872 and 1874 did not set up the deed of 1874. They subsequently brought a suit on that mortgage and it was held that they had lost their priority by their failure to set it up in the action in which the issue was whether the mortgage of 1876 had priority over the mortgages created between that year and 1871. That was the issue and the representatives of the intermediate mortgagee ought to have set up their claim with respect to the deed of 1874 and not having done so lost their priority. That case does not lay down that where the prior mortgagee plaintiff who takes a subsequent mortgage in renewal of the prior mortgage and sues on the basis of both of them and claims to be redeemed by a defendant who is an intermediate mortgagee, and the latter omits to appear and assert his own priority, if any, over the plaintiff mortgagee, and does not raise any contest in the

(8) 29 M. 84 ; 16 M. L. J. 50.

former suit, is precluded from suing to work out his own rights on foot of his mortgage in a subsequent suit of his own. What is mortgaged with a subsequent mortgagee is only a right to redeem and that right being conceded by the plaintiff prior mortgagee there was absolutely no necessity for the subsequent mortgagee to appear and set up the right which was admitted. In the case of *Gopal Lal* v. *Banarasi Pershad Chowdhury*, (9) the plaintiff pleaded that a certain person was a subsequent mortgagee and that he was entitled to sell *clear of encumbrances*. He obtained a decree and permission that there should be a sale failing redemption. The person whom he had declared as a subsequent mortgagee subsequently set up a prior mortgage and sued upon it. There it was held that the prior mortgagee ought to have set up his mortgage in suit in which it was alleged that he was a subsequent mortgagee and the judgment went on on the ground that the plaintiff claimed to sell the property *free from* encumbrances and therefore was claiming a right which affected the rights of the prior mortgagee and if the prior mortgagee desired to dispute his right to sell the property free from encumbrances, he was bound to appear to set up his mortgage and resist it. In the present case the plaintiff's claim as laid is one to enforce his own mortgage. The defendant No. 4 has the option to fall back on the prior mortgage which he redeemed by payment or to offer to redeem plaintiff. He has yet to make his choice between the two courses open to him. The property has been saved from foreclosure under the prior mortgage so that nothing has so far appeared to prejudicially affect the rights of the present plaintiff. I do not therefore think that the case of *Gopal Lal* v. *Banarasi Pershad Chowdhry* (9), has any application to the facts of the present case.

In *Ajudhia Pande* v. *Inayat-ullah* (10), the aforesaid case was distinguished on the ground that the plaintiff himself admitted the prior mortgage of the defendant and offered to redeem it. The prior mortgagee who had thus been impleaded entered no appearance and made no defence as in the present case. It was held that the prior mortgagee in spite of his omission to appear and set up his mortgage in the former suit was not precluded from subsequently bringing a suit for sale on his mortgage. Reliance was placed for this view upon the authority reported in *Sreenivasa Rao* v. *Yamunabai Ammal* (8), already cited. In this view of the case I hold that the plaintiff's suit is not barred by *res judicata* and allowing the appeal remand the case for trial and adjudication on the merits. The appellant will get his costs of this appeal and those of the lower Appellate Court. The costs of the original Court will abide the event.

Z. K. *Case remanded.*

(9) 31 C. 428 ; 8 C. W. N. 385.
(10) 18 Ind. Cas. 21 ; 35 A. 111 ; 11 A. L. J. 57.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 146 OF 1919.

February 12, 1924.

Present :—Sir Norman Macleod, Kt, Chief Justice, and Mr. Justice Shah.

NILKANTH BALVANT NATU—PLAINTIFF—APPELLANT
versus
VIDYASHANKAR BHARATI—DEFENDANT—RESPONDENT.

Regulation V of 1827, *cl.* 15 (3)—*Construction of document—Mortgage possessory — Special agreement prohibiting sale—Mortgagee deprived of possession—Damdupat, rule of, application of.*

In the case of a possessory mortgage governed by Regulation V of 1827, under clause 15 (3) of the Regulation, unless there is a special agreement between the parties, when the bond is entered into, to the effect that the property shall not be brought to sale by the mortgagee, then the mortgagee has a right to institute a suit for the purpose of bringing the property to sale. (p. 395, col. 1.)

Under a possessory mortgage governed by Regulation V of 1827, interest was to be paid on the amount advanced, an account of rents and profits was to be made up after every year, and amount of balance was to be settled by the parties. Even if the mortgagor failed to pass the accounts, he undertook to have the property released after clearing off the total amount of balances struck in each year. It was also argued that if the mortgagor could get the money from any other source for the repayment of the debt, the mortgagee would accept the amount and release the property:—

NILKANTH BALVANT NATU *v.* VIDYASHANKAR BHARATI

Held, that there was no special agreement between the parties prohibiting a sale of the property under the mortgage.

In the ordinary case of a usufructuary mortgage where the mortgagee is in possession of the mortgaged property either in lieu of interest entirely, or on the terms that he must render an account of rents and profits against interest, the rule of Damdupat would apply. But when the terms of the mortgage have been departed from, and the mortgagor has deprived the mortgagee of possession, then the principle of Damdupat can no longer apply as the relationship of the parties has changed. (p. 396, col. 1.)

Gopal Ramchandra v. *Gangaram Anand Shet*, 20 B. 721 F. B. 10 Ind. Dec. (N. S.) 105, relied on.

Appeal from the decision of the Additional First Class Subordinate Judge, Satara in suit No 604 of 1910.

Mr. *H. C. Coyajee*, with Mr. *K. H. Kelkar*, for the Appellant.

Messrs. *M. V. Bhat*, *Bahadurji* with Mr. *A. G. Desai*, Messrs. *D. A. Tuljapurkar*, and *Patvardhan* with Mr. *B. V. Desai*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiffs claimed to be entitled to recover by sale or foreclosure Rs. 5,00,001 and interest charged upon certain immoveable properties in Belgaum, Kolhapur, Sawantwadi, Kurundwad and Satara. The suit was filed in the First Class Subordinate Judge's Court at Satara against the mortgagors or their representatives to enforce the alleged rights of the mortgagee. Certain issues were taken up at the trial as preliminary issues, and from the decision of the Subordinate Judge on those issues an appeal was filed to the High Court (being F. A. No. 39 of 1913, the suit being No. 604 of 1910 of the Satara Court). On appeal the issues were decided in favour of the plaintiffs and the suit continued in the Subordinate Judge's Court.

It was contended by the defendants that the mortgaged property was Devasthan and Saranjam, and not liable to be mortgaged. The Judge decided this issue in plaintiffs' favour and the decision on the fourth issue would necessarily follow also in their favour. The eleventh issue was whether the claim for possession of any and which of the mortgaged properties was in time. The learned Judge held that the claim for possession of the properties in the Kolhapur State only was in time. On the twelfth issue he held that the plaintiffs were not entitled to sell or to foreclose, and he passed a decree on accounts being taken to the following effect:—

"The defendants or any one of them should pay Rs. 3,31,000-0-8 and plaintiffs' costs in proportion within six months from the date of the decree. In default the plaintiffs were to recover possession of the villages in the Kolhapur State only. The claim as to other villages in suit was rejected. The learned Judge declined to allow any further interest from the date of suit until the date of the decree or the date of realization."

The plaintiffs have appealed. Three points have been argued before us:—

1. Whether the learned Judge was wrong in holding that the plaintiffs were not entitled to an order for sale?
2. Whether plaintiffs were not entitled to possession of all the mortgaged properties?
3. Whether the learned Judge's decision on the question of interest was wrong?

The mortgages in this case were entered into between the years 1840 and 1844, and were subject to the provisions of Regulation V of 1827. Clause 15 of the Regulation is as follows:—

First—When a creditor is placed in possession of property by mortgage or otherwise, as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security.

Second—If the property yield profit, and no stipulation has been made respecting the disposal of the said profit, or payment of interest on the debt, the profit shall be considered as equivalent for the interest.

Third—In the absence of any special agreement, or recognised law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any being restored to the owner.

Now the various bonds which were entered into by the defendants' predecessors were all in the same form as Exh. 38 at p. 13. Interest was to be paid on the amount advanced, the mortgagee was placed in possession, an

account of rents and profits was to be made up on the 1st of Ashadh Vad in each year, and the amount of balance was to be settled by the parties. If the mortgagors failed to pass the accounts, they undertook to release the villages after clearing off the total amount of balances which were struck in each year. It was also agreed by the clause which appears at bottom of page 17 that if the mortgagors could get the money from any other source for the repayment of the debt, the mortgagee should accept the amount when it was paid and should release the villages.

It has been contended by the plaintiffs that the learned Judge was wrong in holding that the plaintiffs were debarred from instituting a civil suit for the purpose of causing the properties to be applied to the liquidation of the debt. We cannot agree with the reasoning of the learned Judge by which he came to that conclusion. We have to consider paragraph 3 of clause 15 of the Regulation V of 1827, and then apply it to the document before us. Unless there is a special agreement between the parties, when the bond is entered into, to the effect that the property shall not be brought to sale by the the mortgagee, then the mortgagee has a right to institute a suit for the purpose of bringing the property to sale. There is no issue referring to documents which have been construed in other cases in order to ascertain whether they contained such special agreements. It seems to have been argued before the learned Judge that it was a relevant question whether the document contained a covenant by the mortgagor to repay the mortgage money. But in my opinion, that could have no bearing on the question whether or not there has been a special agreement that the mortgagee cannot realize his security by sale. The covenant as to repayment is purely personal, and is only relevant on the question whether a suit can be brought, not against the security, but against the mortgagor for the repayment of the money borrowed. In this document I can find no evidence whatever of a special agreement such as is relied upon by the defendant. Nor can it be inferred that the parties agreed that the mortgagee should not sell merely because the mortgagors were entitled to redeem. In my opinion, therefore, the suit for sale was competent and the plaintiffs are entitled to an order for sale of the mortgaged properties in the Kolhapur State.

The plaintiffs are clearly entitled to an order for possession of those properties and they are further entitled to a decree for sale, if default is made in payment of the decretal amount.

With regard to the properties in British territory, it has been argued that the plaintiffs were entitled to possession of those properties, because they were in possession before 1902 of the mortgaged properties in the Kolhapur State, and possession of one was possession of the other. No authority has been cited before us for the proposition that if two separate properties are given over into the possession of a usufructuary mortgagee, and if he loses possession of one of the properties, possession of the other saves limitation with regard to a suit to recover possession of the first property. But in this case we need not decide that point because we think the evidence is clear that these properties in British territory were given back to the mortgagors before 1860, and no steps whatever were taken to recover possession until this suit was filed. That we think raises the presumption that the parties agreed that the security of the properties in British territory should be given up, and that the Kolhapur properties only should be considered as security for the debt.

We have been referred to a document, Exhibit 58 at p. 53, which was a petition of the then mortgagors dated 16th August 1879, appealing against an order of the Political Agent Kolhapur and Southern Maratha Country, referring them to a Civil Court for redress in the matter of the forcible recovery from them by the Jagadguru of Sankeshwar and Kolhapur of certain Inam villages situated in the Kolhapur territory. That petition and the Resolution of Government thereon dealt only with mortaged properties in the Kolhapur State, and that to some extent is evidence that the mortgagees and the mortgagors had come to some arrangement with regard to the properties originally mortgaged in British territory, so that in effect the mortgagees agreed to retain their security only on the properties in the Kolhapur territory.

It has been argued by the defendants that the learned Judge was wrong in holding that it is not proved that the properties were not

liable to be mortgaged as being Devasthan or Saranjam properties. But they produced no evidence to support their contention, and there is nothing before us from which it can be shown that the mortgagors between 1840 and 1844 were not competent to alienate or mortgage the suit properties. It was particularly stated in the bond Exhibit 38 that the money was borrowed for the expenses of the Samsthan, and the mortgagors were competent to borrow for such purposes on the security of the Samsthan property. That is the only point argued in the defendants' appeal, with the exception of the question of interest which is common to both appeals.

We do not think the Judge was justified in disallowing all further interest from the date of the suit. It would follow from that decision that the plaintiffs would be debarred thereafter from claiming interest unless they could get into possession of the properties in the Kolhapur State, in which case the terms of the mortgage bonds would revive, and they would have to render account of rents and profits against the interest due. But all sorts of difficulties may arise in that case if the judgment should stand. Considering that we think that the parties agreed that the mortgaged properties in British territory should be surrendered to the mortgagors, and that the mortgagees only remained in possession of the Kolhapur properties until 1902, when they were deprived of possession, it seems to us inequitable that interest should not run on the principal amount due from the date of the suit. It is quite true in the ordinary case of a usufructuary mortgage when a mortgagee is in possession of the mortgaged property either in lieu of interest entirely, or on the terms that he must render an account of rents and profits against interest, that the rule of Damdupat would apply. But when the terms of the mortgage have been departed from, and the mortgagors have deprived the mortgagees of possession, then it seems to me very clear that that principle can no longer be considered as binding as the relationship of the parties has changed and the mortgagors must pay interest.

We amend the decree by directing that interest must run on the principal amount from the date of suit until realisation, and that amount of interest must be added to the decretal amount, which the defendants must pay within six months from the date these proceedings are returned to the Trial Court. In default the plaintiffs will be entitled to bring the properties in the Kolhapur State to sale. There may be difficulties with regard to the sale of the properties. So we had better leave the direction of the Judge as it stands that the plaintiffs can recover possession of the villages in the Kolhapur State. As a matter of fact it will be far simpler if they can bring the properties to sale at once after the six months expire, if default is made. If instead of bringing the properties to sale, they go into possession, they must, under the terms of the mortgage, render an account of rents and profits against the interest which becomes due.

The plaintiffs do not ask for any order as to the properties in Savantvadi and Kurundvad. They do not ask for possession of those properties as apparently they have been out of possession for a considerable period.

The plaintiffs have been on the whole successful. They will be entitled to add their costs to the mortgage amount. The defendant No. 2's appeal will be dismissed with costs.

Shah, J.—I agree. I desire to add a word with reference to the point relating to the applicability of the rule of Damdupat to the facts of this case. Having regard to the terms of the mortgage bond in this case, I think the application of that rule is excluded according to the Full Bench ruling in *Gopal Ramchandra* v. *Gangaram Anand Shet.* (1).

Decree amended.

(1) 20 B. 721 F. B. ; 10 Ind. Dec. (N. S.) 105.

SESHAMMA *v.* YEERANKI PEDA VENKATA RAO

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 425 OF 1922.

January 18, 1924.

Present :—Mr. Justice Odgers and Mr. Justice Wallace.

SESHAMMA, WIDOW AND LEGAL REPRESENTATIVE OF THE DECEASED MANCHIRAJU NARAYANA RAO *alias* SATYANARAYANAMOORTHY—APPELLANT

versus

YEERANKI PEDA VENKATA RAO (DEAD) AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXII, rr. 4, 9, O. XXXIV, r. 5—Preliminary mortgage-decree—Judgment-debtor, death of before decree—Legal representative not brought on record--Abatement—Application for final decree—Second application to set aside abatement--Order dismissing first application, appeal against—Abatement set aside—Order, legality of—Jurisdiction—Appeal, second, whether maintainable—Revision.

A preliminary mortgage-decree was passed on 27th November 1918. That morning, before the decree was passed, the judgment-debtor died. The plaintiff came to know of it soon after, but no steps were taken to bring the legal representatives of the deceased on the record till 27th August 1920 when plaintiff filed an application under O. XXXIV, r. 5 of the Civil Procedure Code wherein he set out the fact that the judgment-debtor had died, entered his widow as defendant and asked for a final decree to be passed. The widow contended that the preliminary decree having been passed after the judgment-debtor's death was a nullity and that in the absence of any petition to bring the legal representatives of the deceased on the record the suit had abated. Nearly seven months thereafter, the plaintiff filed another application asking that the delay in bringing the legal representatives of the deceased on the record be excused and that a final decree may be passed. The Court of first instance dismissed both petitions by two separate orders. An appeal was filed only against the order on the first petition and the Appellate Court treating the first application as one to set aside the abatement, excused the delay in filing it, allowed it and directed the suit to be proceeded with. On appeal,

Held, (1) that the judgment-debtor having died before the decree the decree was a nullity and no legal representative having been brought on the record within the time prescribed by law, the suit had abated.

(2) that the order of the lower Appellate Court in setting aside the abatement was without jurisdiction, first, because it had before it no prayer to set aside the abatement and no substantial motion under O. XXII, r. 9 of the Civil Procedure Code and secondly, because it had no jurisdiction to revise the order on the second application which was not properly before it.

(3) that the order of the lower Appellate Court though technically one under O. XXII, r. 9 of the Civil Procedure Code and consequently not appealable under that order, was passed without jurisdiction, and was therefore, appealable, or at least open to Revision on the ground that it was without jurisdiction. (p. 399, col. 2.)

Where it is necessary, in order to do substantial justice, to brush aside technicalities, the Court will not be too scrupulous in enforcing them ; but when there are no merits in favour of the party invoking the aid of the Court and the merits are on the other side, the Court will not go out of its way to clear from the former's path technical obstacles. (p. 399, col. 1.)

Appeal against the order of the Court of the Additional Subordinate Judge of Cocanada in Appeal No. 78 1922 preferred against the order of the Court of the District Munsif of Peddapuram in E. A. No. 2411 of 1920 in O. S. No. 109 of 1918.

Mr. *Rama Rao* for the Appellant.

Messrs. *G. Lakshmama* and *A. Satyanarayana* for the Respondents.

JUDGMENT.—This appeal is against the order of the Additional Subordinate Judge, Cocanada, setting aside an abatement of a suit, the order appealed against being passed under O. XXII, r. 9. In ordinary circumstances, no appeal lies against such an order, but in the circumstances of this case it is contended that the order appealed against was passed without jurisdiction and vitiated by material irregularity.

The plaintiff who is the respondent in this appeal, sued one M. Narayana Rao, in the Court of the District Munsif of Peddapur on a mortgage and on 27th November 1918 obtained a preliminary decree. It since transpired that the judgment-detor died on the morning of 27th November 1918 before the decree was passed. The plaintiff admits that, not long after the decree, he came to know of the fact of the death of the judgment-debtor, but not of the actual date of it and assumed that he had died after the decree and that therefore the decree was valid. He took no steps to bring on the legal representatives until 27th August 1920 when he filed E. A. No. 2411 of

1920 under O. XXXIV, r. 5 wherein while setting out that the judgment-debtor had died and entering his widow (the present appellant) as the defendant in the petition, he asked merely that a final decree be passed. The present appellant in her counter-petition pointed out that the judgment-debtor had died before the preliminary decree was passed, that no petition to bring on the legal representative on record had been put in time, that, therefore, the suit had abated, and that the date of limitation for bringing on the legal representatives had passed. Even after this allegation the plaintiff did nothing until 23rd March 1921 when he put in E. A. No. 911 of 1921 in which he asked that the delay in bringing on the legal representatives be excused, and that a final decree be passed. In his affidavit to that petition, he persisted in saying that the defendant judgment-debtor died after the decree and that the allegation that he died before the decree was not true.

The District Munsif dismissed both the petitions. The Additional Subordinate Judge, on appeal, held that the application, E. A. No. 2411 of 1920, may be treated as one for setting aside the abatement of the suit and that the excuse for the delay in filing such an application is reasonable and he set aside the abatement of the suit and directed the District Munsif to take it on file and proceed with it.

It is not now disputed that the judgment-debtor died before the preliminary decree was passed, that, therefore, the preliminary decree was a nullity, and that no steps to bring on the legal representatives were taken within six months of 27th November 1918 as required by the Limitation Act, then in force. It follows that the suit abated on 26th May 1919. The plaintiff, no doubt, contends that in O. XXII, r. 4 the phrase 'right to sue' does not apply after a preliminary decree is passed and that, therefore, there is no limitation to the period within which he was bound to apply to have the legal representative brought on ; but, apart from the fact that the law is at present against him on this point see *Dakaju Subbarayudu* v. *Musti Ramadasu* (1) there is the obvious rejoinder that there was, in fact, no valid preliminary decree and, therefore, the suit has not even reached the stage of a preliminary decree. Clearly then the suit abated on 26th May 1919.

The first point to be noted is that, though the plaintiff has never asked that the abatement be set aside, the lower Court, nevertheless, chose to treat his E. A. No. 2411 of 1920 as a prayer for that relief. That E. A., as already pointed out, was not put in under O. XXII at all but under O. XXXIV. Not only that ; when the present appellants' rejoinder to it pointed out that the suit had abated, the plaintiff evidently without making any enquiry chose to take the standpoint that the suit had not abated and maintained that standpoint in his second petition E. A. No. 911 and never even then asked for the abatement to be set aside. It is true that E. A. No. 911 purports to have been put in, *inter alia*, under O. XXII, rr. 4 and 9, but even then he did not pray for the abatement being set aside, nor does the lower Appellate Court make any reference to that E. A. in the body of its order. Had it been pleaded before it that E. A. No. 911 impliedly contained a prayer for the abatement being set aside, we cannot see why he should have thought it necessary to fall back on E. A. No. 2411 of 1920 in order to discover such an implied prayer for that relief, even in his grounds of appeal before the lower Appellate Court, the plaintiff styles E. A. No. 911 merely as a petition to excuse the delay in bringing the legal representative on the record. We must hold that technically there was not before the District Munsif of the lower Appellate Court any prayer under O. XXII, r. 9 to set aside the abatement, and, therefore, the lower Appellate Court had no jurisdiction to set it aside.

There is a further technical difficulty in the plaintiff's way. E. A. No. 911 was dismissed by the District Munsif under a separate order, and no copy of that order seems to have been put in in the lower appellate Court and no petition asking to excuse the omission to file it has been filed. There was, therefore, no proper appeal against that order filed in the lower Appellate Court. This may be the reason why the lower Appllate Court ignores E. A. No. 911 altogether in its judgment. Here also, we must hold that the lower Appellate Court had not before it any legal appeal against the

(1) 68 Ind. Cas. 942 ; 45 M. 872 ; 15 L. W. 309; 42 M. L. 301 ; 29 M. L. T. 202 ; (1922) M. W. N. 375 ; (1923) A. I. R. (M.) 287.

order in E. A. No. 911 and had therefore no jurisdiction to set that order aside. Technically it remains in force and is a legal bar to the present appellant being brought on record as the legal representative of the deceased judgment-debtor.

Now, when it is necessary in order to do substantial justice to brush aside technicalities, the Court will not be too scrupulous in enforcing them; but when, as we find in this case, there are no merits in the plaintiff's favour and the merits are on the appellants' side, the Court will not go out of its way to clear from the plaintiff's path technical obstacles. As already pointed out, although the plaintiff knew of the death of the judgment-debtor, he did not make any enquiry as to when it had occurred or make any attempt to have the legal representative brought on record within the legal period, six months. He did not even in E. A. No. 2411 ask the legal representative to be brought on record and he did not do so until 23rd March 1921, nearly two years after the last day for bringing on the legal representative, and even though it had been pointed out to him on 4th December 1920 by the appellant's counter that the suit had abated, he omitted or refused to make any enquiry, categorically said that that allegation was not true, and refused to believe that there had been any abatement, and that there should be a petition to set it aside, so that even now up to date there is no petition to set aside the abatement. The lower Appellate Court's reasons for indulging the plaintiff are based wholly on unsupported surmises; that the plaintiff's pleader might have been ignorant of the law or that the plaintiff had this or that mistaken idea in his head. He announces a general plenary indulgence to parties to take their own time for applyiug for a final decree and that the "usual procrastination" of plaintiffs is a good ground for granting any indulgence to such a dilatory, negligent and mendacious party and we are not prepared to override the technical difficulties in the plaintiff's way.

We hold therefore that the lower Appellate Court's order is without jurisdiction, first because it had before it no prayer to set aside the abatement and no substantial motion under O. XXII, r. 9, and secondly because that it had no jurisdiction to revise the order on E. A. No. 911 which was not properly before it. It follows that his order, though technically one under O. XXII, r. 9 and technically not appealable under that order, was passed without jurisdiction, and is therefore appealable or at least open to revision on the ground that it was without jurisdiction. We therefore set it aside and restore that of the District Munsif with costs of the appellant throughout.

V. N. V.
K. S. D.

Order set aside.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 98 OF 1922.

April 1, 1924.

Present:—Mr. Walsh, Acting Chief Justice, and Mr. Justice Piggot.

PHOOL SINGH—PLAINTIFF—APPELLANT
versus
Mussammat GOBIND KOER AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1897), s. 42, proviso—Agra Tenancy Act (II of 1901), s 167—Hindu Law—Joint family—Lease of agricultural land granted by father—Suit by son to challenge terms of lease—Ejectment—Declaration, suit for, whether maintainable—Jurisdiction of Civil and Revenue Courts.

Plaintiff, a Hindu son, brought a suit for a declaration that certain terms in a lease of agricultural land of joint family property granted by his deceased father were not binding upon him. It was objected that as the plaintiff was entitled to sue for ejectment, a mere suit for a declaration was not competent. (p. 401, col. 1.)

Held, that as a decree for ejectment of a tenant of agricultural land could not be passed by a Civil Court, a suit for a declaration was maintainable:

Appeal under section 10 of the Letters Patent, from the judgment of Mr. Justice Gokul Prasad, dated the 26th April 1922.

Messrs *P. L. Banerji* and *Baleswhari Prasad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

PHOOL SINGH *v.* GOBIND KOER

JUDGMENT.—This is an unfortunate case, on the facts found. The plaintiff was the minor son of one Gitam Singh, During his minority his father granted a perpetual lease of certain agricultural land on terms highly favourable to the lessee and unfavourable to himself. It seems to have been also found by two Courts that undue influence was used by two of the defendants in obtaining this lease from the plaintiff's father. After the death of his father the plaintiff, acting through his next friend, endeavoured to obtain from the Revenue Court the ejectment of the defendants, admitting them to be his tenants but claiming that they had no higher right than those of tenants at will. When this lease was set up the attempt at ejectment in the Revenue Court failed. The plaintiff then brought the present suit asking for a declaration that the lease is not binding upon him, either on the ground that it was obtained by undue influence exercised upon his father, or, even if that plea should fail, on the ground that it amounted under the circumstances to an alienation of joint ancestral family property in the hands of the plaintiff's father, which the latter was not competent by law to make. Two Courts found in favour of the plaintiff on all points and granted him the declaration prayed for.

There was a second appeal to this Court and in this appeal the first two points taken related to the question whether the land covered by the lease was joint ancestral property and whether there had been a clear finding on the question of undue influence. On the first point the learned Judge of this Court held that there was a finding of fact in favour of the plaintiff. At any rate, the learned Judge found definitely that the property in dispute was ancestral property, belonging jointly to the plaintiff and to his father. On the second point the learned Judge of this Court held that the finding of the lower Appellate Court, to the effect that the terms of the lease were clearly prejudicial to the plaintiff's interests was sufficient in itself to make the contract of lease voidable at the plaintiff's instance.

There was, however, taken in this Court a further point which had been overruled in the two Courts below. This was based on the proviso to section 42 of the Specific Relief Act; that is to say, it was contended that the plaintiff ought in this present suit to have claimed the ejectment of the defendants and actual possession over the disputed land. The two Courts below had discussed this point, but had come to the conclusion that there had certainly been an agricultural tenancy in favour of the defendants and the latter could only be ejected by a proceeding in the Revenue Courts, and that consequently the proviso to section 42 of the Specific Relief Act had no application inasmuch as the plaintiff could not have sought relief by way of ejectment from the Civil Court in which this suit was instituted. On this ground alone the learned Judge of this Court reversed the decision of the lower Appellate Court and dismissed the plaintiff's suit.

The question is one which comes up from time to time in one form or another and is always likely to give some little trouble. The real difficulty to our minds is whether the Revenue Court, that is to say, the Court of the Assistant Collector, was not really competent to have adjudicated upon the entire question raised by the pleadings before it whether it could not have tried out the plain issue whether the defendants were mere tenants at will in respect of this land, or whether they were holding under a covenant of perpetual lease, valid and enforceable against the plaintiff. It seems, however, to have been conceded, in the course of the abortive proceedings attempted by the plaintiff in the Revenue Court, that the said Court would not eject the defendants unless and until the question of the validity of this lease had been adjudicated upon by a competent tribunal that is to say, by suit in the Civil Court. It seems to us, therefore, whether that decision was right or wrong, it must be treated as a decision *inter partes*, and one which neither party is now entitled to challenge in argument. If it be once assumed that the *assistant Collector* could not have ejected the defendants, then in our opinion this suit was clearly maintainable in the form in which it was brought. The Civil Court could not have undertaken to eject the defendants from this agricultural holding. Any such decree by an Assistant Collector would have offended against the clear provisions of section 167 of the Tenancy Act. The learned Judge of this Court seems to have assumed that on the facts set up by the plaintiff himself the Civil Court could, if it found those facts proved, have treated the defendants as

mere trespassers. This, however, is not a correct statement of the plaintiff's position. He admitted that there had been a letting of this land by his father to the defendants. His father was perfectly competent to let even joint ancestral land for a reasonable period and on reasonable terms. What the plaintiff complained of was that there had been what amounted in effect to an alienation of joint ancestral property, which his father was not competent to make, to the prejudice of the plaintiff's interest. It was those terms in the covenant of lease under which the defendants claimed to be entitled to hold, (*a*) in perpetuity and (*b*) at a low rate of rent, which the plaintiff was assailing. In our opinion relief by way of declaration could and ought to have been granted in this case. (The question whether the suit as brought did not offend against the provisions of section 167 of the Tenancy Act was never raised in the Trial Court, and could not be raised at any subsequent stage.)

We set aside the decree of the learned Judge of this Court and restore that of the lower Appellate Court with costs of both hearings in this Court to the plaintiff, including fees on the higher scale.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 1072 OF 1923.

February 5, 1924.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

A. SETHURAMA MUDALIAR—
PETITIONER
versus
M. P. MANGALA GOUNDAR AND ANOTHER
—RESPONDENTS.

Madras District Municipalities Act (*V of* 1920) *ss.* 9, 303 (2) (4)—*Madras Municipal Election Rules, r.* 17 (1)—*Ballot papers marked with voter's number, validity of—Election void—Procedure—Fresh election.*

Where at an election held under the Election Rules framed under section 303 (2) the Madras District Municipalities Act of 1920, the Polling Officer, when giving out the ballot papers to the voters, put on the back of the ballot papers not only the serial number but also the voter's own number on the electoral roll ;

Held, (1) that the voter's number on the back of the ballot paper is a mark within the meaning of Rule 17 (1) of the Rules by which the voter may be afterwards identified and the ballot papers were, therefore invalid ;

Woodwards v. *Sarsons*, (1875) 10 C. P. 733 ; 44 L. J. C. P. 293 ; 32 L. T. 867, relied on.

(2) that all the votes cast being invalid, no proper election had taken place. (p. 402, col. 1).

Section 9 of the Madras District Municipalities Act is not applicable to a case where an election has taken place but has been afterwards declared void and the retiring councillor cannot, in such a case, be declared to have been re-elected. A fresh election must, therefore, be held in such a case.(p. 402, col. 2).

Rule 17 does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. (p. 402, col. 1).

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Dindigul, dated the 3rd December 1923 in O. P. No. 30 of 1923.

Messrs. *S. Muthiah Mudaliar*, *K. S. Ganapathy Aiyar* and *S. Subramania Aiyar*, for the Petitioner.

Mr. *K. V. Krishnaswamy Aiyar*, for the Respondents.

JUDGMENT.

Phillips, J.—In this petition the Subordinate Judge of Dindigul has found that the ballot papers of a Municipal election held in Palni Municipality are invalid und " Rule 17 (1) of the Election Rules. The Polling Officer, when giving out the ballot papers to the voters, put not only the serial number upon the back of them but also the voter's own number on the electoral roll. Consequently, any one seeing this number on a voting paper could, by a reference to the electoral roll which is available to everybody, identify the particular voter; and it has been held in *Woodwards* v. *Sarsons* (1) in an almost identical case, that the ballot papers were invalid; but in that case the electoral numbers were placed not upon the back, but upon the face of the ballot paper. It is now argued that this makes a great deal of

(1) (1875) 10 C. P. 733 ; 44 L. J. C. P. 293 ; 32 L. T. 867.

difference, because the back and the front of the paper cannot be seen at the same time. In Madras there is no rule like the English rule enjoining on the Returning Officer the necessity of keeping the ballot papers face upwards as far as possible, and it is not suggested that the back of the ballot papers would not be visible when taken out of the box. Rule 17 (1) merely says that the paper is invalidated by any mark put upon it by which the voter may be afterwards identified. Considering the possibility and even the probability of the back of the voting paper being visible to the candidate or his agent, the fact that the electoral number is on the paper would afford a ready means of identification, and it is I think such a mark as is contemplated in r. 17 (1). No doubt, at the present election these numbers were not particularly noticed at the time of the election and, as a matter of fact the voters were not identified thereby, but the Rule does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. In fact, in the case already referred to *Woodward* v. *Sarsons* (1) the numbers had been identified ; but as they could have been seen by the persons present at the counting of the ballot papers, it was held that the rule, which is similar in England to that in Madras, had been violated and the votes were invalid. It was argued for the petitioner that the decision in *Woodward* v. *Sarsons* (1) cannot be applied to India, because under r. 17 (1) the mark by which identification may be had must be placed on the voting paper by the voter himself. Apparently the first part of the Rule does apply to marks put by the voter, but there is nothing in the later part to show that it is the voter himself who must put the mark by which he may be identified ; and in the absence of words restricting the meaning of the rule, I see no reason why the view held in *Woodward* v. *Sarsons* (1) with reference to a similar rule should not equally apply to r. 17 (1). There is no restriction in the words of the rule and, consequently, no restriction could be read into it without adequate reason. It follows, therefore, that these votes are invalid under r. 17 (1) : and inasmuch as all the votes cast at the election are invalid, no proper election has been held and the petitioner has not been properly elected.

"It is then argued for the petitioner that under section 9 (1) of the Madras Municipalities Act V of 1920, the petitioner who is the retiring councillor must be deemed to have been re-elected. That section reads as follows :—

> "If for any cause no councillor is elected at an ordinary election held under the previous section, the retiring councillor shall, if willing to serve, be deemed to have been re-elected."

The argument is that, as all the votes cast are invalid, there has been no election of a councillor and that, consequently, the provisions of section 9 (1) apply. On the other hand, it is contended for the respondent that this section is only applicable to cases in which an election is held but no candidates are nominated for election or no voters vote for any of the candidates. The petitioner's contention has the support of the case. *In the matter of the Specific Relief Act and In the matters of Sarafally Mamooji* (2) where Macleod, J. read a similar section in the Bombay Municipal Act as being applicable in the case of an invalid election. The point is not at all discussed in Macleod, J.'s judgment and it does not appear whether there are rules framed in Bombay similar to those framed in Madras for the decision of disputes as to the validity of an election. From the Madras rules framed for this purpose it is quite clear that section 9 (1) is not meant to apply to cases where an election has been held and is subsequently declared void, for r. 12 states that the Judge, on declaring an election void, must order a fresh election. It is suggested that the first portion of this rule declaring any other party to the petition to be duly elected applies to the case of the retiring councillor who would generally be made a party. It does not follow, however, that a retiring councillor would necessarily be a party and I do not think that it is the intention of this Rule. If the section applied to all cases of invalid election, there is no reason why it should not say so in terms but it purports to apply only to the case where no councillor is elected. When an election has been duly held and votes have been cast and a councillor has

(2) 7 Ind Cas. 958 ; 34 B. 659 ; 12 Bom. L. R. 737.

been declared duly elected, can it be said, when the election is declared void, that no Councillor has been elected ? I think not, for the Councillor undoubtedly was elected and would remain in office as a Councillor provided that no petition objecting to such election was put in. In this view, section 9 (1) is not applicable to the present case and consequently, a fresh election must be held and this petition is dismissed with costs (two sets).

Odgers, J.—I agree and have nothing to add.

V. N. V. *Petition dismissed.*
Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 64 OF 1922.

February 27, 1924.

Present :—Mr. B. C. Kennedy, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

RAMJIBHOY & Co.—APPLICANTS
versus
YUSIFALI MAHOMEDALI—OPPONENTS.

Arbitration—Reference, construction of—Error patent on face of award, what amounts to—Award set aside on basis of alleged error patent on face of award—Revision—Civil Procedure Code (Act V of 1908), s. 115.

A reference in respect of disputes "concerning the acceptance of a shipment and payment of the same" is not vague and is a sufficient authority for the arbitrators to decide the question of breach of the contract and payment of damages (p. 405, col. 1).

In finding out whether there is an error patent on the face of an award courts are not to investigate beyond the award of the arbitrators and documents actually incorporated therein.

Champsey Bhara v. *Jivraj Baloo Spinning and Weaving Co Ltd.*, (1923) II Indian Appeals, 324, overruling I.L.R. 44 Bom. 780, followed

Where from an award itself or any necessary papers attached to it, it appears that the arbitrators have awarded payment of damages to a party who committed breach of a contract, there is an error patent on the face of the award, the arbitrators are guilty of a technical misconduct and the award should be set aside. (p. 404, col. 1).

Where an award is ordered to be taken off the file on the ground of there being an error patent on the face of the award, whereas there is no such error to be found on the face of the award the Court assumes jurisdiction which, as a matter of law, it does not possess, to interfere with the findings of the arbitrators and such an order is liable to be set aside in revision. (p. 403, col. 1).

Application to revise the order of the Additional Judicial Commissioner (Mr. A. H. S. Aston), dated the 22nd March 1922, in J. Mis. 469 of 1921, directing an award to be taken off the file (*vide* 76 I. C. 261).

Mr. *Dingomal Narainsing*, for the Applicants.

Mr. *Tahilram Maniram*, for the Opponents.

JUDGMENT.—In this case Yusifali Mahomedali contracted to purchase certain American galvanised iron pipes from Ramjibhoy and he signed the usual indent form with the usual arbitration clause. Disputes arose in connection with this consignment, Yusifali, refusing to take it up, and the matters were submitted to arbitration. After certain difficulties the arbitrators came to an award directing Yousifali to pay to Ramjibhoy Rs. 1305—6—0 with interest. This award was duly filed in this Court, whereon Yousifali applied to have the award taken off the file on the grounds given at page 8 of the paperbook. The learned Additional Judicial Commissioner after considering the grounds submitted by the respondent No. 2 held in favour of the award except on one point. He held that there was a patent error in law in deciding a certain question which arose under this reference. He, therefore, directed the award to be taken off the file.

Against that order of the learned Additional Judicial Commissioner respondent No. 1 has applied here in revision and as a preliminary objection to his petition it is urged by respondent No. 2 that we must hold that the learned Additional Judicial Commissioner was perfectly within his jurisdiction in directing the award to be taken off the file and that we have no power to interfere.

This may quite well be the case in many matters arising out of arbitration. But we do not think it is the case where a judge disposing of an application to have the award taken off the file assumes a jurisdiction which, as a matter of law he does not possess to interfere

with the findings of an arbitrator. In such a case, it is difficult to say that a judge has not exceeded his jurisdiction and that he should not be controlled.

The question, therefore, is whether, the learned Additional Judicial Commissioner has so exceeded his jurisdiction. He has found that the arbitrators have decided incorrectly because he is of the opinion that the breach of the contract was committed not by respondent No. 2 but by respondent No. 1 in as much as some condition in respect of the date of shipment was not complied with by the respondent No. 1. Thus he finds that although respondent No. 1 actually committed the breach yet the arbitrators have penalised respondent No. 2 and have thus acted contrary to plain justice. No doubt if it had clearly appeared by the award itself or any necessary papers attached to the award that the arbitrators having found that respondent No. 1 had committed the breach nevertheless proceeded to inflict damages to be paid by respondent No. 2 that will be clearly a gross error on the part of the arbitrators amounting to a technical misconduct thus authorizing the judge to take the award off the file.

The learned Judge in acting as he did, followed an excellent authority. He had before him the case of *Jivrai Baloo Spinning and Weaving Co. Ltd.*, v. *Chamsey Bhara* (1). in which the Bombay High Court had held that where it was pleaded that the arbitrators had misconducted themselves in the way described, it is competent and even indeed the duty of the Court to consider the whole proceedings before the arbitrators and if it found that the arbitrators had so misconducted themselves it was the duty of the Court to take the award off the file. That decision was followed in several Bench judgments of this Court.

But we are now certain that the law laid down in *Jivraj Baloo Spinning and Weaving Co. Ltd* v. *Chamsey Bhara* (1) was erroneous because that judgment has been reversed by the Privy Council *Champsey Bhara & Co. Ltd.* v. *The Jivraj Baloo Spinning and Weaving Co. Ltd.* (2) and it appears from the judgment of the Privy Council in that case that the Courts are not to investigate beyond the award of the arbitrators and documents actually incorporated therein and thus where there is no error so patent on the face of the award it is not open to the Court to go into the proceedings of the arbitrator. Now, in the present case all that the arbitrators were asked to do was to decide the liability of the party in respect of the shipment of American galvanised iron pipes, on this very point namely the breach or otherwise of the conditions of the shipment and all they find is that Yusifali is bound to pay Rs. 1,305-6-0. There are no materials whatsoever, on the award for saying that the arbitrators have in any way found incorrectly. Since there is no error of law patent on the face of the award presumably they applied their minds to the proceedings before them and came whether incorrectly or not to the conclusion that they did. It is clear therefore, that had the learned Additional Judicial Commissioner had the benefit of the Privy Council's judgment referred to which was not published in India when he passed the order he did, he would not have assumed what is to all intents and purposes the position of a judge sitting in appeal on the arbitrators' finding. We therefore think that this part of the order of the learned Additional Judicial Commissioner is erroneous.

The order taking off the award from the file was attempted to be supported on various other grounds, which need not be considered at great length. The learned Additional Judicial Commissioner has fully dealt with those points. One point was whether the arbitrators who pronounced the award were legally authorized to proceed and after hearing the arguments advanced before us we are agreed with the conclusion of the learned Additional Judicial Commissioner and find that his finding in that respect is correct.

A further point taken before us was not taken before the Learned Additoinal Judicial Commissioner and that was that the reference to arbitration is not in proper, form. The reference is not perhaps very carrefully drafted but it is quite wide enough to cover the question of damages due to the breach of the contract. The effective clause of the reference recites the disputes between the parties "concerning the acceptance of the shipment of galvanised pipes and *payment of the same.*

(1) 53 Ind. Cas. 799; 44 B. 780; 21 Bom L.R. 1087.
(2) 73 Ind. Cas. 436; 50 I. A. 324; 44 M. L. J. 706; 25 Bom. L. R. 589; (1923) A. I. R. (P. C.) 66; (1923) M. W. N. 596; 50 C. 130; 47 B. 578; 33 M. L. T. 443; 28 C. W. N. 397 (P. C.).

Ramjibhoy and Co. saying that the notice of the refusal of the shipment ought to have been given within three days, after the receipt of the arrival notice, failing which the shipment was binding on the other party, on the other hand Yousifali contending that they could not accept the same". That seems to us to be quite a sufficient authority for the arbitrators to come to the decision that they have and to order payment of damages and a sufficient indication as to the actual disputes between the parties. We cannot, therefore, find on the ground of vagueness of the reference that the award is in any way unjustified and should be rejected.

We think that the learned Additional Judicial Commissioner was in error in directing the award to be taken off the file and we set aside his order taking off the award from the file and direct that the award should remain filed with costs.

P. B. A. *Application allowed.*
Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 124 OF 1923.

March 15, 1924,

Present :—Mr. Baker, J. C.

Mt. JANKI—PLAINTIFF—APPELLANT
versus
MOHANLAL—DEFENDANT—RESPONDENT.

Trusts Act (II of 1882), s. 6.—Transfer of Property Act (IV of 1882), s. 100—Gift of immoveable property—Charge for maintenance in favour of stranger—Suit to enforce charge, maintainability of.

Where immoveable property is gifted subject to a charge of maintenance, the person in whose favour such a charge is created, can enforce it by a suit in his own name against the donee even though he is not a party to the deed of gift. (p. 406, col. 1).

Seth Ramlal v. *Seth Narsinghdass*, 14 C. P. L. R. 22; discussed ;

King v. *Denision*, (1813) 1 Ves & B. 260 ; 12 R. R. 227 ; 35 E. R. 102 ; In re, *West*, *George* v. *Grose*, (1900) 1 Ch. 84 ; 69 L. J. Ch. 71 ; 81 L. T. 720 ; 48 W. R. 138, referred to.

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 142 of 1922, dated the 8th December 1922.

Mr. *R. B. V. R. Pandit*, for the Appellant.
Mr, *W. R. Puranik*, for the Respondent.

JUDGMENT.—The facts of this case are that one Beharilal gifted his property to his nephews; one condition in the gift deed was that they should maintain the present plaintiff who was his permanent mistress. The plaintiff brought this suit for arrears of maintenance from the present defendant, alleging that he had not paid his quota of her maintenance.

The first Court, the Munsiff of Burhanpur, awarded the plaintiff's claim, but the District Judge of Nimar, on appeal, dismissed the suit holding that this deed of gift with the condition embodied in it is a contract between Beharilal and the defendant, to which the plaintiff was no party, and that the plaintiff has no cause of action. He relied on *Seth Ramlal* v. *Seth Narsinghdass* (1) in which it was held that a stranger to the consideration cannot enforce performance of a contract by an action thereon in his own name although he be the party avowedly intended to be benefitted thereby.

It is contended on behalf of the appellant that the deed of gift constitutes a trust, and reference is made to section 6 of the Indian Trusts Act II of 1882. It is argued for the respondent that in view of illustration (*e*) to that section, which is very similar to the present case, the present deed of gift is a gift with a condition and not a trust. I may here state that the question of a right of the plaintiff to maintenance from the estate of Beharilal as a permanent mistress under Hindu Law does not arise in the present case, because her case was not founded on that right; there were no pleadings on the subject, no issues and no evidence, the case being based on the deed of gift itself.

The learned Counsel on either side have not been able to point out any rulings on the subject, but it seems to me that the question of contract does not arise. The case quoted *Seth Ramlal* v. *Seth Narsingdass* (1) *supra* states that to entitle a third party not named as a partner to the contract to sue either of the contracting parties, that third party must possess an actual beneficial right which places him in the position of *cestui que trust* under that contract.

In Story on Equity, 3rd English edition, page 524, paragraph 1244 Sqq., it is stated

(1) 14 C. P. L. R. 22.

" Another class of implied liens or trusts arises where property is conveyed *inter vivos*, or is bequeathed or devised by last Will and testament, subject to a charge for the payment of debts, or to other charges in favour of third persons. In such cases, although the charge is treated, as between the immediate parties to the original instrument, as an express trust in the property, which may be enforced by such parties or their proper representatives; yet, as between the trustee and *cestui que trust*, who are to take the benefits of the instrument, it constitutes an implied or constructive trust only ; a trust, raised by Courts of equity in their favour, as an interest *in rem*, capable of being enforced by them directly by a suit brought in their own names and right. Thus, for example, if a devise is made of real estate, charged with the payment of debts generally, it may be enforced by any one or more creditors against the devisee, although there is no privity of contract between him and them (*King* v. *Dennison* (2)), and (In re *West George* v. *Grose* (3)). There is, also, a distinction between a devise of an estate in trust to pay debts and other charges, and a devise of an estate charged with, or subject to, debts or other charges. In the latter case, the devise is construed to convey the whole beneficial interest to the devisee, subject only to the payment of the debts, or other charges."

There would therefore appear to be an implied trust in the present case. The terms of the deed of gift are clear. Paragraph 9 begins by saying : "The following conditions shall govern the deed of gift," and clause (c) provides for the plaintiff's maintenance.

I am of opinion, that the view of the first Court that the defendant having accepted the gift subject to the conditions in the gift deed is bound by those conditions is correct. The decree of the lower Appellate Court is therefore set aside and the appeal remanded for decision on the point of limitation which has not been decided by the District Judge. Costs in 2nd appeal on respondent. Costs in the lower Courts to abide the result.

G. R. D. *Appeal accepted*
Z. K. *Case remanded.*

(2) (1813) 1 Ves. & B. 230; 12 R. R. 227: 35 E. R. 102.

(3) (1900) 1 Ch 84; 69 L. J. Ch. 71 ;81 L. T. 720; 48 W. R. 138.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 401 OF 1921.

April 15, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

THAKUR SRI GAT ASHRAM NARAINJI—PLAINTIFF—APPELLANT

versus

JAISHTH MADHO ACHARIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI —Res judicata—Decree for declaration and accounts obtained by one trustee against others, whether binding

A decree obtained by one of the trustees of a trust on behalf of the trust against the other trustees either for a declaration that the property in dispute is trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property, is binding as much on the trustees who are parties to the suit as on all persons interested in the trust (p. 408, col. 1).

Prosunno Kumari Debya v. *Gopal Chand Baboo*, 2 I. A. 145 at. p. 152 ; 14 B. L. R. 450 ; 3 Sar. P. C. J. 449 ; 23 W. R. 253 ; 3 Suth. P. C. J. 102 (P. C), referred to.

First appeal from the decree of the Subordinate Judge of Muttra, dated the 28th July 1921.

Messrs. *B. E. O' Conor*, *S. C. Das* and *Ram Nama Prasad*, for the Appellant.

Dr. *K. N. Katju*, Messrs. *G. Agarwala* and *N. P. Asthana*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to the income derivable from the village Khasrai Bhajanpura and the question for consideration is whether the right to receive an eight annas share of the said village belongs to the temple of Thakur Shri Gat Ashram Narainji at Muttra.

The temple in question was constructed by Pt. Pran Nath Shastri, a learned divine, a long time ago. He died in 1830. The income derived from the temple and the endowments appertaining thereto used to be applied after his death to the maintenance of religious

THAKUR SRI GAT ASHRAM NARAINJI *v.* JAISHTH MADHO ACHARIA

services at the temple and the support of the Acharis or heirs of the founder. For a considerable time the endowed property was under the management of Raja Pitambar Singh, the then proprietor of the Ava estate. Some time in 1850 disputes appear to have arisen between the heirs of the deceased founder and a reference was made to arbitration which resulted in an award by which the proportion of the income to be applied to the maintenance of religious services in the temple and to be distributed among the heirs of the deceased founder was determined. In pursuance of that award an agreement was executed by the heirs of the deceased founder on the 26th of March 1850 which provided that an 8 anna share of the income of the entire property shall be applied towards the expenses connected with the temple and the support of *Vaishnawas Acharis* and servants of the temple and the payment of certain allowance to two other persons named therein, and the balance was to be distributed among the heirs of the deceased founder. By a subsequent agreement executed on the 2nd November 1874 the heirs agreed that a half of the total income which was then estimated to amount to Rs. 3,200 per annum, was *to be applied to* the maintenance of worship and other services at the temple and the other half was to be appropriated by the heirs personally. The proportion in which each of the heirs was to contribute to the expenses of the worship and services at the temple was also specified. The agreement further provided that none of the heirs shall have any power to transfer the half of the property and income aforesaid which belonged to the Thakurji, but they would have power to transfer their share of the remaining half of the property and income.

The agreement of the 26th of March 1850 expressly mentioned the village Khasai Bhajanpura as a part of the property, the income of which was to be dealt with in the manner therein specified. There was no express reference to that village in the agreement of the 22nd November 1874 but a reference was made therein to the award of the 26th March 1850 and it was provided that all the conditions entered therein shall be maintained and be enforceable among the heirs of the deceased founder.

The plaintiff claims to be one of the trustees of the temple in question. The defendants are the other trustees or heirs of the deceased founder. The allegation of the plaintiff was that the village Khasrai Bhajanpura was under the management of the Raja of Ava and that the temple was entitled to the income thereof to the extent of an eight anna share. The complaint was that the defendant No. 1 had received a larger portion of that income than he was entitled to, thereby depriving the temple of that portion which he had received in excess of his share. In the plaint a reference was made to a previous suit said to have been filed by the plaintiff through *Mt.* Sundar Kuar against the present defendants in the Court of the Subordinate Judge of Agra for the rendition of accounts in respect of the income of the said property from the 5th November 1902 till the 15th November 1906 and it was mentioned that that suit had been decreed on the 8th December 1909, and the appeal filed by the defendants against that decree had been dismissed in 1910. Those facts were admitted by the principal contesting defendant—respondent Jeshth Madho Achari. He contested the suit mainly on the ground that whatever was paid to him was paid voluntarily by the Raja of Ava and that the temple was not entitled to recover the same from him. The Court below accepted his contention and dismissed the claim.

In doing so it appears to have entirely disregarded the decision in the previous suits in which the nature of the title held by the plaintiff in the villages in question and the right to receive the income thereof was in issue. One of the suits was brought by *Mt.* Sunder Kuar the widow of Parshadi Lal one of the heirs of the deceased founder in her capacity as one of the trustees of the temple aforesaid against the present defendants—respondents on the 14th November 1904 in the Court of the Subordinate Judge of Agra for a declaration that the property in dispute including the village now in question belonged to the said temple and was a public and charitable endowment, that the idol was the absolute owner of the said property, and that the parties to the suit had no personal interest therein. That suit was decreed after a prolonged contest by the Subordinate Judge of Agra and his decree was upheld by this Court on the 28th October 1909. The finding of

this Court in that suit was that the whole property in question appertained to the temple and that its income was intended for the expenses of the temple and the support of the *Acharis* and *Vaishnawas*, worshipping there. Subsequently there was another suit instituted by *Mt.* Sundar Kuar against the present defendant-respondent Jaishth Madho Achari for the rendition of accounts. *Mt.* Sundar Kuar sued in her capacity as one of the trustees of the temple Jaishth Madho Achari and other trustees were impleaded as defendants. Jaishth Madho Achari contested that suit on various grounds amongst others that the temple was only entitled to one-fourth of the income of the village Khasrai Bhajanpura. One of the issues framed by the learned Subordinate Judge was whether one-half of the income of the village Khasrai Bhajanpura formed the share of Thakurji and should go to it. His finding on that issue was that the Thakurji was entitled to one half of the income and that the defendant dishonestly wanted to reduce the share of Thakurji to one-fourth and to appropriate the remaining one-fourth to himself. He pointed out that the Ava estate collected the rent of the village and paid the income to the *mutawallis* of the temple. That decision was upheld on appeal, the finding being that the *wakf* was a public one and the temple was entitled to receive half of the income of the said village from the Raja of Ava.

It is not open to the defendant Jaishth Madho Achari to go behind those findings. In the previous suit all the trustees were impleaded and the effect of the decree of this Court was that the entire property then in question including the village now in dispute was declared to be a public endowment for religious and charitable purposes connected with the temple and in favour of the idol. In the latter suit the effect of the decree was that one-half of the income of the village now in question was declared to be the share of property of the idol and the defendant Jaishth Madho Achari was found to have no right to receive any portion of the same from the Raja of Ava or to appropriate it to his own use. A decree obtained by one of the trustees on behalf of the trust against the other trustees either for a declaration that the property in dispute was trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property is binding as much on the trustees who are parties to the suit as on all persons interested in the trust; for as observed by their Lordships of the Privy Council in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1) the *Shebaits* of a trust form a continuing representation of the idol's property. Each of the above suits was instituted by *Mt.* Sundar Kuar not in her private right but on behalf of the trust and as such the decision arrived at in those suits is conclusive between the parties thereto within the meaning of Explanation VI of section 11 of the Code of Civil Procedure.

It is urged on behalf of the defendants-respondents that the payment which is sought to be challenged was made to him voluntarily by the Raja of Ava and that the plaintiff was not entitled to claim a refund. But the payment formed part of the distribution of the entire income derived from the villages in question. The Raja kept no part of the income himself. He distributed the income in a particular manner between the persons who were considered by him to be entitled to receive the same. The dispute is virtually one between the different persons claiming a title to it and if one party has received a larger portion than he was entitled to and has thereby deprived another party of that which he ought to have received, the latter is entitled to claim from the other to the extent to which he was entitled. The Raja did not purport to make any payment to the defendant-respondent, Jaishth Madho Acharia out of any personal fund of his own. The income of the village in question was ear-marked for a specific purpose, namely, for the maintenance of the services connected with the temple and distribution of the income among the heirs in the manner settled in the previous case. The defendant-respondent Jaishth Madho Acharia was not entitled to receive payment in excess of what he was declared entitled to in the previous proceeding and the mere fact that for some years the payment had not been made precisely in the manner in which they ought to have been made would not destroy or prejudice the

(1) 2 I. A. 145 at p. 152; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C).

right of the plaintiff to receive it in the manner he was entitled to receive. The proceedings of the Court of Wards filed show that there was some dispute between the heirs of the deceased founder as to the manner in which the income was to be distributed by the Ava estate. The Court of Wards proposed to act only as a stake-holder and they did not undertake any liability for anything beyond what was payable by them on account of the said villages. That dispute having been settled by a decree of the proper Court the rights of the parties should now be adjusted in accordance with that decision. That appeal must, therefore, be allowed and the suit remanded to the Court below with a direction to reinstate it under its original number and to proceed with its disposal in the manner required by law. Costs of this appeal including fees in this Court on the higher scale will abide the result.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SEDOND CIVIL APPEAL NO. 604 OF 1922.

July 17, 1923.

Present :—Mr. Justice Sulaiman.

SITAL PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

DUKKHI LAL AND OTHERS—PLAINTIFF-DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887) Sch. II, Arts. 19, 28, applicability of—Suit to recover ornaments from stakeholder, nature of—Declaration, suit for—Jurisdiction of Small Cause Court

Article 28 of Schedule II to the Provincial Small Cause Courts Act contemplates a suit between rival claimants to the estate of a deceased person, when the relief claimed is a share of the estate and not only an item of the estate as against a third party. (p. 410, col. 2.)

Chedi v. *Gulabo*, 2 A. L J. 388 ; A. W. N. (1905) 134; 27 A. 622; *Tika Shalim* v. *Chirkat Shahu*, 27 Ind. Cas. 778 ; 19 C. W. N. 614, followed.

A suit to recover certain ornaments and jewellery from a stakeholder to whom they have been made over for safe custody and who is willing to hand them over to the true owner, to which other persons claiming the ornaments etc. are also impleaded as parties, is in its essence a suit for a declaration and falls within the purview of Article 19 of Schedule II to the Provincial Small Cause Courts Act and is, therefore, excluded from the cognisance of a Small Cause Court. (p 410, col. 2.)

Appeal against the decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 25th January 1922.

Messrs. *P. N. Sapru* and *M. N. Raina*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of a suit for recovery of possession of certain ornaments and jewellery which were valued at Rs. 280. The Courts below have decreed the claim.

Defendants Nos. 1, 2 and 4 have come up in second appeal and on their behalf the main point that is taken is that the suit was instituted in the wrong Court. It is their contention that the suit was of a nature cognisable by a Court of Small Causes and that, therefore, the Munsif in whose Court the suit was instituted had no jurisdiction to try it. If this contention were to prevail there would be the initial difficulty in the way of the appellants that no second appeal would lie. Under section 102 of the Code of Civil Procedure no second appeal lies in any suit of the nature cognisable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. Therefore on the appellant's own showing no second appeal would lie and this appeal must be dismissed.

The learned Vakil for the appellants has, therefore, been forced to ask this Court to convert this second appeal into an application in revision and to exercise its powers on the revisional side. If a clear case of the absence of jurisdiction had been made out, I would have willingly treated this as a revision. The present, however, is not such a case.

The plaintiffs claimed to be the heirs of one *Musammat* Lalti deceased. Their case was that after her death she left certain ornaments belonging to her about which the defendants Nos. 1 and 2 raised some disputes before the police. The police handed over these ornaments to defendant No. 3 who held them as a stakeholder. The plaintiffs served a notice on

defendant No. 3 and as remarked by the learned Judge of the lower Appellate Court the defendant No. 3 replied saying that he was willing to deliver the ornaments to the rightful owner and that the plaintiffs should satisfy him that they were the rightful owners. On this the plaintiffs instituted the suit out of which these proceedings have arisen. In their written statement the defendants did not deny the genealogical tree set up by the plaintiffs, but disputed that the oranaments and jewels belonged to the deceased. They pleaded *jus tertii* and said that one Musammat Kunwar was the real owner of these ornaments which had only been lent to Musammat Lalti deceased. On this plea having been raised Musammmat Kunwar was made a *pro forma* defendant. It is true that the plaint was not further amended and no express relief for a declaration was added.

The learned Munsif overruled the objection of the defendants as to want of jurisdiction, being of opinion that the suit was in essence a suit of a declaratory nature and was, therefore, cognisable by a Civil Court on the regular side. On the merits he found that the ornaments had, in fact, belonged to the deceased and the plaintiffs were entitled to recover them. The learned Judge of the lower Appellate Court on appeal has confirmed the findings of the first Court. The reasons for holding that the Munsif had jurisdiction to try the case given by him are slightly different. He was of opinion that the case fell under clause 28 of the Second Schedule to the Provincial Small Cause Courts Act. On the merits he agreed with the first Court holding that the ornaments were proved to have belonged to Musammat Lalti Bibi and that the plaintiffs were entitled to recover them.

On the pleadings it is clear that defendants Nos. 1, 2 and 4 who are the applicants before me were mere *pro forma* defendants. They were not in actual possession of the ornaments in question and were obviously impleaded in the suit with a view to make the decree binding on them. Although no relief for a declaration against them is sought it is obvious that the chief reason for impleading them was to have it declared as against them that the property belongs to the plaintiffs, so that no further dispute might arise in future. It is also quite apparent that the defendants Nos. 1, 2 and 4 could not possibly have been impleaded in a suit brought in the Court of Small Causes. Those persons, if impleaded, would very naturally have contended that the plaint disclosed no cause of action as no relief was claimed against them. If I were to interfere now and set aside the decrees of the Courts below and direct the plaint to be returned in order that it may be filed in the Court of Small Causes the result would be that the suit as against defendants Nos. 1, 2 and 4 would not be maintainable there at all. I must, therefore, consider whether the plaint, as it stood, having impleaded all the defendants in the suit, was one which could properly be filed in the Court of Small Causes. In my opinion this was not so. I agree with the Munsif that the suit must be *deemed* to be one of a declaratory nature which is expressly exempted under clause 19 of the Second Schedule.

I must, however, point out that the reason given by the Judge of the Court below for holding that the Munsif had jurisdiction is not correct. His view was as I have said that clause 28 of the Second Schedule was applicable. That clause exempts a suit for the whole or a *share* of the property of an intestate. It has been held in a number of cases that that clause contemplates a suit between rival claimants when the relief claimed is to recover a share of the estate and not only an item of the estate as against a third party, This was the view accepted in the cases of *Chedi* v. *Gulabo* (1) and *Tika Shahu* v. *Chirkat Shahu* (2). Clause 28, therefore, was not applicable. But in view of the opinion expressed by me above the Munsif had jurisdiction to try it.

Furthermore there is this additional difficulty in the way of the defendants. They have not presented a proper application for revision before me and the jurisdiction to interfere under section 115 of the Code of Civil Procedure is after all only discretionary. The case has been fought out on the merits and both the Courts below have come to a concurrent finding against the defendants. It is an accident that the appeal was actually heard by the Judge of the Small Cause Court in whose Court the suit ought to have been

(1) 2 A. L. J. 386; A. W. N. (1905) 184; 27 A. 622
(2) 27 Ind. Cas. 773 ; 19 C. W. N 614.

filed as contended by the defendants. He on the merits too has agreed with the finding of the first-Court. Under all these circumstances therefore I decline to interfere even on the revision side. The result therefore is that this appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 13, 1924.

Present :—Lord Shaw, Lord Blanesburgh, Mr. Ameer Ali and Lord Salvesen.

MAHOMED RAHIMTULLA HAJI JOOSAB—APPELLANT

versus

ESMAIL ALLARAKHIA—RESPONDENT.

Execution of decree—Decree against mortgagor's property—Amount deposited by mortgagee—Deposit, whether enures to benefit of all interested parties—Mortgage satisfied—Mortgagee, right of, to withdraw deposit.

A Mohammadan widow professing to act for herself and her minor children transferred certain property. The transaction was, however, challenged by the children by a suit and a decree was passed which provided that on their paying their share of the purchase-money within a certain time, they would be entitled to recover possession, but if they failed to do so, their suit would stand dismissed. Shortly before the expiry of the time a mortgagee from one of the children paid the sum in Court to save the property. Subsequently his mortgage having been discharged, the mortgagee applied for a return of his deposit. The application was opposed by a transferee of the mortgaged property :—

Held, (1) that the mortgagee had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless. (p. 412, col. 2)

(2) that the benefit of the deposit enured to all parties having an interest in the condition of the decree being satisfied and the mortgagee could not be allowed to withdraw the deposit without giving the transferee an opportunity of paying the money, such payment being treated as within the period allowed by the decree. (p. 412, col. 2).

Appeal from the judgment of the Bombay High Court, dated the 22nd September 1920.

Sir *George Lowndes*, *K. C.*, and *Raikes*, for the Appellant.

Messrs. *Dunnre*, *K. C.*, and *McNair* for the Respondent.

JUDGMENT.—This is an appeal from a decree of the High Court of Bombay of September 22, 1920, which set aside an order of the Subordinate Judge of Thana, dated October 5, 1918.

The appellant derives such title as he has to the property in dispute from the widow of Balabhai, a Mahommedan resident in Bombay. When she sold the property, the widow professed to act for herself and as guardian of her minor children. The transaction was, however, challenged by Banemiya, the only son of Balabhai then surviving, and by others representing the rest of the family, by a suit raised in 1914 in the Thana Court, in which they claimed that the sale by the widow should be set aside in so far as the shares of the son and daughters were concerned. In that suit, which ultimately came to depend before the High Court of Bombay, Banemiya and his co-plaintiffs, on February 26, 1918, obtained a decree aganist the appellant which is thus expressed :—

"The plaintiffs will have six months within which to pay their share, *i. e.*, 10-16th of the Rs. 1,250 and the Rs. 1,200, with added interest as directed in the lower Court's judgment."

"If within six months the plaintiffs pay the sums due from them they are to recover possession of the land in suit. But if within that time the plaintiffs do not pay the sums due from them then the suit to stand dismissed with costs."

Prior to the date of this decree Banemiya had, on July 21, 1915, mortgaged his share of the property to one Dattatraya R. Gandhi, for Rs. 2,000. On September 15, 1916, he had sold a five-annas share to Narayan, a brother of Gandhi, who in turn transferred it to one Motilal Ratansi. Subsequent to the decree Banemiya contracted, on June 10, 1918, to sell to the respondent all his remaining interest in the property and undertook to obtain an assignment in his favour of the right, title and interest of the heirs of his sister who had died. By these transactions Banemiya, for himself and the other plaintiffs (assuming he was authorised to act for them), deprived himself of all interest in the con-

ditional decree of February 26, 1918. In these circumstances the mortgagee, Dattaraya R. Gandhi, realising that the security which he held over the property would become valueless if the condition specified in the decree wss not purified, on August 22, 1918, or four days before the money fell to be paid, presented an application in which on the narrative that Banemiya had failed to pay the sum required and that he estimated the sum at less than Rs. 4,000, prayed that the said amount might be ordered to be received for payment to the appellant according to the High Court decree and paid to him. The money was duly deposited in Court and a notice to this effect was signed by Mr. R. B. Gogate, Sub-Judge.

No question has been raised as to the sufficiency of the amount to satisfy the appellant's claim nor is it open to doubt that the appellant would have been entitled to uplift the whole sum of Rs. 4,000 or as much of it as represented the Rs. 1,250 and Rs. 1,200 with added interest which formed a first charge on the shares of Banemiya and his sister.

The appellant, however, made no application for payment to him of the sum deposited. Instead of doing so he entered into an agreement dated October, 3, 1918, with the two brothers Gandhi, the substance of which was that in consideration of Rs. 5,000 paid by the appellant to them, they agreed to withdraw the application under which the Rs. 4,000 had been deposited and to claim the return of the said sum to the depositor. In terms of this agreement, an application in the name of Gandhi was duly lodged on October 4, 1918, in the Court of the First Class Sub-Judge at Thana. The applicant prayed for the return of the deposit made by him on the ostensible ground that as the amount of his mortgage had been repaid there was now no possibility of his being involved in loss. The application was opposed by the respondent. He maintained that the payment made by Gandhi had fulfilled the condition in the decree, and offered to pay the amount of Rs. 4,000 to the appellant on the footing that such payment should be treated as equivalent to the payment made by Gandhi. The Sub-Judge overruled the respondent's contentions and allowed Gandhi to take back the money and it was, in fact, uplifted by him. The respondent thereupon appealed to the High Court, which set aside the order granting leave to Gandhi to take back his money and allowed respondent an opportunity of paying the money within a specified short period such payment to be treated as within the period of six months allowed by the decree of February 26, 1918.

Various contentions were put forward by the appellant in support of his appeal from this order: (1) He contended that on a sound construction of the decree the sum that was provided to be paid by the plaintiffs in that suit fell to be paid to the appellant and that a deposit in Court did not satisfy the condition in the decree. Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted, it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition. (2) It was contended that a deposit made by another than a party to the suit did not satisfy the condition, and that the mortgagee, who was not a party, had no right in a question with the appellant to make the deposit. Their Lordships agreee with the learned Judges of the High Court in rejecting this argument for the reasons they state. They are further of opinion that the mortgagee had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the plaintiffs in his favour he had acquired their rights, and the mortgage-deed expressly authorises him to charge on the mortgage property any expenses which the mortgagee might be required to make for his protection.

(3) Lastly, it was contended that the mortgagee had an absolute right to withdraw the deposit. If no other interests were in question but those of the mortgagee and the appellant, this would no doubt have been the case. But it cannot be overlooked that the real object of the application for the withdrawal was to defeat the claims of the respondent who was the only other person that had an interest in the condition expressed in the decree being satisfied. Their Lordships think that the benefit of the deposit having been made before the expiry of the time limit necessarily enured to all parties having an interest in the condition

being satisfied. The legitimate interest of the appellant was to obtain payment of the sums to which he was preferably entitled and this was secured to him by the deposit. Just as the plaintiffs' suit would have stood dismissed if the deposit had not been made, so equally the decree provided that if the sums in question were paid the plaintiffs were to recover possession of the land in suit. The respondent in virtue of the agreement of June 10, 1918, of which he subsequently obtained a decree of specific implement, is now in right of this decree and entitled to enforce it against the appellant. As, however, the money deposited by Dattatraya had been actually uplifted by him before the order of the High Court was made, the condition which the Court imposed on the respondent appeared to be the only method by which the position which had been inverted by the appellant's action could be restored so as to do justice between the parties. Their Lordships are accordingly of opinion that the decision of the High Court was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

N. H. *Appeal dismissed.*

Messrs. *Ashurst, Morris, Crisp & Co.*—Solicitors for the Respondent.

Messrs. *T. L. Wilson & Co.*—Solicitors for the Appellant.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 330 OF 1921.

December 19, 1923.

Present :—Mr. Justice B. Lindsay and Mr. Justice Sulaiman.

Musammat KHUDAJIATUL KUBRA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat AMINA KHATUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Ex-parte *decree, suit to set aside, maintainability of—Jurisdiction of Court to entertain suit, whether can be questioned.*

When a suit is brought and the Court has to make up its mind as to whether it is within its pecuniary jurisdiction, all that it can rely on is the valuation of the subject-matter which is given in the plaint. (p. 414, col. 2).

It is open to a defendant when he appears to answer the suit, to raise the plea that the suit has not been properly valued and to show, if he can, that the Court in which the suit has been brought has no jurisdiction to try it. But if no such plea is taken by defendant when he has had the opportunity of raising it, it cannot be said that the Court has acted without jurisdiction. (p. 414, col. 2).

A decree cannot be set aside by a separate suit brought for the purpose, except on the basis of fraud or of something akin to fraud. (p. 415, col. 1).

Where a decree is passed *ex-parte* against a defendant after due service of summons, a suit to set aside the decree on the ground that the suit was undervalued and the Court which passed the decree had no jurisdiction to entertain the suit, is not maintainable. (p. 414, col. 2).

Appeal from the decision of the Subordinate Judge of Bijnor at Moradabad, dated the 26th May 1921.

Mr. *Raza Ali*, for the Appellants.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—After hearing the learned Counsel for the appellants in this case we are clearly of opinion that the appeal must fail.

The relevant facts to be stated are as follows :—

In the year 1882 one Muhammad Rahmat Ali executed an agreement whereby he undertook to pay to his daughter-in-law *Musammat* Amina Khatun a sum of Rs. 15 a month for food and clothing. This payment was to be made to her during her life-time.

In order to secure the performance of this undertaking Saiyid Rahmat Ali hypothecated a 5 *biswas muafi* share in the village named Phondapur and charged this property with the allowance which he had contracted to give his daughter-in-law. It was distinctly provided by this agreement that if Rahmat Ali failed to pay the said monthly allowance of Rs. 15 any month, the lady was to be entitled to take possession of the property which was charged and to realise the income thereof under her own supervision and to spend the same for her food and clothing.

Pausing here, it is clear beyond all doubt that the lady if she took possession was to be entitled to bring to her use the entire income of the property upon which her allowance had been charged during her life-time.

KHUDAJIATUL KUBRA *v.* AMINA KHATUN

It is apparent from the judgment in this case that Amina Khatun has had on more than one occasion to bring suits to enforce this agreement.

Rahmat Ali himself has died but he has left daughters, *Musammat* Khudajiatul Kubra and *Musammat* Atiqatul Kubra, who are the plaintiffs in the present suit.

The other issue of Rahmat Ali is Sahib Saqib Hussain who is married to *Musammat* Amina Khatun.

In the year 1920 *Musammat* Amina Khatun brought a suit against the present two plaintiffs, *Musammat* Khudajiatul Kubra and *Musammat* Atiqatul Kubra, for possession of a 2½ *biswas* share of the property in *Mauza* Phondapur.

It appears that these ladies were in possession of this 2½ *biswas* share, that being one-half of the 5 *biswas* share upon which Rahmat Ali had created the charge in favour of his daughter-in law *Musammat* Amina Khatun.

Full particulars of this case are not before us. All we have on record is the judgment of the Munsif. There are also one or two copies of certain statements which were made in the course of this case.

According to the finding of the Court below the lady Amina Khatun, alleged apparently that a sum of Rs. 54|- odd was owing to her on account of arrears of the allowance to which she was entitled and she asked to be allowed to enforce the agreement by taking possession of the property charged with her maintenance including the 2½ *biswas* of this property which were in the possession of the present plaintiffs at that time.

According to what is stated in the judgment of the Subordinate Judge, this suit was decreed *ex parte*, but after due service upon Khudajiatul Kubra and Atiqatul Kubra.

In execution of that decree, possession over this property, has passed to *Musammat* Amina Khatun.

It is important to observe that neither of the defendants in that suit has ever made any attempt to challenge the decree in appeal.

Instead of doing this they have launched the suit out of which this present appeal has arisen with all sorts of allegations directed against *Musammat* Amina Khatun with respect to the conduct of the earlier suit in the Munsif's Court. It is said that the suit was brought collusively and fraudulently, and it is also sought to be made out that the decree of the Munsif under which possession passed to Amina Khatun is altogether void for want of jurisdiction.

With regard to this plea of want of jurisdiction the case which was put for the plaintiff was this, namely, that the value of this 2½ *biswas* share which has passed into possession of Amina in execution of decree is Rs. 7,000. It is pointed out that this being the value of the property in suit in the case which was tried by the Munsif the Munsif had no jurisdiction to give a decree for possession inasmuch as his pecuniary jurisdiction is limited to suits of a value not exceeding Rs. 1,000 or at most Rs. 2,000 if he has been specially invested with higher powers.

The question really is whether these plaintiffs are entitled to maintain a suit on this allegation. We are clearly of opinion that no suit of this kind can be maintained to set aside the Munsif's decree on the ground of want of jurisdiction.

It is perfectly clear on all hands that when a suit is filed in a Civil Court the pecuniary jurisdiction of the Court is primarily determined by the valuation which the plaintiff puts upon the subject-matter of the suit.

It may be, that sometimes the value of the suit is exaggerated and sometimes it is underestimated, but at any rate, when a suit is brought and the Court has to make up its mind as to whether it is within its pecuniary jurisdiction, all that it can rely on is the valuation of the subject-matter which is given in the plaint.

Of course, it is open to a defendant when he appears to answer the suit, to raise the plea that the suit has not been properly valued and to show, if he can, that the Court in which the suit has been brought has no jurisdiction to try it. But clearly, if no such plea is taken by a defendant when he has had the opportunity of raising it, it cannot be said that the Court has acted without jurisdiction. The Court has assumed jurisdiction on the basis of a statement made in the plaint upon which it is bound to rely, a statement which has not been challenged or corrected in any way; and so, it is not possible to argue as has been argued here that the decree passed by the Munsif in

this case was altogether void for want of jurisdiction in the Munsif.

In this connection we may draw attention to the provisions of section 11 of the Suits Valuation Act, Act VII of 1887. That section lays down that unless an objection to the over-valuation or under-valuation of a suit has been raised in the Court of first instance it shall not be entertained by an Appellate Court unless, for reasons to be recorded in writing, the Appellate Court is satisfied that the suit in appeal was wrongly valued and that the wrong valuation has prejudicially affected the disposal of the suit on its merits. This enactment operates in spite of anything contained in section 578 of the Code of Civil Procedure which corresponds to section 99 of the present Code. It is clearly contemplated there that any objection which is to be raised on the ground of pecuniary jurisdiction must be taken in the Trial Court at the earliest possible opportunity and where the objection is not taken it is not to be entertainable thereafter unless the Appellate Court is satisfied that there has been some miscarriage of justice on the merits.

If this is the law in so far as it concerns procedure in appeals, it seems to us that in no way ought it to be possible for a party against whom a decree has been passed in the circumstances we find in this case, to be able to go to another Court and institute a fresh suit for the purpose of having the decree set aside. If this sort of thing were allowed there would be no end to litigation. It is perfectly well understood of course, that the decree of a Court may be set aside by a suit brought, but it is also the rule that no such decree can be set aside except on the basis of fraud or of something akin to fraud. In the present case, although there were allegations of fraud made in the plaint, no case of fraud whatever has been made out and for this reason therefore we hold that this suit, to set aside the decree which was passed by the Munsif on the 7th of May 1920, is not maintainable. This finding of ours really puts an end to the whole of the case. It has been suggested to us that we ought, in any case, to allow an account to be taken between the plaintiffs and Musammat Amina Khatun on the ground that she is entitled under the agreement only to a sum of Rs. 15 a month, whereas, the present profits accruing from the property upon which this allowance is charged, are greatly in excess of that sum. We think it inexpedient to say anything about this claim except that the suit as framed was not a suit for accounts.

Another suggestion has been made to us that, in any case, under the terms of an award which is printed at pages 22 and 23 of the record, we ought to pass a money decree against Saiyid Saqib Husain the second defendant who is the husband of *Musammat* Amina Khatun. It is not clear to us however what decree for money could be passed against Saqib Husain and again we have to draw notice to the fact that no such relief was claimed in the plaint.

We are satisfied therefore that this suit was a suit which ought not to have been entertained and which though for other reasons, was rightly dismissed by the Court below. The appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 327 OF 1923.

March 24, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SHRIDHAR SHABAYA JOTISHI—DEFENDANT—APPELLANT

versus

JANAK SHANKAR JOTISHI—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (b)—Receipt of mortgage money—Registration.

A receipt showing that the whole of the mortgage money has been paid does not require registration under section 17 (*b*) of the Registration Act, unless the receipt mentions that the mortgage has been extinguished thereby. (p. 416, col. 1.)

Appeal from the decision of the District Judge, Kanara, in Appeal No. 49 of 1922, confirming the decree of the First Class Subordinate Judge, Karwar, in Suit No. 261 of 1920.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *S. V. Palekar*, for the Respondent.

JUDGMENT.—We think that the Judge was right in holding that the two receipts showing that the whole of the mortgage money was paid did not require registration. If it had been mentioned that thereby the mortgage had been extinguished then they would come within the provisions of section 17 (*b*) of the Indian Registration Act. The plaintiff was entitled to show that the mortgage money had been paid, and if he succeeded he would undoubtedly be entitled to recover the mortgaged property. But while he was proving the payment it was not necessary for him to prove that the passing of the receipts would extinguish the mortgage, and that was the distinction referred to in the decision in *Shidlingappa* v. *Chenbasappa* (1), where it was held on the facts of the case that receipts passed by a mortgagee for sums paid on account of the mortgage debt and exceeding Rs. 100 each, were not inadmissible in evidence for want of registration under Act III of 1877, section 17. The learned Chief Justice said (p. 238):—

"Undoubtedly the payment reduces the sum due at the time on the mortgage, and thus modifies the account between the mortgagor and the mortgagee; but it does not operate to limit or confine within narrower limits the right or interest of the mortgagee in the land, which is simply to have the payment of the principal and interest secured on the mortgaged premises by some one or other of the remedies available for that purpose."

When the money has been paid, the need for the security has gone.

The appeal, therefore, will be dismissed with costs.

N. H. *Appeal dismissed.*

(1) 4 B. 235 : 5 Ind. Jur. 143 : 2 Ind. Dec. (N. S.) 664.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 440 OF 1920.

June 28, 1920.

Present :—Mr. Justice Broadway.

WALI MAHOMED AND OTHER—OBJECTOR —APPELLANT

versus

KAPURIA MAL AND OTHERS—DEFENDANTS —RESPONDENTS.

Pre-emption decree, compliance with—Short payment—Costs, whether can be deducted.

It is the duty of a person holding a decree for pre-emption to take all precautions to ensure the carrying out of the terms of the decree.

A pre-emptor who has been awarded costs is entitled to deduct the amont of those costs from the pre-emption price at the time of payment. If, however, he does not choose to do so, and fails to pay the full amount mentioned in the decree within the period prescribed, there is no compliance with the terms of the decree.

Kanhaya Lal v. *Muhammad Shafi Khan*, 18 Ind. Cas. 600 ; 141 P. L. R. 1913 ; 3 P. W. R. 1913, referred to.

Appeal from the decree of the District Judge, Ambala, dated the 3rd December 1919.

Mr. *Obedulla*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.— Kapuria Mal and *Mussammat* Indi instituted a suit against Wali Mohammad and others claiming to be entitled to pre-empt immoveable property that had been sold. On the 25th of March 1918 a decree was passed in their favour. The amount the decree-holders had to pay in order to obtain possession of the property was Rs. 99, and they were entitled to Rs. 19-10 as costs of the suit. The pre-emption price had to be paid into Court by the 30th April 1918. The opposite party preferred an appeal to the District Judge which was dismissed, the time for the payment of the pre-emption price was not extended ; indeed no time was fixed by the learned District Judge. The plaintiff decree-holders had, on the 18th of December 1917, paid in a sum of Rs. 15 as a deposit. On the 23rd of April 1918, a further sum of Rs. 83 was paid, thus making a total of Rs. 98.

WALI MAHOMED *v.* KAPURIA MAL

Subsequent to this the decree-holders took possession of the property and realized the costs amounting to Rs. 19-10. Wali Mahmmad then drew the attention of the 1st Court to the fact that the pre-emption price had not been paid into Court within the prescribed period, and that therefore the decree was null and void. The learned *Munsif* found this to be the case and holding that the pre-emption decree was null and void directed that possession must be given to Wali Mahammad. The decree-holders then preferred an appeal to the District Judge claiming that they had paid the full amount of Rs. 99-0-0, having paid Re. 1-0 0 on the 28th of August 1918. It has been found by both the Courts that this sum of Re. 1-0-0 was never paid, and in any case it was not paid within the fixed period. This is a question which cannot be gone into in Second Appeal. We have it then that the pre-emption price had been short paid to the extent of Re. 1-0-0.

The learned District Judge, however, accepted the appeal, holding that inasmuch as the pre-emptors decree-holders were *entitled* to take credit for Rs. 19-10-0, the amount of the costs that they had been allowed, there had been a sufficient compliance with the original decree.

Against this decision Wali Mohammad has come up to this Court through Mr. Obedulla, and I have heard Mr. Durga Das on behalf of the decree-holders respondents.

My attention was drawn to *Kanhaya Lal* v. *Mohammad Shafi Khan* (1). In that case the pre-emption price had been short paid by one anna, and it was held that the pre-emption decree had not been complied with and that the pre-emptor could not, therefore, take possession of the land. This case has been held by the learned District Judge to be inapplicable although the learned District Judge has given no reason for coming to this conclusion. He has based his decision on the various decisions cited in the Law of Pre-emption by Ellis, 3rd edition page 371. The statement of the law relating to deduction of costs from purchase-money is thus given by Mr. Ellis. Where the plaintiff has been awarded costs he is entitled to deduct the amounts of costs awarded him from the purchase-money at the time of payment. In support of this proposition he has cited decisions of the Chief Court and the Allahabad High Court. It seems to me that the facts of the present case are not on all fours with the facts of the cases cited by Mr. Ellis. I have no doubt that a pre-emptor, who has been awarded costs, is *entitled* to deduct the amount of those costs from the pre-emption price *at the time of payment.* In the present case the pre-emptors did not do this. Had they, when they paid the sum of Rs. 83 into Court deducted their costs therefrom, they would have been within their rights, although they had not been specifically authorized by the decree to do this. As a matter of fact they appear to have been under the impression that they had paid the whole of the pre-emption price, namely Rs. 99-0-0. They, therefore, obviously never intended to deduct from the pre-emption price the amount of costs that had been awarded to them. This is further indicated by the fact they subsequently sued out execution for Rs. 12-10-0 for costs that had been awarded to them. The learned District Judge appears to have held that inasmuch as they *could have*, had they so desired, deducted the whole of the Rs. 19-10-0 from the pre-emption price at the time of payment, although they did not do so, the payment of Rs. 98, leaving Rs. 19-10-0 cost still unrealized, was a sufficient compliance with the decree. In this view I am unable to agree. No doubt, the short payment was due to a mistake. Nevertheless it was the duty of the decree-holders to take all precautions to ensure the carrying out of the terms of the decree, and there can be no doubt that the full payment of the pre-emption price was not made in the prescribed period.

I, therefore, accept this appeal with costs and setting aside the order of the learned District Judg restore that of the learned *Munsif*.

Z. K. *Appeal accepted.*

(1) 18 Ind. Cas. 600 ; 141 P. L. R. 1913 ; 8 P. W. R 1913.

MOTICHAND GIRDHARSHET *v.* CHANDRABAI

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 29 OF 1923.

February 25, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

MOTICHAND GIRDHARSHET—
DEFENDANT—APPELLANT
versus
CHANDRABAI—PLAINTIFF— RESPONDENT.

Hindu Law—Mayukha—Regenerate Castes—Illegitimate children—Maintenance—Marrige expenses.

There is no direct prohibition against illegitimate children of Hindus of the regenerate castes governed by the *Mayukha* being entitled to maintenance, nor does the maintenance cease when they come of age. The illegitimate children, however, are not entitled to marriage expenses. (p. 418, cols 1 & 2).

Appeal from the decision of the First Class Subordinate Judge, Alibag, in suit No. 34 of 1920.

Messrs. *H. C. Coyajee* and *S. C. Joshi* (with Messrs. *M. N. Talpade* and *P. S. Bakhale*), for the Appellant.

Mr. *G. N. Thakor* (with Mr. *R. A. Jahagirdar*), for the Respondent.

JUDGMENT.

Macleod, C. J.—This is a suit by the plaintiff No. 1 to recover arrears of maintenance and future maintenance for herself and her three sons, and her daughter, and also marriage expenses of plaintiffs Nos. 2, 3 and 4. The first plaintiff was the kept mistress of one Girdhar Madhowji and the other plaintiffs were her children by him. The parties come from Alibag where they are subject to the *Vyavahara Mayukha* and it is contended before us that illegitimate children under the *Mayukha* would not be entitled to any maintenance. However, we agree with the decision of the learned Judge that it does not appear from the *Mayukha* that there is any direct prohibition against illegitimate children in the case of the regenerate castes being entitled to maintenance, and considering the authorities which have been referred to, it would be going too far if we were to lay down that in the Districts, which are governed by the *Mayukha*, illegitimate sons are 'not entitled to maintenance.

With regard to the quantum of maintenance, we think that as under the Will of Girdhar, Chandrabai, plaintiff No. 1, was to be allowed Rs. 100 annually as maintenance, she ought to be allowed that sum now. Therefore, we alter the decree of the lower Court by directing that plaintiff No. 1 should get maintenance at Rs. 100 a year. We see no reason to alter the decision of the lower Court with reference to plaintiffs Nos. 2, 3 and 4.

With regard to marriage expenses allowed by the decree to plaintiffs Nos. 2, 3 and 4, no authority has been cited for such an allowance. That must be deleted.

It was also contended that in the case of illegitimate sons the maintenance ceased when they came of age. But no authority for such a proposition has been cited, and it must be taken that the right under Hindu law of illegitimate sons to maintenance is a substitute for any right which they might otherwise have had to share in the family property. We do not think therefore that maintenance should cease when plaintiffs Nos. 2, 3 and 4 come of age. However, if, in future circumstances alter, we give the first defendant liberty to apply at his own expense, if he thinks he can make out a case for reducing the amount of maintenance.

In the circumstances of the case the appellant must pay the respondents' costs of the appeal and cross-objections.

Shah, J.—I agree. I desire to deal with the argument that has been urged on behalf of theappellant that the illegitimate sons of his father Girdhar are not entitled to maintenance according to Hindu law. The deceased Girdhar was a Vaishya. So far as the *Mitakshara* is concerned, it is clear that they would be entitled to a simple maintenance (see *Mitakshara*, Ch. I, Section XII, para. 3. Stokes' Hindu Law Books, p. 426). The Vyavahara Mayukha is silent on this point. (See Stokes' Hindu Law Books, pp. 55 and 56, Ch. IV, Section IV, para. 32 and Mandlik's Hindu Law). It has been argued that the author of the Vyavahara Mayukha does not mean to adopt the view of the author of the *Mitakshara*. I am unable to accept that contention. It seems to me that the texts of Brihaspati and Gautama mentioned in para. 30 of the same section in the Vyavahara Mayukha refer to a son born by a Shudra wife. The subject of *dasiputra*

is dealt with in para. 32. It is, therefore, true to say that Nilkantha is silent on the question of the right of the illegitimate sons of a Brahmin, Kshatriaya and Vaishya. It is, however, a recognised rule in this Presidency that so far as it may be reasonably possible the *Mitakshara* and the *Vyavahara Mayukha* should be harmonised, when they are not inconsistent with each other. According to this rule it would be fair to hold that Nilkantha accepts Vijnaneshwara's view on this point; or else he would have expressly said so. The reference to this subject in para. 32 of Ch. IV, section IV, is made in such a manner as to indicate that Nilkantha does not mean to dissent from Vijnaneshwara's view on this subject. This view is further confirmed by the fact that Mitra Mishra expressly accepts this view in the Viramitrodaya. (See Golap Chandra Sarkar Sastri's Translation, p. 130, and Vira Mitrodaya, Calcutta edition of 1875, p. 623). It is clear that the view taken in the *Mitakshara* must be accepted on the point.

As regards the argument that the maintenance should be limited to the period of minority, it may be mentioned that there is nothing in the texts bearing on this point in the *Mitakshara* or in the *Vyavahara Mayukha* to justify this limitation.

N. H. *Decree varied.*

CALCUTTA HIGH COURT.

SMALL CAUSE COURT REFERENCE NO. 1 OF 1923.

May 16, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

M. L. CHAKRABARTY—PLAINTIFF
versus
OLOF BORIN—DEFENDANT.

Presidency Small Cause Courts Act (XV of 1882), ss. 38, 69—Reference under s. 69 form, contents, and competency of—Application under s. 38, nature of.

A Small Cause Court is competent to make a Reference to the High Court, under section 69 of the Presidency Small Cause Courts Act, upon an application made under section 38. (p. 420, col. 1).

In order that a Reference under section 69 of the Presidency Small Cause Courts Act may be in the proper form, there must be a statement of the facts of the case signed by the Judges who heard it; the point on which there is a difference of opinion must be formulated, and statements of the reasons assigned by each Judge in support of his view. (p. 422, col. 1).

An application under section 38 of the Act is a stage in the suit which is not necessarily terminated by the decree, and attracts the operation of section 69. (p. 421, col. 1).

Case-law considered.

Reference heard by the Sixth Judge, Calcutta Small Cause Court, on the 18th August 1922 and New Trial Application heard by the Officiating Chief Judge and the Sixth Judge on the 8th March 1923.

Messrs. *B. K. Ghosh* and *D. N. Mitter*, for the Plaintiff.

Mr. Surita, for the Defendant.

JUDGMENT.—This is a Reference under section 69 of the Presidency Small Cause Courts Act, 1882. The suit, which was brought by the buyer against the seller for damages for breach of an indent contract, was instituted on the 18th July, 1922. The trial took place before the sixth Judge who dismissed the suit on the 18th August 1922. On the 7th September, 1922, the plaintiff made an application under section 38 before the Chief Judge and the sixth Judge who directed notice to issue. The matter was adjourned from time to time till the 16th February 1923, when the application was heard in the presence of both sides. There was a further hearing on the 22nd February 1923, when the Court reserved judgment. On the 8th March 1923, two separate judgments were delivered one by the Chief Judge, the other by the sixth Judge. They disagreed in their conclusions. The judgment of the Chief Judge narrates the history of the case, contains an exposition of his view of the law, concludes with the expression of opinion that the suit should have been decreed and formulates two questions which are referred to this Court. The judgment of the sixth Judge similarly contains a statement of facts, an exposition of the law, and an expression of opinion that the suit had been rightly dismissed by him. We have to consider whether the Reference thus made is in conformity with section 69 of the Presidency Small Cause Courts Act, 1882, and

in this connection two points require examination, namely, first whether a Reference under section 69 is permissible on an application under section 38, and secondly, whether the Court has in this case drawn up a " statement of the facts", within the meaning of section 69.

As regards the first point, we are of opinion that the Small Cause Court is competent to make a Reference under section 69 on an application under section 38. Section 38 is in these terms.

" Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

Section 69 is in these terms :

" If two or more Judges of the Small Cause Court sit together in any suit, or in any proceeding under Chapter VII of this Act, and differ in their opinion as to any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, or if in any suit or any such proceeding, in which the amount or value of the subject-matter exceeds five hundred rupees, any such question arises, and either party so requires, the Small Cause Court shall draw up a statement of the facts of the case, and refer such statement, under section 617 of the Code of Civil Procedure, for the opinion of the High Court, and shall either reserve judgment or give judgment contingent upon such opinion."

The decision of Garth, C.J., and Wilson, J. in *Nusserwanjee* v. *Pursutum* (1) is an authority for the proposition that an order rejecting an application for a new trial subject to the decision of the High Court on certain point or points referred, is not a contingent judgment within the meaning of section 69, and points of difference between the Judges at that stage cannot form matters for Reference. In support of this view reference was made to the decision of Couch, C. J. and Pontifex, J. in *Hall* v. *Joakim* (2). On the other hand, the decision of Peacock, C. J. and Mitter, J. in *Isan Chandra* v. *Haran Sardar* (3), points to the opposite conclusion. The Madras High Court in *Oakshort* v. *The British India Steam Navigation Co. Ltd* (4), followed the decision in *Nusserwanjee* v. *Pursutum* (1). The later decisions in Madras, however, have uniformly adopted the contrary view : *Seshammal* v. *Munusami* (5), *Rangiah Naidu* v. *Rungiah* (6), *Lodd Govindass Krishnadass* v. *Rukmani Bhai* (7) and *Ramasamy Aiyer* v. *Madras Times Printing and Publishing Co., Ltd.* (8). In this conflict of judicial opinion, we must turn to the language of the statute and ascertain its plain meaning.

Section 69 authorises a Reference when two or more Judges of the Small Cause Court sit together in any suit and differ in their opinion as to any question of law or usage having the force of law or the construction of a document, which construction may affect the merits. The term " suit " is not defined either in the Presidency Small Cause Courts Act or in the Code of Civil Procedure, and its meaning cannot be determined apart from the context. The decisions in *Gagan Chand* v. *Caspersz* (9) and *Batasu* v. *Jaiti* (10) show that the term "suit" sometimes includes the appellate stage, while section 10 of the Civil Procedure Code 1908 speaks of an appeal before His Majesty in Council as a suit. We are not unmindful that, notwithstanding this, it has been held that an application for leave to appeal to His Majesty in Council is not a suit within the meaning of section 10. *Nainappa Chetti* v. *Chidambaram Chetti* (11). In *Shayama Charan Mitter* v. *Debendra Nath Mukerjee* (12), it was held that the term suit includes even execution proceedings, though *Venkata Chandrappa Nayaninaru* v. *Venkatarama Reddi* (13) might be invoked to

(1) 11 C. 298 ; 5 Ind. Dec. (N. S.) 958.
(2) 17 B. L. R. 34.
(3) 3 B. L. R 135 ; 11 W. R. 525.
(4) 15 M. 179 ; 5 Ind. Dec. (N.S.) 474.
(5) 20 M 358 ; 7 M L. J. 140 ; 7 Ind. Dec. (N S.) 254.
(6) 31 M. 490; 4 M. L. T. 283.
(7) 21 Ind. Cas. 302 ; 38 M 438 ; 1 L. W. 529 ; 14 M. L T. 310.
(8) 33 Ind. Cas. 929; 30 M. L. J. 207; 19 M. L. T. 165.
(9) 4 C. W. N. 44.
(10) 3 C. W. N. 62 S. N.
(11) 21 M. 18 ; 7 Ind. Dec. (N.S.) 369.
(12) 27 C. 484 ; 4 C. W. N. 269 ; 14 Ind. Dec. (N.S.) 318.
(13) 22 M. 256 ; 8 Ind. Dec. (N.S.) 182.

support the view that the term suit does not include an application under section 47 of the Civil Procedure Code. In *Achha Mian Chowdhury* v. *Durga Churn Lal* (14) it was ruled that an application to review an order made in a suit is a proceeding in the suit itself. Again, in *Samed Sheikh* v. *Naba Nepal Ghose* (15), an application to rehear an appeal was treated as an application in the suit and not merely an extraneous proceeding which if granted in effect revives the appeal. We are not disposed to place a narrow and restricted interpretation upon the term "suit" in section 69 of the Presidency Small Cause Courts Act and we cannot find any conclusive reason against the view that an application under section 38 is a stage in the suit which is not necessarily terminated by the decree. This, no doubt, seems to militate at first sight against the view propounded in *Nusserwanjee* v. *Pursutum* (1). But Sir Richard Garth, C. J. appears to have overlooked that though section 69 of Act XV of 1882 was similar in its terms to section 7 of Act XXVI of 1864, which was in force when *Hall* v. *Joakim* (2) was decided, section 38 of Act XV of 1882 is materially defferent from section 53 of Act IX of 1850 which was moulded on section 89 of the County Court Act, 1846. Section 53 of Act IX of 1850 was in these terms :

"Every order and judgment of any Court holden under this Act except as herein provided, shall be final and conclusive between the parties ; but the Judges shall have power to non-suit the plaintiff, in every case in which satisfactory proof shall not be given to them, entitling either the plaintiff or defendant to the judgment of the Court ; and shall also in every case whatever, have the power, if they shall think fit to order a new trial to be had, upon such terms as they shall think reasonable, and in the meantime to stay the proceedings."

This, it will be observed, refers to new trial only. Section 38 of Act XV of 1882, on the other hand, is far more comprehensive in scope and empowers the Court not only to order a new trial but also to alter, set aside, or reverse the decree. The substance of the matter is that, on an application under section 38, the Court may exercise what is essentially appellate jurisdiction. We need not, however, lay stress on the change in the heading of Chapter VI from "New Trials and Re-hearing" to "New Trials and Appeal" by section 13 of Act I of 1895. Reference may be made to the decision of the Full Bench in *Sikander Rowther* v. *Ghouse Mohidin* (16) which overruled the decision in *Ramasamy Aiyar* v. *Madras Times Printing & Publishing Co. Ltd.* (8) and held that a Full Bench of the Presidency Small Cause Court sitting under section 38 has no jurisdiction to decide questions of fact, whether they are raised generally or in consequence of its finding on another question of fact or law. This accords with the view taken in this Court in *Sassoon* v. *Hurry Dos Bhukut* (17) and *Johan Smidt* v. *Ram Prasad* (18). A similar attempt was made unsuccessfully in *Cousins* v. *Lombard Deposit Bank* (19) to maintain the view that section 6 of 38 and 39 Vict. c. 50 contemplated an extension of the right to appeal in suits arising within what used to be called the common law jurisdiction of the County Court ; it is now settled that there is no appeal on questions of fact in that class of cases, though under sections 14 of 13 and 14 Vict. c. 61 not only might a new trail be ordered but judgment entered for either party: *Muratagh* v. *Barry* (20), *Robinson* v. *Fawcett and Firth* (21), *Clarke* v. *West Ham Corporation* (22). We are of opinion that although section 38 provides for a more extended jurisdiction than what would be technically called a new trial, a jurisdiction analogous to an appeal, yet there is no appeal on facts. But though the power of interference is thus restricted, the application under section 38 is nevertheless an application in the suit and attracts the operation of section 69. The conclusion follows that in this case it was competent to the two

(14) 25 C. 146 ; 2 C. W. N. 137 ; 13 Ind. Dec. (N.S.) 99.

(15) 28 Ind. Cas. 12 ; 19 C. L. J. 310; 19 C. W. N. 359.

(16) 38 Ind. Cas. 346 ; 40 M. 355 ; 21 M. L. T. 111 ; (1917) M. W. N. 156 ; 32 M. L. J. 213 ; 5 L. W. 377.

(17) 24 C. 455 ; 1 C. W. N. 44 ; 12 Ind. Dec. (N.S.) 971.

(18) 12 Ind. Cas. 11 ; 38 C. 425 ; 16 C. W. N. 25.

(19) (1876) 1 Ex. 404 ; 45 L. J. Ex. 578 ; 35 L. T. 484 ; 25 W. R. 116.

(20) (1890) 24 Q. B. D. 632 ; 59 L. J. Q. B. 388 ; 38 W. R 526.

(21) (1901) 2 K. B, 325 ; 70 L. J. K. B. 639 ; 84 L. T. 629.

(22) (1914) 2 K B. 448 ; 83 L J. K. B. 1306 ; 110 L. T. 1007 ; 78 J. P. 309 ; 12 L. G. R. 744 ; 58 L. J. 496 ; 30 P. L. R. 389.

Judges to make a Reference under section 69 in conformity with the requirements thereof. We may add that this view accords with what has been the recognised practice in recent years, not withstanding the decision in *Nusserwanjee* v. *Pursutum* (1) and *Okhoy Coomar Bonnerjee* v. *Koylash Chundar Ghasal* (23) and *Rajendra Mullick* v. *Nanda Lall Gupta* (24) may be mentioned as instances where References under section 69 made on applications under section 38 were heard by this Court without objection.

As regards the second point, we are of opinion that the Reference is not in proper form. Section 69 contemplates a statement of the facts of the case drawn up by the Court, that is, by the two or more Judges where the case is heard by more than one Judge. This cannot create any difficulty, because when an application under section 38 is heard, the Judges cannot disagree on the facts. There is no appeal on the facts as we have already explained and the facts as found by the Trial Judge must be accepted. Consequently, the first step, when a Reference is to be made under section 69 is to draw up a statement of the facts of the case, to be signed by the Judges. They must then formulate the point on which there is a difference of opinion. This statement of facts and of the point on which there is a difference of opinion is to be accompanied by statements of the reasons assigned by each Judge in support of his view. This was emphasised by the Madras High Court in *Ramaswami Iyer* v. *The Madras Times Printing and Publishing Company, Ltd.* (25); see also *Jardine Skinner & Co.* v. *Money* (26), *Benode Lall Roy* v. *River Steam Navigation Co.* (27). Useful examples of a case stated will be found in *R.* v. *Dudley* (28) and *R.* v. *Commissioner of Sewers for Essex* (29).

The result is that the Reference must be discharged and the records returned to the Small Cause Court so that such steps as may be considered necessary may be taken in accordance with law. Each party will pay his own costs in this Court.

W. C. A. *Reference discharged.*

(23) 17 C. 367 ; 8 Ind. Dec. (N.S.) 797.
(24) 31 C. 1001.
(25) 32 Ind. Cas. 610 ; (1915) M. W. N. 785.
(26) 14 W R. 312.
(27) 1 C. W N. 143.
(28) (1884) 14 Q. B. D. 273 ; 54 L. J. M. C. 32 ; 52 L. T. 107 ; 33 W. R. 347; 15 Cox. C. C. 624 ; 49 J. P. 69.
(29) (1885) 14 Q. B. D. 561 ; 54 L. J. M. C. 89 ; 52 L. T. 587; 33 W. R. 650.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 584 OF 1922.

March 6, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GANPAYA NARNAPPA—DEFENDANT—APPELLANT

versus

KRISHNAPPA ANNAYA HEDGE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Assignment of decree—Application by assignee—Procedure—Succession Certificate Act (IX of 1887), s. 16—Succession Certificate—holder to minor's estate, position of—Payments made after majority of minor, validity of.

When an application is made to the Court by an assignee decree-holder under O. XXI, r. 16 of the Civil Procedure Code it must be made to the Court as the Court which passed the decree and not as the Court which is executing the decree, so that proof can be given of any uncertified payments. (p. 423, col. 1).

Raghunath v. *Gangaram*, 75 Ind. Cas. 893; 25 Bom L. R. 474 ; 47 B. 643 ; (1923) A. I. R. (B) 404, relied on.

The holder of a succession certificate who has to collect debts due to the estate of a minor cannot be compared to a certified guardian. The succession certificate holds goods until the minor takes steps to revoke it on coming of age, so it does not follow that the moment the minor becomes eighteen years of age, the Succession Certificate is no longer valid, and that if any payment is made to the holder it is made to an unauthorized person. (p. 423, col. 1).

Appeal from the decision of the District Judge, Kanara, in Appeal No. 68 of 1920, confirming the decree of the Subordinate Judge, Sirsi, in Darkhast No. 50 of 1919.

Mr. *G. N. Thakor*, with Mr. *G. P. Murdeshvar*, for the Appellant.

Messrs. *S. S. Patkar* and Mr. *V. R. Sirur*, for the Respondent.

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JUDGMENT.

Macleod, C. J.—This was an application under O. XXI, r. 16, Civil Procedure Code, by the assignee of a decree to be placed on the record as the decree-holder. The decree was originally passed in favour of Ganpaya defendant in Suit No. 333 of 1911. Ganpaya died leaving a daughter-in-law Mahadevamma. A succession certificate was granted to her mother-in-law, who was also called Mahadevamma. As a holder of that succession certificate she collected Rs. 500 of the decretal amount after agreeing with the judgment-debtor to compromise for Rs. 50 less. Since the case was before the District Judge, we have decided in *Raghunath* v. *Gangaram* (1) that when an application is made to the Court under O. XXI, r. 16, it must be made to the Court as the Court which passed the decree and not as the Court which is executing the decree, so that proof can be given of any uncertified payments. Therefore the judgment-debtor was entitled in resisting the application to plead that the debt was satisfied. But unfortunately for him he could not plead that the debt had been wholly satisfied as the holder of the succession certificate was not entitled to compromise without the intervention of the Court. The application, therefore, to that extent must succeed, but the judgment-debtor was entitled to the benefit of the payment made to Mahadevamma under the succession certificate given to her. The lower Appellate Judge appears to have thought that the payment was made by the judgment-debtor to an unauthorised person. There seemed to be some confusion in the minds of the parties with regard to the position of a holder of a succession certificate who has to collect the debt due to the estate of a minor. He cannot be compared to a certificated guardian. Such a succession certificate holds good until the minor takes steps to revoke it on coming of age, so it does not follow that the moment the minor becomes eighteen years of age, the succession certificate is no longer valid, and that if any payment is made to the holder it is made to an unauthorised person. Therefore, an order will be made on the application that the applicant should be placed on the record in place of the original decree-holder, but that the Court should take notice in executing the decree of all payments which had been made to Mahadevamma under the succession certificate. We understand that as a matter of fact Rs. 50 remain to be paid under the decree.

The appeal is allowed.

The appellant is entitled to his costs throughout.

Shah, J.—I agree. As regards the question whether in view of the provisions of O. XXI, r. 2 (3) evidence of payment not certified could be given, it seems to me that on the facts of the present case we are bound by the decision in *Raghunath* v. *Gangaram*. (1) Though I confess that I feel some difficulty in distinguishing the case of a person claiming as a transferee from the decree-holder from that of a decree-holder claiming the same amount so far as the application of rule 2 is concerned, I think that effect may be given to the distinction in *Raghunath* v. *Gangaram* (1).

As regards the question whether the person in whose favour the certificate was issued, that is, Mahadevamma the widow of Ganpaya, as the guardian of her minor daughter-in-law, was competent to receive the payment, the argument for the respondent is that the authority given to her under the succession certificate came to an end as soon as the minor attained majority. There is an express provision in the Guardians and Wards Act providing that on the ward attaining majority the guardianship ceases. There is no such provision in the Succession Certificate Act and ordinarily I should say that a certificate under the Succession Certificate Act gives an authority to the person holding the certificate to receive the payment. It is intended to protect the debtor who pays money to the person holding such certificate. There is also a provision in the Act for the revocation of the certificate, and it would be hazardous and inconvenient, it seems to me, to hold that the certificate which has not been formally revoked has ceased to be operative in the sense that the debtor who makes a payment on the strength of the certificate can be held not to have been justified in making that payment to the person holding the certificate. I am

(1) 75 Ind. Cas. 893; 25 Bom. L. R. 474 ; 47 B. 643; (1923) A. I. R. (B.) 404.

unable to accept the argument urged on behalf of the respondent as also the view taken by the lower Appellate Court that Mahadevamma who held the certificate was not authorised to receive the payment under the circumstances. Such a conclusion would be inconsistent with the basic principle underlying section 22 of the Act and the general scheme of the Act. Order XXXII, r. 6, which has been relied upon by Mr. Patkar, does not appear to me to have any application to the facts of this case. The payment is not received by Mahadevamma as the next friend or guardian in suit of the minor within the meaning of this rule; but it is received by her under a certificate, which authorised her to receive it under the Succession Certificate Act. That gives sufficient protection to the person making the payment, so far as the actual payment is concerned, even though the certificate may have become inoperative or invalid in law, provided the payment is made in ignorance of its having become inoperative or invalid.

N. H. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 144 OF 1923.

July 23, 1923.

Present :—Mr. Justice Mullick and Mr. Justice Bucknill.

JAGANNATH THIRANI—PETITIONER
versus
TARA PRASANNA GANGULI—OPPOSITE PARTY.

Provident Funds Act (IX of 1897), ss. 2. 4—Civil Procedure Code (Act V of 1908), s. 6—Compulsory deposit, what is—Attachment, exemption from—Rules framed by Government, validity of.

The test as to whether a deposit in a Provident Fund is or is not a compulsory deposit within the meaning of section 2 of the Provident Fund Act, is whether the money is repayable on demand or at the option of the subscriber or depositor, if it is not, the deposit is a compulsory one and is exempt from attachment by a Civil Court under section 4 of the Act. (p. 424, col. 2).

It is competent for Government to issue rules relating to the internal management of a Provident Fund, but the Provident Fund Act does not empower Government to prescribe by rules the procedure which shall be followed for the recovery of debts due by depositors for which a decree has been obtained in the Civil Court and any such rules must be treated as *ultra vires.* (p. 425, col. 1).

Veerchand Nowla v. *B. B. & C. I. Ry. Company*, 6 Bom. L. R. 921 ; 29 B. 259 ; *Hindley* v. *Joynarain Marwari*, 54 Ind. Cas. 439; 46 C. 962 ; 24 C. W. N. 288 ; *Secretary of State for India in Council* v. *Raj Kumar Mukerjee*, 77 Ind. Cas. 1025 ; 27 C. W. N. 472 ; 50 C. 347, relied on.

Appeal from the decision of the Subordinate Judge of Purnea, dated the 27th March 1923.

Mr. *Rai Guru Saran Prasad*, for the Petitioner.

Mr. *Lalmohan Ganguly*, for the Opposite Party.

JUDGMENT.

Mullick, J.—The question in this application for revision is whether a certain amount of money which lies to the credit of the judgment debtor Tara Prosanna Ganguli in the General Provident Fund can be attached in execution of a decree obtained against him by the petitioner Jagannath Thirani. The Subordinate Judge at first issued a notice of attachment upon the Accountant-General in whose custody the fund is, but in consequence of an objection by the Secretary of State he has withdrawn the notice.

The present application is made by the decree-holder for the exercise of our powers under section 115 of the Civil Procedure Code.

The judgment-debtor who was a *Nazir* in the Civil Courts at Kishenganj in the district of Purnea was an optional subscriber within the meaning of r. 3 of the rules regulating the General Provident Fund ; but it seems that the deposits were not capable of withdrawal except under rules 10, 15, and 18. In my opinion the deposits were compulsory deposits within the meaning of section 2 of the Provident Fund Act. (Act IX of 1897 as amended by Act IV of 1903), the test being whether the money is repayable on demand or at the option of the subscriber or depositor.

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The next question is whether under section 4 of the Act the deposits are exempt from attachment by the Civil Court. The Act is peremptory and clear and section 60 of the Civil Procedure Code does not stand in the way. Reference has been made to r. 10 of the rules regulating the Fund, but, in my opinion, that rule in so far as it refers to notices of attachment is *ultra vires*. It is noticeable that although reference is made in the Act to rules relating to the Fund there is no express provision in the Act conferring power to frame rules. In my opinion, it is competent for Government to issue rules relating to the internal management of the fund, but the Act does not empower Government to prescribe by rules the procedure which shall be followed for the recovery of debts due by depositors for which a decree has been obtained in the Civil Court; and this is the view that has been taken in *Veerchand Nowla* v. *B. B. & C. I. Ry. Co.* (1), *Hindley* v. *Joynarain Marwari* (2) and *Secretary of State for India in Council* v. *Raj Kumar Mukerjee* (3).

The result, therefore, is that the application will be dismissed with costs. Pleader's fees three gold mohurs.

Bucknill, J.—I agree.

Z. K. *Application dismissed.*

(1) 6 Bom. L. R. 921 ; 29 B. 259.
(2) 54 Ind. Cas. 439 ; 46 C. 962 ; 24 C. W. N. 288.
(3) 77 Ind. Cas. 1025; 27 C.W. N. 472 ; 50 C. 347.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 723 OF 1922.

March 25, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

NAMDEV TUKARAM GIRME—
DEFENDANT—APPELLANT
versus
VISHNU CHINTAMAN DUNAKHE—
PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Decree against manager—Co-parceners, whether bound.

The interests of persons who are not parties to a decree either by name or by implication cannot be attached in execution of such decree. (p. 426, col 1.)

I C—54

Where a decree is passed against a person who happens to be the manager of a Hindu joint family, without stating whether he is sued in a representative capacity or not, the property belonging to the family cannot be seized in execution of the decree. (p. 426, col. 1.)

Appeal from the decision of the Joint Judge, Poona, in Appeal No. 223 of 1921, reversing the decree of the First Class Subordinate Judge, Poona, in Civil Suit No. 112 of 1920.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Macleod, C. J.—There was a joint family consisting of Namdeo and his son Savalaram together with Trimbak and Raghunath sons of Namdev's brothers Sopana and Piraji respectively. Savalaram opened a branch shop at Baramati, and from the facts found there is little doubt that that was a family shop, and that Namdeo and his brother Sopana, now deceased, advised the present plaintiff to advance moneys to Savalaram for the purposes of the shop. Eventually plaintiff had to file a suit against Savalaram in which a consent decree was passed. In execution of that decree the plaintiff sought to attach certain property, when objections were raised to the attachment by Namdev and his nephews. The objections were maintained by the Court, and consequently the plaintiff brought this suit for a declaration that the property was liable to be sold in execution of the decree in suit No. 30 of 1916 obtained against the defendant No. 4 and that the summary order holding that the decree did not bind defendants other than defendant No. 4 should be set aside.

The trial Judge dismissed the suit, although it does not appear clear why he did not declare that the property to the extent of defendant No. 4's share therein was liable to be sold in execution of the plaintiff's decree.

In appeal the decree of the lower Court was set aside, and the plaintiff obtained the declaration he prayed for. If it had been held in the suit filed by the plaintiff against Savalaram, that Savalaram was manager, and if that had been so stated in the decree, then it would have been possible for the plaintiff in execution of the decree to attach family property in the

hands of Namdev and his nephews. Although we are told that in the title of the suit Savalaram was described as manager, it is admitted now that there was no finding on that question, and the decree was passed against Savalaram personally. I may point out that although our decision depends on the wording of the decree in that suit, the decree has not been translated. The question then which arises as far as we can judge can be answered in this way. When there is a decree against A who happens to be a member of a joint Hindu family, without stating whether he is sued in a representative capacity or not, the property belonging to the family cannot be seized in execution of the decree against A. It seems to me clear that the interests of persons who are not parties to the decree either by name or by implication cannot be attached in execution of such a decree. That is one of the elementary principles of law as regards the limitations of a decree against an individual. There is no necessity to refer to any authority for that, though reference may be made to *Laxman Nilkant* v. *Vinayak Keshav* (1), where it was held that when the stage of sale of property has not been reached there is no reason for assuming jurisdiction to dispose of property belonging to one who was not a party to the suit and was not a representative of the judgment-debtor. The case which most frequently comes before the Court is the case where a decree has been passed against a person as manager of a family, and the proprety of the family having been sold in execution, the question arises whether the interests of persons who were not parties to the suit passed by the sale. But it seems to me extremely inadvisable that the Court should be asked to decide upon the liabilty of a person by means of execution proceedings, when he is not a party to the suit, and is not mentioned in the decree which is sought to be executed, and where no attempt has been made at the hearing to prove that such a person is liable. I think, therefore, that, however, morally unsound the contention of the present appellants may be, the plaintiff has not taken the necessary steps to make them liable for his dealing with Savalaram and we must hold that defendants Nos. 1, 2 and 3 are entitled to have the suit dismissed as against them. The plaintiff is entitled to a declaraction that the property to the extent of defendant No. 4's share therein is liable to be sold in execution of his decree. The suit is dismissed as against defendants Nos. 1 to 3 who must get their costs throughout.

Shah, J.—I agree.

N. H. *Appeal allowed.*

(1) 33 Ind. Cas. 956 ; 40 B. 329 ; 18 Bom. L. R. 52.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1092 OF 1923.

February 4, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

GANESH LAL AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

THE EAST INDIAN RAILWAY LTD.—DEFENDANT—OPPOSITE PARTY.

Railway Company—Loss of goods consigned—Risk note B—Admission of loss by plaintiff—Company, whether bound to prove loss

In the case of goods consigned to a Railway Company under Risk Note B, where the plaintiff admits the loss of the goods consigned by him the defendant company is relieved of the necessity of proving the same (p. 427, col. 1.)

Certain goods were consigned under Risk Note B at a station on the E. B. Ry but were eventually lost. Plaintiff, while admitting the loss, sued to recover the value of the goods from the E. I. Ry. but did not adduce any evidence that the loss was due to the neglect of that railway.

Held, that under the circumstances the plaintiff was not entitled to succeed.

Gholabhai Punsi v. *East Indian Railway Co.*, 63 Ind Cas. 241 ; 45 B. 1201; 23 Bom. L. R. 515, distinguished.

East Indian Railway Company v. *Jagpat Singh*, 79 Ind Cas 12, followed.

Rule against the order of the Court of the Munsiff, Berhampore, exercising the powers of a Court of Small Causes, dated the 13th August 1923, in S. C. C. Suit No. 481 of 1923.

Babu *Urukram Das Chakraburty*, for the Petitioners.

MANJAYA SUBRAYA *v.* TAMMAYA VASUDEO SHANBHOG

Babu *Ambikapado Chowdhury*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—The rule was issued on the ground that in view of the decision of the Bombay High Court in the case of *Gholabhai Punsi* v. *East Indian Railway Co.* (1) the order of dismissal made by the Small Cause Court Judge should not have been made. It appears on a perusal of the plaint that the plaintiff admits that the goods were lost and further he makes a claim that the goods were lost on the E. I Railway. The goods were originally consigned at a station on the E. B. Railway and the plaintiff wants to make the Company liable for the loss of the goods. The loss has been admitted but the plaintiff has not adduced any evidence that the loss was due to the neglect of the railway administration &c., in accordance with the terms of the Risk Note B under which the goods were consigned. The learned Small Cause Court Judge has dismissed the plaintiff's suit and I think he is right in so doing. In the case of the *East Indian Railway Company* v. *Jagpat Singh* (2), to which I was a party, we have held that when the loss is not admitted by the plaintiff the Railway Company must prove it. In this case, as I have said, the plaintiff has admitted the loss so that the defendant Company is relieved of the necessity of proving it. In the Bombay case above referred to the same thing happened. From the report of that case it appears that the plaintiff never admitted the loss and he sued the defendant Company first, for recovery of two bags of rice' or secondly for the sum of Rs. 30 as compensation for the value thereof. The point that was decided in that case was whether it was sufficient for the defendant Company merely to admit the loss and not to adduce any evidence to show that the goods were as a matter of fact lost. That case therefore, is distinguishable from the present case and the ground upon which this Rule was issued must, therefore, Jail. The rule is discharged with costs—One gold mohur.

Chotzner, J.—I agree.

K. S. D. *Rule discharged.*

(1) 63 Ind. Cas. 241 ; 45 B. 1201 ; 23 Bom. L. R. 525.
(2) 70 Ind. Cas. 129.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 502 OF 1923.

March 28, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

MANJAYA SUBRAYA—DEFENDANT—APPELLANT

versus

TAMMAYA VASUDEO SHANBHOG—PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (*Bom. Act V of* 1879) *ss.* 63, 64—*Alluvial accretions—Sale by Government to landlord—Permanent lessee, whether liable to pay extra rent.*

The holder of a *Mulgeni* (permanent) lease at a fixed rent is liable to pay extra rent for any alluvial accretion made to the land, if sections 63 and 64 of the Bombay Land Revenue Code have been put into operation with regard to it and the landlord has paid its price and assessment to Government, even though the lease recites that the parties would not claim an increase or a decrease of rent on any ground whatever. The alluvion in such a case must be treated as an entirely separate piece of land and the tenant cannot cultivate it as part of his original holding (p. 428, col. 1)

Appeal from the decision of the District Judge, Kanara, in Appeal No. 99 of 1923, confirming the decree of the Subordinate Judge, Kumta, in Civil Suit No. 158 of 1921.

Mr. *S. V. Palekar*, for the Appellant.

Mr. *G. P. Murdeshvar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The first defendant executed two *Mulgeni* leases, one on September 26, 1917, in favour of Vithoba Madhav, and another on January 27, 1917, in favour of Sheshgiri Upendra, for the suit holding agreeing to pay seventeen *Mangis* of *Kuchgi Talsal* rice to each of them for the one-third *Malki* of each of the suit holding and on default to pay interest. On November 14, 1919, the two *Maliks* by two separate deeds sold their *Malki* in the suit holding to the plaintiff, including, in the areas sold, the alluvial accretions also. The plaintiff sued to recover arrears of rent Rs. 195-8-0 and proper rent and profit for the accretions in the suit holding with future mesne

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Before the plaintiff purchased the land the District Deputy Collector on September 18, 1919, passed an order under section 63 of the Bombay Land Revenue Code by which certain alluvial land had been offered to the plaintiff's vendors for a certain price together with payment of the annual assessment. The first defendant contended that he was not bound under his leases to pay the plaintiff any proportionate rent for the alluvion. Both the Courts have held that he must pay Rs. 10-8-8 to the plaintiff in respect of the alluvion.

The first defendant has relied on his lease according to which the rent fixed was not to be increased. Neither the lessors nor their descendants were to claim for an increase or a decrease of the rent on any ground whatever. If the assessment due in respect of that plot would be enhanced in future then the defendant was to pay the enhancement. This alluvion, in the circumstances of the case, must be dealt with as a separate piece of land. As long as the alluvion does not exceed an acre the occupant is entitled to the temporary use thereof. It is only when the area of alluvion goes beyond that extent that it shall be at the disposal of the Collector, subject to the provisions of section 63. The Collector under that section can offer it to the occupant, and if the occupant refuses the offer, the Collector may dispose of it. This alluvion, therefore, must be treated, since sections 63 and 64 of the Bombay Land Revenue Code were put into operation with regard to it, as an entirely separate piece of land, and the tenant would no longer be able to cultivate it as part of his original holding. The landlord, in my opinion was entitled, as he had to pay a certain price for it and the assessment to Government, to demand a proportionate rent from the tenant. The tenant can say "this is not a part of my original holding and I do not want to cultivate the extra land." But if he insists on cultivating the extra land, then he is bound to pay a proportionate rent. He cannot stay "I shall remain in occupation of this land as an accretion to my holding without paying any further rent." In my opinion, therefore, the decision of the Appellate Court was right and the appeal must be dismissed with costs.

Shah, J.—I agree.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1084 OF 1923.

February 1, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Arthur Page.

MAHARAJ BAHADUR SINGH—DECREE-HOLDER—PETITIONER

versus

NOSHARAN BIBI AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58, 60--Attachment of property in possession of mortgagee—Removal of attachment—Equity of redemption, attachment of, whether can be allowed to continue.

If property in the possession of a usufructuary mortgagee is attached, under O. XXI, r. 54, Civil Procedure Code, by the holder of a money decree against the mortgagor and the mortgagee applies for removal of the attachment, under O. XXI, r. 58, Civil Procedure Code the Court has no alternative but to release the attachment. (p. 429, col. 2.)

Kassiram Saheb Holbaraa v. *Vithaldas Mangalji*, 10 B. H. C. R 100 and *Parashram Hartal* v. *Govind Ganesh*, 21 B. 226 ; 11 Ind. Dec. (N S) 153, followed.

But if it can be inferred that the intention of the decree-holder was not to attach the property itself but the equity of redemption, the attachment may be allowed to continue upon the equity of redemption (p.430, col 1.)

Parashram Harlal v *Govind Ganesh*, 21 B. 226 ; 11 Ind. Dec. (N. S.) 153, relied upon.

Rule against the order of the Munsif, First Court, Rampurhat, dated the 28th July 1923 in Claim Case No. 36 of 1923.

Dr. *Sarat Chandra Basak* (with him Babus *Priyanath Dutt* and *Urukram Das Chakraburty*), for the Petitioner.

Babu *Baranasibasi Mukerji*, for the Opposite Parties.

JUDGMENT.

Suhrawardy, J.—In this case the decree-holder petitioner attached certain property belonging to this judgment-debtor. The opposite party laid a claim to the property attached on the ground that he was a usufructuary mortgagee in possession and prayed that the attachment might be withdrawn. There was an investigation and the Court below allowed

the claim and passed the following order regarding attachment: "As a usufructuary mortgagee in possession, the claimant is entitled to an order of removal of attachment. The claim is allowed. The attached property be released from attachment." This Rule has been obtained to have this order set aside.

It is urged by the petitioner that the order is wrong in law. He contends that what he attached was the interest of the judgment-debtor in the property. That interest has now been found to be only the equity of redemption and his attachment ought to be confined to that interest. The whole attachment ought not to have been withdrawn but that the equity of redemption should have been sold in execution of the decree. In my opinion, this contention is not correct; under O. XXI, r. 58, a claimant comes before the Court and alleges that the property is not liable to be attached. The property in this case was that entire interest of the judgment-debtor in the property attached and the usufructuary mortgagee under section 58 came to Court and asked that that interest could not be attached as he was in possession of it. The Court had to investigate that claim and come to a finding under r. 60 as to whether the claimant was in possession of the attached property. If the claimant was in possession of the attached property, the Court was bound to release the attachment. It, therefore, follows that in this case the Court was right in directing the release of the attachment. This view was adopted so long ago as 1873 in the case of *Kassiram Saheb Holkar* v. *Vithaldas Mangalji* (1). This was followed by Farran, C. J. in the case of *Parashram Herlal* v. *Govind Ganesh* (2). There the learned Chief Justice observed, as follows: "The attachment of such property is effected under section 274 of the Code (O. XXI. r. 54) by an order prohibiting the judgment-debtor from transferring or changing the attached property in any way and all other persons from receiving the same from him by purchase, gift or otherwise, such order being proclaimed and notified as there directed. The property to be attached should, however, be not the mortgaged property itself, but the equity of redemption of the mortgagor or as it is called in section 60, T. P. A. the right of the mortgagor to redeem the mortgaged premises. This is not vested in the mortgagee nor does he hold it in trust for the mortgagor. When the right to redeem only is attached, the mortgagee cannot come in and ask to have the attachment raised under section 280 (O. XXI, r. 80). It is otherwise when the property itself is attached as it was in the case of *Kassirao Sahib Holkar* v. *Vithaldas Mangalji* (1) referred to above." A similar view was expressed in the case of *Gonesh Mareshwar* v. *Purshottam Balkrishna Rodi* (3). In that case the question of withdrawal of attachment was not raised and the property was sold and purchased by the attaching creditor. But Scott, C. J., observed, with regard to the illegality of the order of the Court below, that the attached property should have been released under section 280 (O. XXI, r. 60) and the judgment-creditor should have been left to the suit allowed by section 283. The order passed by the Court below was irregular as section 282 only applies to cases of mortgages or liens created in favour of a person not in possession. This view is further strengthened by a reference to O. XXI, r. 62, that being a case of simple mortgage where the mortgaged property is not in possession of the mortgagee. A special provision is made which enables the Court to sell the attached property subject to the mortgage or charge. This leads to the inference that in the case in which the mortgaged property has passed from the possession of the judgment-debtor to that of the mortgagee the Court has no alternative but to release the property from attachment. The question, therefore, that is raised in this rule should be answered in the negative and the petitioner is not entitled to succeed.

But we should adopt the course that was followed in the case of *Parashram Harlal* v. *Govind Ganesh* (2), as it is the course which is commendable in the circumstances of this case also as Dr. Bysuor contends that the intention of the decree-holder was to attach the right, title and interest of the judgment-debtor in the property whatever it might be. We may, therefore, be left to infer that the intention of the decree-holder was not to attach the pro-

(1) 10 B. H. C. R. 100.
(2) 21 B 226; 11 Ind. Dec. (N. S.) 153.
(3) 1 Ind. Cas. 106; 33 B. 311; 11 Bom. L. R. 26; 5 M. L. T. 228.

perty itself but the equity of redemption of the judgment-debtor therein, though that intention has not been actually expressed.

The order, therefore, that we purpose to pass in this Rule is that the Rule should be made absolute, the order removing the attachment of the property is set aside and we direct that the attachment will continue upon the equity of redemption of the judgment-debtor. As the litigation has proceeded so far on account of the conduct of the petitioner he must pay the costs of the opposite party both here and in the Court below. We assess the hearing fee in this Court at 2 gold mohurs.

Page, J.—I am of the same opinion. I only desire to add that the course which we propose to adopt is in accordance with common sense, and, in my opinion, also in accordance with the power vested in the Court under O. XXI, r. 60 and also with the decision of the Bombay High Court in the case of *Parashram Harlal* v. *Govind Ganesh* (2).

S. D. *Rule made absolute.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 11 OF 1921.

March 6, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

THE NARSINGGIRJI MANUFACTURING COMPANY—PLAINTIFF—APPELLANT

versus

BUDANSAHEB ABDULSAHEB KAJI —DEFENDANT—RESPONDENT.

Vendor and purchaser—Contract for sale of goods—Refusal to take delivery—Property in goods, whether passes—Damages, measure of—Damages claimed on wrong basis—Amendment of plaint.

Where a purchaser does not take delivery of goods ordered by him, the vendor cannot resell the goods on his account as the property in the goods has not passed to the purchaser. But he can claim damages the measure of which, under the ordinary rule, would be the difference between the contract rate and the market rate at the date of the breach. (p. 431, col. 2)

In such a case as the above if the vendor claims as the measure of damages the difference in price which he realized at the resale of goods and the contract price, the Court can nevertheless award damages according to the correct measure even without an amendment of the plaint to that effect. (p. 431, col. 2)

Angullia & Co. v. *Sassoon & Co.*, 18 Ind. Cas. 705; 39 C. 668; 16 C. W. N 598, not followed.

Appeal from the decision of the First Class Subordinate Judge, Sholapur, in Suit No. 541 of 1919.

Mr. *H. C. Coyajee* (with Mr. *N. V. Gokhale*), for the Appellant.

Mr. *G. N. Thakor* (with Mr. *G. P. Murdeshvar*), for the Respondent.

JUDGMENT.—The plaintiff Company, hereafter called the plaintiff, sued to recover Rs. 33,818-9-9 by way of damages for breach of contract. There were various contracts entered into between the plaintiff and the defendant from July 3, 1918, to September 1, 1918, for the purchase of saris, yarn, and dhotis. The delivery was to be taken on or about December 31, 1918.

The plaintiff alleged that the defendant did not take delivery of all the goods within the stipulated period. He took delivery of only forty bales as described in para. 2 of the plaint at the rates of Rs. 16-14-0 per piece. The plaintiff then informed the defendant by a notice of December 31, 1918, that he should take delivery of the goods after paying their price, and it was stated therein that the goods would be sold by public auction if delivery was not taken. After the notice, the defendant requested the plaintiff to extend the time up to the end of March, and the plaintiff agreed to do so on deposit of Rs. 7,500 in case any damages were sustained. Accordingly the plaintiff alleged that the time was extended up to March 31, and thereafter the defendant took delivery of certain goods but refused to take delivery of the remainder in spite of the notice sent on March 22. The goods were sold by the plaintiff on April 3, and the plaintiff claimed that the Company was entitled to recover from the defendant the difference between the sale price and the contract price after giving credit to the defendant for Rs. 7,500.

The defendant admitted the agreement sued upon but contended that he could not take delivery of the goods as they were not in stock, and that the deposit of Rs. 7,500 was made

for the purpose of deriving interest and had no connection with the transactions in suit.

The following issues were raised :—

(1) Whether the plaintiff was not ready and able to give delivery of goods as per agreement to the defendant?

(2) Was the time extended up to the end of March 1919 as alleged?

(3) Was parol evidence admissible to prove the extension of time having regard to section 91 of the Evidence Act?

(4) If time was extended, what was the amount of damages?

(5) If the time was not extended, what damages were proved?

(6) What decree should be passed?

The Judge held that the time was not extended up to the end of March 1919, as alleged, considered it unnecessary to find on issues Nos. 4 and 5, and dismissed the suit on the authority of the decision in *Angullia & Co.* v. *Sassoon & Co.* (1) where it was decided that inasmuch as the claim for damages was based on a re-sale, in the circumstances of the case no decree could be made for damages on the basis of the difference between the contract and market rates. The Judge said :—

"It is finally to be reconsidered whether the damages cannot be awarded to the plaintiff on the assumption that there is a breach of contract which entitles him to claim damages under section 73. Having regard to the principle laid down in 24 and 39 Cal. I think that this cannot be done. It is quite clear that until the plaint is amended in the way suggested in those rulings the relief sought is unawardable."

Later on at page 5 the Judge says :—

"There is no amendment in the plaint. It is worthy of remark that the prices were going down after the contracts were entered into. The defendant, therefore, must be unprepared to meet a case not at all disclosed in the pleadings. In fact we have not before us defendant's answer to the case which was never propounded but on the strength of which I am called upon to award a decree merely because there is an issue as to the genesis of which enough has already been said. Particularly there is no reason to sympathise with the plaintiff because it is unreasonable obstinacy which was probably responsible for the refusal to amend the plaint though the objection was stoutly urged on behalf of the defendant. It is, I concede, otherwise, if the plaintiff disagrees with the view which I had taken, but it is a little short of folly to take this risk and pin their whole faith upon a fact that an issue has been raised."

Now this is a perfectly simple case of a claim for relief on the ground that the defendant has broken his contract by not taking delivery of the goods ordered by him. Clearly the property in the goods did not pass to the purchaser, and if the purchaser failed to take delivery on the due date, then the ordinary rule would apply and the measure of damages would be the difference between the contract rate and the market rate at the date of the breach. The contract provided that if the purchaser failed to take delivery of the goods, the vendor should sell the goods to another. In spite of this provision, and although the Judge rightly found that the property in the goods had not passed to the purchaser, by some curious process of reasoning he came to the conclusion that the plaintiff had not an uncontrolled power of sale. As a matter of fact the provision in the contract with regard to the vendor's power to sell the goods was unnecessary, and the failure to recognise this has caused one of the errors in the judgment under appeal. In the next place, the fact that the plaintiff claimed as the measure of damages the difference between the price, which he realised on the re-sale of goods and the contract price, would, in my opinion, be no reason for the Court to refuse to award damages according to the correct measure. With all due respect to the Judges who decided *Angullia & Co.* v. *Sassoon & Co.* (1) it seems to us that it is going too far to hold that when a plaintiff has made a mistake in demanding damages on a wrong basis, the Court must refuse to set right the mistake by directing the damages to be calculated in the proper way unless the plaint is amended. In 1919 when hundreds of suits were being filed for breach of contract in this Court, I tried many cases in which damages were claimed on the basis of the prices realised by the sale of the goods of which the purchasers had

(1) 18 Ind. Cas. 705; 39 C. 589; 16 C. W. N. 593.

failed to take delivery, but it was never considered that this was a defect which was fatal to the suit unless the plaint was amended. It was at once conceded that the prices so realised could only be evidence of the market price at the time of the sale, which might or might not be relevant on the question of the market price at the date of the breach. I think, therefore, that the suit was wrongly dismissed.

The plaintiff had a good claim unless the Court could come to the conclusion on the first issue that the plaintiff was not ready and able to give delivery of the contract goods on the due date. We must set aside the order dismissing the suit and remand the case to be re-tried in the Court below on the following issues :—

(1) Was the plaintiff ready and willing to give delivery of the contract goods according to the terms of the contract to the defendant ?

(2) If the breach of contract was by the defendant and not by the plaintiff, what was the market price of the goods on December 31, 1919 ?

The Court below has found that the contract time was not extended. If the defendant committed the breach the plaintiff will be entitled to the difference between the contract rate and the market rate as found. The item of Rs. 7,500 must be included as having been paid by the defendant under the contract, and consequently the plaintiff must give him credit for that amount.

The defendant did not go into the witness-box to support his story that there was a separate deposit at interest and it would not be fair to the plaintiff to allow any fresh evidence on the point. Fresh evidence will only be allowed on the question what was the market rate at the date of the breach, if it is found that the defendant had committed the breach.

The appellants are entitled to costs of the appeal. Costs in the lower Court to be costs in the cause.

N. H. *Decree reversed : case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2281 OF 1921.

January 28, 1924.

Present :—Mr. Justice Rankin and Mr. Justice Mukerjee.

KUMUDINI DASSYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUKTA SUNDARI DASSYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Variance in pleadings and proof—Hindu Law—Joint family property—Presumption of jointness—Conduct of parties when no evidence as to nucleus of joint funds—Hindu ladies exclusion, when to be inferred—Duty of Court.

Where it is alleged in the plaint that certain lands were acquired by B in respect of which the plaintiff could not possibly have any definite information and if it subsequently transpires in the course of the proceedings that it was not B but S who had acquired the lands for the joint family and as a member thereof, there is not such a variation in the plaintiff's case as would either disentitle him to a decree or discredit his case altogether. (p. 434, col. 1.)

Ram Nath Chatterji v. *Kusum Kumari Debi*, 4 C. L. J. 56, followed.

In the absence of proof of division the legal presumption is that the normal state of every Hindu family is joint in food, worship and estate. The presumption, however, is not applicable after separation in the sense of disruption such as would put an end to a joint family. (p. 434, col. 1.)

Banoo v. *Kasiram*, 3 C. 315 (P.C.) : 3 Sar. P. C. J. 78; 1 to 3 Suth P. C. J. 490 ; Rafique and Jackson's (P.C.) No. 49; 2 Ind. Jur. 151; 1 Ind. Dec. (N. S.) 783; *Obhoy Charan Ghose* v. *Gobind Chander Day*, 9 C 237 ; 7 Ind. Jur. 361 ; 5 Shome L. R. 51; 4 Ind. Dec (N. S.) 803, referred to.

Where there is no evidence as to nucleus it may be very readily presumed from the subsequent conduct of the parties, that the property was joint. (p. 435, col. 1.)

Where the question of inclusion of Hindu ladies is concerned, the Court has got to be exceedingly careful to come to a conclusion one way or the other, so long as it does not appear that they ceased to obtain their maintenance from the family. (p. 434, col. 2.)

Appeal against the decree of the First Additional District Judge, Mymensingh, dated the 1st July 1921 reversing the decree of the Subordinate Judge, Second Court, Mymensingh, dated the 11th August 1919.

KUMUDINI DASSYA *v.* MUKTA SUNDARI DASSYA

Babu *Dwarka Nath Chakravarty*, with Babu *Khitish Chandra Neogi* and *Raman Mohan Chatterjee*, for the Appellant.—This is a judgment of reversal. The suit was decreed in part by the Trial Court but was dismissed by the lower Appellate Court which has reversed all findings of fact. The most important question is whether the property was joint. In this matter, the Trial Court has come to a finding that the property has all along been treated as joint property. According to the learned Judge the plaintiffs' evidence on this point is very weak but he has not considered that all property of a joint Hindu family is joint and that there is a legal presumption of jointness of every Hindu Family. The onus is all the other way. The other side is to show that the brothers had separated prior to the acquisition of the property. Moreover the finding of the learned Judge as to separation is not sufficient. He has not found that the brothers were separate in anything but in mess and that does not effect a separation in estate.

Babu *Brajalal Chakravarty*, with Babu *Birendra Kumar De*, for the Respondents:—The case is concluded by the findings of fact. The Appellate Court distinctly finds that there was a separation and that is conclusive. Cites *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1) and *Bannoo* v. *Kashee Ram* (2). However the plaintiff is changing his front from time to time. [Reads the plaint and shows the geneological tree.] He subsequently sets up a different case altogether. The whole case fails and the suit should be dismissed.

Babu *Dwarka Nath Chakravarty*, replied in brief.

JUDGMENT.

Mukerji, J.—The pleadings of the parties are set out in sufficient detail in the judgment of the Trial Court and it is unnecessary to repeat them here. A reference to the geneological tree in that judgment will show how the parties to this suit are related to each other.

(1) 9 C. 237 : 7 Ind. Jur. 361 ; 5 Shome L. R. 51 ; 4 Ind. Dec. (N.S.) 808.

(2) 8 C. 315 (P. C.) ; 8 Sar. P C. J. 781 ; 3 Suth. P. C. J. 490 ; Rafique & Jackson's (P.C.) No. 49 ; 2 Ind. Jur. 151 ; 1 Ind. Dec. (N. S.) 788.

The substantial points in controversy in this litigation were whether the lands in suit were the joint property of a family which traces its origin to one Bali Charan De, and whether the plaintiffs as widows of two of the male-members of the family were entitled to certain shares therein.

The subject-matter of the suit were plots bearing *Khatian* Nos. 182, 91, 108, 138 and 208.

The Subordinate Judge dismissed the suit so far as it related to lands of *Khatian* No. 182 and made a decree in favour of the plaintiff No. 1 declaring her title to 1/6th share and in favour of the plaintiff No. 2 declaring her title to 2/9 ths share in the lands of *Khatian* Nos. 91, 108, 138 and 208, and for joint possession in favour of both the plaintiffs with the defendants to the extent of their respective shares.

On appeal by the defendants Nos. 1 and 4 against the said decree the suit was dismissed by the first Additional District Judge of Mymensingh.

Against this decision the plaintiffs have preferred this appeal.

The two Courts below have recorded in their respective judgments findings on some of the questions which arise in the case, which may be said to be diametrically opposite in nature and this has necessitated our going into the matter very carefully in order to see whether the findings arrived at by the Court of appeal below do really cover the whole ground, whether they adequately dispose of the various issues which arise in the case and whether they are sufficient for dismissing the plaintiffs' suit.

Now the first question that arose in the case was whether the family was a joint Hindu family and if so, who were the members thereof and whether the properties were acquired by Sambhu Nath as a member of the same. On this question the learned Subordinate Judge recorded a clear finding in his judgment which was in these words. "My conclusion, therefore, is that Sambhu Nath acquired the *chak* and the *jote* as a member of a joint Hindu family consisting of himself,

his brothers and nephews." The learned Additional District Judge observed in his judgment. "The Lower Court proceeded on the assumption that Sambhu acquired the lands for the family. He was not at all justified there. That was not the case for the plaintiffs. The evidence is too weak to lead to the conclusion that Sambhu and his two brothers were joint when the lands were acquired. There is no evidence worth the name that the brothers had any joint property from the income of which the lands could be acquired. There is no evidence that the lands were acquired with the joint exertion of all the brothers." Now what is referred to as being a variation in the plaintiff's case is not really a matter of much moment. The plaintiffs no doubt alleged in their plaint that the lands were acquired by Bali Charan, but that was a matter in respect of which the plaintiffs could not possibly have any definite information and if subsequently in the course of the proceedings it transpired that it was not Bali Charan but Sambhu Nath who had acquired the lands but that he acquired it for the joint family and as a member thereof, it cannot be said that there was such a variation in the plaintiffs' case as would either disentitle them to a decree or discredit their case altogether (*Rama Nath Chatterjee* v. *Kusam Kumari Debi* (3). The treatment of this part of the case by the learned Additional District Judge seems to me to be open to serious objection. He has not found that Bali Charan was alive at the date of acquisition of the properties. He seems to have held that there was at that date a family consisting of the three brothers but was unable to hold that they were joint at that time. The acquisition took place not later than 1256 B. S. Now if the family was a Hindu family, there is the presumption that it was a joint Hindu family. The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption. His own finding as to separation the character of that separation is again a different matter and will be referred to hereafter-as recorded in his judgment is in the following words : —" It is clear on the evidence on the plaintiffs' side that the separation was more than some 30 years back. We cannot say on the evidence exactly when the separation took place. "We cannot say that Sambhu and his brothers did not separate from each other." In the present case, no separation in the sense of a disruption such as would put an end to a joint family was ever admitted, and it was not a case in which the plaintiffs were seeking to recover property from the hands of a member after such disruption as might negative the application of that presumption ; such as was the case in *Banoo* v. *Kashee Ram*(2) upon which was based the decision in *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1) to which reference was made on behalf of the respondents during the hearing of this appeal. The weak evidence that the learned Additional Judge speaks of, coupled with the presumption referred to above and which he has altogether ignored may be sufficient to come to the conclusion that it was a joint Hindu family.

[After discussing facts His Lordship proceeded to observe as follows:]

Then again the finding of the learned Additional District Judge on the question of what he calls separation of the family does not seem to me to be at all sufficient or conclusive. The separation referred to by him in his Judgment was, according to the finding of the Trial Court, a separation in mess only ; the learned Additional District Judge has not said that it was otherwise. Moreover in dealing with the character of possession exercised by Goloke and Ram Kumar, the learned Additional District Judge should have enquired into the circumstances under which they came to be in possession of the properties; and it is obvious that much would depend upon his conclusion on that point as also as to how Nidya and Kalitara came to be excluded at all and whether such exclusion, if any, was to their knowledge or not. On the question of exclusion so far as Hindu ladies are concerned it is well-known that the Court has got to be exceedingly careful to come to a conclusion one way or the other, so long as it does not appear that they ceased to obtain their maintenance from the family.

Lastly, a question of supreme importance in the case, having regard to the pleadings, was as to how the names of the ladies came to be

(3) 4 C. L. J. 56.

excluded from the finally published Record-of-Rights. There is no finding or discussion at all in the judgment of the learned Additional District Judge upon this question.

On the whole, therefore, I am not satisfied that the matters in controversy have been properly disposed of by the Court of Appeal below, and I am clearly of opinion that his treatment of the case is defective in essential particulars.

I would, therefore, set aside the decree of the lower Appellate Court and send back the case, to that Court to be dealt with afresh in the light of the observations made above. For the guidance of the lower Court I would call attention to the presumption of the jointness and that although there is no evidence worth the name, as the lower Court puts it, as to nucleus, from the subsequent conduct of the parties it may be very readily presumed that the property was joint. The question is whether the property was treated unambiguously as joint or separate property. If it does not appear on a careful review of the facts as a whole that it can be said to have been treated unambiguously either way, regard being had to the presumption of jointness with which we start, then I think there is no doubt that the plaintiffs will fail ; but only in that event.

I would only observe further that nothing that has been said in this Judgment should be taken as an expression of my opinion on any question of fact. The costs will abide the result.

Rankin, J.—I entirely agree.

S. D. *Case sent back.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 465 AND 546 OF 1922.

April 4, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

NABAR GOVIND NAVATHE—PLAINTIFF—APPELLANT

versus

BALVANT HARI NAVATHE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption- Grandson succeeding grandfather -Grandson, death of—Succession opening to grandmother—Grandmother, whether can adopt.

Under the Hindu Law if a grandson succeeds directly to his grandfather and dies leaving his grandmother as his sole heir, the latter can adopt a son to her deceased husband. (p. 437, col. 2.)

Case-law discussed.

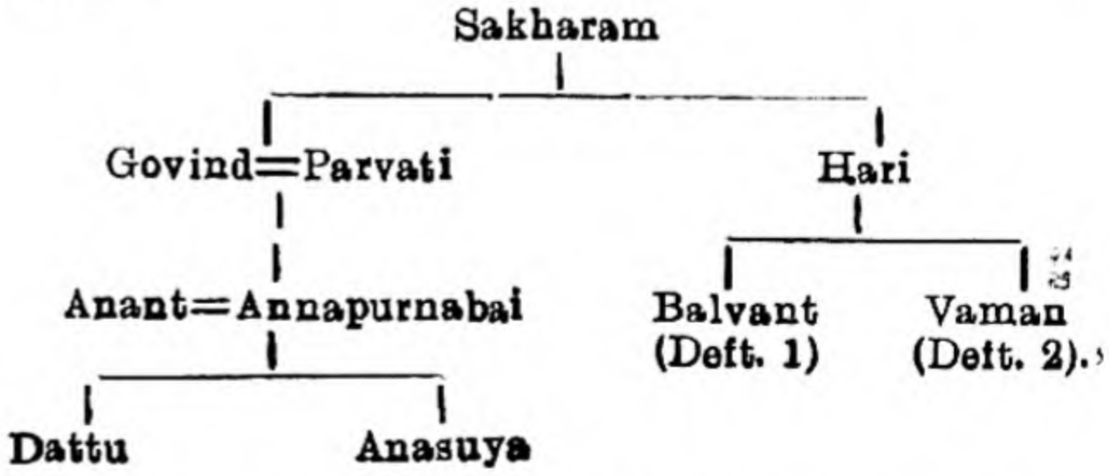
Appeals from the decision of the District Judge, Satara, in Appeal No. 389 of 1920, confirming the decree of the Joint Second Class Subordinate Judge, Karad, in Civil Suit No. 452 of 1918.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *S. R. Parulekar* for Mr. *H. G. Desai*, Mr. *P. S. Bakhale* for Mr. *S. R. Bakhale*, for the Respondents.

JUDGMENT.

Shah, J.—The question of law in this second appeal is whether the adoption of the plaintiff by Parvatibai after the death of her grandson Dattu is valid. The relationship of the parties may be indicated by the following table :—



Govind and Hari were divided: Govind's son Anant and Anant's wife Annapurnabai predeceased Govind. Govind died leaving a widow Parvati and a grandson Dattu and a granddaughter Anasuya. On Govind's death Dattu became the owner of the property. Dattu died unmarried : and his grandmother Parvati succeeded him. She adopted the plaintiff

who has filed the suit to enforce his rights as the adopted son of Govind against the representatives of Hari's branch. The fact of the adoption was held proved by the Trial Court and not challenged in the lower Appellate Court. Both the lower Courts have held the adoption to be invalid on the authority of *Ramkrishna* v. *Shamrao* (1). The lower Appellate Court was of opinion that the fact that Parvati's son Anant never succeeded would not make any difference as to the applicability of the said decision.

In the appeal before us the correctness of this view is questioned. It is urged that in *Ramkrishna* v. *Shamrao* (1) the grandmother adopted after the estate had vested in her son and had descended to the grandson on the death of the son, that while the grandmother would have no authority in such a case to adopt on the death of the grandson, the present case is essentially different in so far as her position was exactly the same on Dattu's death as that of a mother who would inherit the estate on the death of her son, who has left no other nearer heirs.

There is no decided case so far as I have been able to ascertain, and none has been cited to us at the bar, dealing with the question of the power of the grandmother to adopt to her husband under circumstances such as we have in this case.

The decision in *Ramkrishna* v. *Shamrao* (1) requires to be closely examined in order to see whether it can apply to a case of this kind. In that case the essential facts were that Sitabai's husband Ramchandra died in the lifetime of his father Anandrao leaving a son Sakharam. On Anandrao's death the estate passed to his grandson Sakharam. Then Sakharam died leaving a widow Gangabai and a son Dattatraya. Then Gangabai died and subsequently Dattatraya died unmarried. On his death his grandmother Sitabai succeeded to his property. Sitabai then adopted a boy: and the question that was referred to the Full Bench was "whether a grandmother succeeding as heir to her grandson dying unmarried is entitled to adopt in the circumstances of the present case." Unfortunately the question referred to the Full Bench has not been accurately stated, and the words "in the circumstances of the present case" have been omitted in the report at p. 527. The judgment of the Full Bench delivered by Chandavarkar, J., makes the position clear. After stating the case the learned Judge has pointed out as follows (p. 528) :—

"The real question which we have to decide is whether, apart from the general principles of Hindu Law bearing on the subject of a widow's power to adopt a son to her deceased husband, the decision of this Court in *Hasabnis's case* (2) has interpreted the law correctly as expounded by the Privy Council in *Bhooban Moyee's case* (3) and reaffirmed in their later decisions in *Pudma Coomari's case* (4) and *Thayammal's case* (5)."

These cases are then examined in the judgment and the principle deduced therefrom is stated as follows:—"Where a Hindu dies leaving a widow and a son and that son dies leaving natural born son, or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never after be revived". The argument based on the consideration that the grandmother took an absolute estate as heir of her grandson was advanced but negatived; and the basis of that argument is not well founded as it has been held by this Court in a later decision that the grandmother like the mother takes only a widow's estate (see *Dhondi Mahipaty* v. *Radhaboi Shaboji* (6) In the result the Full Bench held that the decison of this Court in *Hasabnis's case* (2) correctly interpreted the law as laid down in the Privy Council with reference to the power of a widow to adopt and answered the question referred to that Bench in the negative. It is clear that the question of the grandmother's power to make a valid adoption when the estate has passed directly from the husband to the grandson and has come back to her directly from her grandson without the intervention of any other heir did not arise and was not considered in the case.

(1) 26 B. 526 ; 4 Bom. L. R. 315.

(2) 17 B. 164; 9 Ind. Dec. (N.S.) 107.

(3) 10 M. I. A. 279 ; 3 W. R. P. C. 15 ; 1 Suth. P. C. J. 674 ; 2 Sar. P. C. J. 111 ; 19 E. R. 978.

(4) 8 I. A. 229; 8 C. 302 ; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148 ; 4 Ind. Dec. (N. S.) 198.

(5) 14 I. A. 67; 10 M. 205; 11 Ind. Jur. 271 ; 5 Sar. P. C. J. 10 ; 3 Ind. Dec. (N. S.) 895.

(6) 16 Ind. Cas. 848; 36 B. 546; 14 Bom. L. R. 569

NABAR GOVIND NAVATHE *v.* BALVANT HARI NAVATHE

The question that we have to decide is really one of first impression. In the very nature of things such a case could not frequently arise. It is clear that Govind's widow Parvati would have been entitled to adopt if Govind had died sonless, *i. e.*, without a grandson- or great-grand-son. (See *Bharmappa* v. *Ujjangauda* (7). If he had left only a son and if that son died too without leaving any heir nearer than his mother Parvati, Parvati would have been entitled to adopt according to the decisions of this Court. In the present case, however, the son and his wife predeceased Govind. When Govind died he had a grandson. So he did not die sonless. The grandson continued the line : but on the death of the grand-son without any son or widow behind him, *i. e.*, without any nearer heir, the estate went to Parvati as his grand-mother. The line of Govind became extinct on Dattu's death and the considerations which apply to a mother in that position in favour of letting her continue the line apply to the case of a grand-mother. Mr. Justice Ranade has observed in *Gavdappa* v. *Girimallappa* (8) with reference to the case of a mother that "If a widow cannot adopt after the death of her natural or adopted son under any circumstances, half the adoptions that take place would have to be declared invalid." This observation cannot apply with the same force or anything like it to the case of a grand-mother. But on principle her position is not distinguishable from that of a mother where the devolution of the estate has followed the course as in this case. On the other hand it is urged that the case of a mother is an exception to the general rule and it is not proper to extend the exception in favour of the grand-mother. In this Presidency no express power enabling the widow to adopt to her husband is essential. The mother inheriting the estate of her son, who has left no son or widow is placed exactly in the same position as a widow of a Hindu who has died sonless. On the facts of the present case it seems to me that Parvati was placed on Dattu's death exactly in the same position as a mother would be on the death of her son without any nearer heir. On the whole it seems to me that it would be in keeping with the liberal interpretation of the widow's power to adopt, accepted in this Presidency, to hold that a grand-mother could make a valid adoption to continue the line of her husband under circumstances such as we have in this case.

I may add that I have not been able to find anything in modern works on Hindu Law which can throw any light on this question except in Mr. Justice Mulla's work on Hindu Law. In the 4th Edition of this book at p. 430 we find illustration (*j*), which is exactly the present case.

I may add that the Privy Council decisions, referred to in *Ramakrishna* v. *Shamrao*, (1) and the later case of *Madana Mohana* v. *Purushothama* (9) in which the decision of the Full Bench is referred to with approval, all deal with the question of the power of the mother to adopt, on the death of her son, when the son has left no nearer heir than the mother. There is no decision bearing on the question that we have to decide ; and I am of opinion that the view taken by Mr. Justice Mulla in his book on Hindu Law accords with the powers of the widow to continue her husband's line as understood in this Presidency. If the *ratio decidendi* of *Ramkrishna* v. *Shamrao* (1) is to be applied to this case it may be stated that on the facts the stage when Parvati's powers to adopt can be held to be extinguished has not been reached. I would, therefore, allow the appeal and decree the plaintiff's claim as prayed with costs throughout on defendants Nos. 1 and 2.

Macleod, C. J.—I agree, and I should like to add a few remarks with regard to the report of the decision in *Ramkrishna* v. *Shamrao* (1) which appears to have prevented the joint Subordinate Judge from deciding in the plaintiff's favour as he was evidently inclined to do. The pedigree in *Ramkrishna* v. *Shamrao* (1) was as follows :

Anandrao, d. 1878.
|
Ramchandra=Sitabai
|
Sakharam, d. 1886=Gangabai
|
Dattatraya

(7) 65 Ind. Cas. 216 ; 46 B. 455 ; 23 Bom. L. R. 1820 ; (1922) A. I. R. (B.) 178.

(8) 19 B. 331 at p. 337 ; 10 Ind. Dec. (N. S.) 224.

(9) 46 Ind. Cas 481 ; 45 I. A. 156 ; 20 Bom. L. R. 1041; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 25; (1918) M W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 23 C. W. N. 177 (P.C.).

NABAR GOVIND NAVATHE *v.* BALVANT HARI NAVATHE

Ramchandra died in the lifetime of his father leaving his widow Sitabai and a son Sakharam. When Anandrao died Sakharam succeeded to his estate. Sakharam died leaving his widow Gangabai and a son Dattatraya. Then Gangabai died and lastly Dattatraya died unmarried. His grand-mother Sitabai succeeded as his heir, and she adopted the plaintiff to her husband Ramchandra. On Sitabai's death her husband's cousin took possession of the property disputing the plaintiff's status as adopted son. The plaintiff's suit was dismissed in both the lower Courts. In second appeal the Judge as reported referred the following question for the decision of a Full Bench.

"Whether a grand-mother, succeeding as heir to her grand son, who died unmarried can by Hindu Law make a valid adoption."

It would have been impossible for the Full Bench to have attempted to answer so general a question, and as a matter of fact the question referred was whether in the circumstances of the case (as detailed above) a grandmother succeeding as heir to her grand-son dying unmarried was entitled to adopt.

Chandavarkar J. was of opinion that the answer to the question depended on whether the inheritance had vested in some heir of the son other than the mother. Her power of adoption did not depend upon the mere vesting of the estate in herself at any time. Reference was made to the three hypothetical cases put by Lord Kingsdown in *Bhoobun Moyee's case* (3). Really there were four cases including the one actually before the Court. These may be usefully set out as follows :—

1

A=B
|
C
|
D
|
E

If A dies leaving a widow B and a son C, and C dies leaving a son D, and D dies leaving a son E, B cannot adopt to A on the death of E.

2

A=B
|
C
|
D

If D dies without leaving a son, B cannot adopt, as her power came to an end when the estate passed to her grand-son D.

3

A=B
|
C=D

If C dies leaving a widow D as his heir B the widow of A cannot adopt so as to defeat the vested estate of D.

4. If, however, C dies without leaving a son or a widow, B's power to adopt has not come to an end.

It is clear, therefore, that the case we have before us is not covered by the facts of the case either in *Ramkrishna* v. *Shamrao* (1) or any other reported case or by any of Lord Kingsdown's hypothetical cases in *Bhoobun Moyee's case* (3).

It does, however, appear as illustration (*j*) to section 386 of Mulla's Principles of Hindu Law. "A dies leaving a widow and a grandson B. On A's death B succeeds to the estate as his grandson, B then dies without leaving any wife or children. On B's death the widow succeeds to the estate as his grand-mother, the widow may adopt a son to her husband A."

The learned author supports his opinion in this way. When a husband has left a son but the son dies leaving his mother as his nearest heir, she can adopt to her husband. 'Son' means a son, grand-son or great grand-son. Accordingly, if the husband dies leaving only a son, or a grand-son or a great-grand-son, and the son or grand-son or great-grand-son dies leaving the first widow his nearest heir, her power to adopt has not been extinguished. It is otherwise if any intermediate estate intervenes, as that brings the first widow's power of adoption to an end. I see no reason why we should not accept this argument.

If there are only two steps in the inheritance (1) from the husband to the grand-son and (2) from the grandson to the widow grandmother, she can adopt to her husband.

N. H. *Appeal allowed.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 38 OF 1920.

November 24, 1919.

Present :—Mr. Justice Das and Mr. Justice Foster.

RAGHUBANS NARAYAN SINGH—APPELLANT

versus

KHUB LAL SINGH—RESPONDENT.

Court Fees Act (*VII of* 1870) *ss.* 7 (*V*) (*a*) *&* (*d*), 12 —*Claim for possession of* Khudkasht *lands lying within* Malkiat *shares—Possession of* Malkiat *shares also claimed—Separate Court-Fees payable for* Malkiat *and* Khudkasht.

The claim for possession of *Malkiat* does not include a claim for possession of the *Khudkasht*. Therefore, where possession of *Khudkasht* lands is claimed and in addition is also claimed possession of the *Malkiat* shares within which the *Khudkasht* lands, lie, separate Court fees should be paid on the market value of the *Khudkasht* lands. (p. 441, col. 1.)

The claim in respect only of *Khudkasht* lands falls under section 7 (V) (*d*) of the Court Fees Act and not under section 7 (V) (*a*) of that Act. (p. 441, col. 1.)

FACTS appear from the following order of the Registrar :—

Order of the Registrar.—This is a Court-fee matter. The suit out of which this appeal arises was for possession of 15-as. *milkiat* share in one *Tauzi* and one-anna odd share in another *Tauzi*, for possession of 108 *bighas* of *Khudkasht* land, and for mesne profits. At the hearing it was not contended that the plaintiffs had not these shares in the two *Tauzis*, and it was contended by the defendants, and was found to be the case by the Court, that these shares had been handed over to the plaintiffs in 1315. A modified decree was passed in plaintiffs' favour for 63 *bgs.* odd and for mesne profits of 63 *bgs.* odd which were to be determined at a subsequent stage. The plaintiff has appealed, asking for a decree for 96 *bighas* odd instead of 63, and also for Rs. 600 more as costs. The *milkiat* shares and the *khudkasht* land were jointly valued at Rs. 15,000 and the value of the mesne profits was given as Rs. 1,387-4-0 Court-fee was paid on ten times the Government revenue of the *milkiat* shares and on the mesne profits. This appeal has been valued at Rs. 2,747 value of the land plus Rs. 600 costs. Court-fees on this amount have been paid. There are two questions for decision (1) under section 5 of the Court-Fees Act in regard to the memo. of appeal, (2) under section 12 in regard to the plaint.

(1) The only point in regard to the memo. of appeal is that the Stamp Reporter is of opinion that the appellants must also pay Court-fee on the mesne profits the amount of the mesne profits bearing the same relation to the total mesne profits on which Court-fees were paid in the lower Court as the land claimed in this appeal does to the land claimed in the plaint. Under the decree of the lower Court the mesne profits on the land decreed to the appellants are to be subsequently determined. We are not concerned with those mesne profits, but only with those which would be due on the land claimed in this appeal. The learned Vakil contends that he has not prayed for mesne profits in the memo. of appeal. He declines to state in the memo. of appeal that he did not claim mesne profits. In my opinion the appellants cannot be compelled to pay Court-fee on a relief they did not ask for and are not bound to ask for. But it is very necessary that this matter should not be overlooked when the appeal comes up for hearing. I direct that at the time of hearing the attention of the Bench be called to this report, and to the fact that the appellants have declined to pay any Court-fee on the mesne profits for the land claimed in this appeal, on the ground that they have not asked for any decree for mesne profits. The extra Court-fees would only be Rs. 15 and as the appellants have obtained a decree for mesne profits for so much of the land as was decreed to them in the lower Court, it is somewhat surprising that they are not claiming mesne profits in regard to the land which is now under appeal. But they are not bound to claim them, and as they have refused to pay any Court-fees they will not be entitled to get any decree for the mesne profits of any land which may be decreed to them in this appeal.

(2) The question at issue in regard to the plaint is both interesting and important. Had I had to decide it under section 5, I should have referred it to the Taxing Judge, but as

my decision will merely be under section 12, and as the appellants will probably refuse to pay, the question will come before the Bench for decision before the appeal can be heard. The whole plaint and the prayers therein will be found in the paper-book of the Calcutta High Court. The view of the Stamp Reporter is that the claim to the *Khudkasht* lands is not a claim under section 7 V (*a*) but under section 7 V (d), and Court-fee should be paid separately on the value of the *Khudkasht* lands. The contention of the appellants will be found in para. 12 of the plaint. It amounts to this that the greater contains the less and the *milkiat* includes the *khudkasht* lands. The question is of special importance in this case because there can be no doubt that the prayer for the *milkiat* right is a device to save Court-fees. For in the written statement the defendants say that there is no dispute about the *milkiat*, but that the dispute was about the *Khudkasht* lands which the defendants claim to be their *rayati jote*. The lower Court has found that the defendants' contention about the milkiat is correct, and that they had given up possession as they said at the end of 1315.

Ten times the Government revenue of the *milkiat* is Rs. 898-8 0 and so the plaintiffs paid only the Court-fees on that sum, namely, 67-8-0 but the value of the *milkiat* and the *khudkasht* lands jointly is Rs. 15,000. The question for decision, therefore, has two aspects :—

(1) If the prayer in regard to the *milkiat* were *bona fide* and if in addition to that prayer recovery of possession of certain plots of *khudkasht* land be prayed for, must Court-fees be paid under section 7 V (*d*) on their market value ?

(2) Whatever the answer to the first question is, whether the plaintiff can be allowed to make an unnecessary prayer in regard to the *milkiat* to avoid payment of Court fees on the *khudkast* lands which is the only dispute between the parties? Court fees on ten times the Government revenue of an estate containing valuable *khudkast* lands may frequently be lower than the Court fees on the market value of those lands, because the incidence of the permanently settled revenue is naturally very low compared with the present market value of an estate. In my opinion the pleadings in this case show that the plaintiffs' prayer in regard to the *milkiat* was unnecessary and was a mere device to save Court-fees. But even if this were not the case, I am of opinion that separate Court-fees must be paid on the market value of the *khudkast* lands. They form a part of the *milkiat*, and if the dispute were only about the share in the *milkiat* it was unnecessary to make a special prayer in regard to *khudkast* lands. In the plaint there is no special prayer for recovery of possession of the waste, jungle and the other rights inherent in the *milkiat*. It is stated that the defendants are in possession of the plaintiffs' share of the *milkiat* and of the *khudkast* lands If the share were decreed the *khudkast* lands would be included. It is not usual when claiming recovery of possession of an estate to claim separately recovery of possession of the *khudkast* lands plot by plot, any more than to claim recovery of possession of the jungle, waste, tanks, etc. In my opinion the plaintiffs were really making two distinct claims (1) for the *milkiat* share (2) for certain plots alleged by them to be *khudkast*. The first claim was not disputed, and in fact the plaintiffs were in possession of the *milkiat* share and only included a prayer about that share in order to save Court-fees. The whole dispute was in regard to the second claim whether particular lands were *khudkast* or not. In my opinion the plaintiffs in the lower Court ought to have paid additional Court-fees on Rs. 9,000 the market value of the *khudkast* lands. As reported by the Stamp Reporter there is, therefore, a deficit on the plaint of Rs. 347-8-0. If the appellants accept this decision one month's time is allowed within which to pay. If they do not accept let this matter be put up before the Bench for decision under section 12 of the Court-fees Act. One week is given within which the appellants should decide whether they accept the decision or not.

ORDER.

Das, J.—This is a Court-fee matter. The facts of the case will be found fully stated in the admirable order of the learned Registrar. The question for determination is, was the question of Court-fees wrongly decided by the Court in which the plaint in the suit was filed.

JAGRANI *v.* IQBAL NARAIN

The question arises in this way: The suit was for possession of 15 annas odd *Milkiat* share in *Tauzi* No. 655, and 1-anna odd share in *Tauzi* No. 657, for joint possession of 108 *Bighas* 14 *cottahs* 10 *Dh.* of *Khudkasht* lands. The *milkiat* shares and the *khudkasht* lands were jointly valued at Rs. 15,000, and Court-fee was paid on ten times the Government Revenue of the *Milkiat* shares under section (v) (*a*) of the Court-Fees Act. The question is, ought the plaintiffs-appellants not have paid Court-fees on their claim in respect of the *khudkasht* lands?

I have no doubt at all that if the claim was in respect only of the *Khudkasht* lands, the case would fall under section 7 (v) (*d*) of the Court-Fees Act and not under section 7 (v) (*a*) of that Act, that is to say, Court-fees would be payable on the market value of the land. But does it make any difference because the plaintiffs asked, in addition, for possession of the *Milkiat* shares within which the *Khudkasht* lands lie? The plaintiffs' view of the matter is contained in para. 12 of the plaint and is as follows: "As the *khudkasht* land, possession whereof is sought, lies within the *Milkiat*, the possession whereof is also asked, therefore, Court-fee for *Khudkasht* land is not paid separately and is included in that paid for the *milkiat*."

I am clearly of opinion that this view is not a correct one. A claim for possession of *Milkiat* does not include a claim for possession of the *Khudkasht*. The test, in my opinion, is this: Would the plaintiffs be entitled to direct possession of *Khudkasht* lands in a suit for possession of *Milkiat* shares? Clearly they would not be so entitled, if the defendants claimed to be tenants in respect of these lands. What the plaintiffs put in issue in the suit which they filed was, not only their right to receive rent in respect of the *Milkiat* shares, but their right to direct possession of lands in respect of which the defendants claimed to be tenants. If the claim for possession of *Milkiat* shares included the claim for the possession of *Khudkasht* land, then clearly there was no necessity for asking for any relief in respect of the *Khudkasht* lands.

I am of opinion that the Registrar has taken an entirely correct view of the matter. The appellants must pay the deficit within one month from to-day.

Foster, J.—I agree.

1 C—56

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 32 OF 1922.

March 16, 1923.

Present:—Mr. Simpson.

Must. JAGRANI—PLAINTIFF—APPELLANT

versus

P. IQBAL NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 109, cl. 15 and 194, cl. (b) and (c)—Profits, suit for—Lambardar, *failure of, to file accounts—Gross rental, liability on.*

In a suit for profits against a *lambardar*, the latter ought to file accounts especially when he is literate and on his failing to do so, he is liable to have a decree passed against him based on gross rental. [p. 442, cols 1 and 2.]

Ubaid Ullah Khan v. *Nazir Husain*, 24 Ind. Cas. 15; 1 O. L. J. p. 184, relied on.

Appeal against the judgment and decree of the District Judge, Lucknow, dated the 10th September 1922, confirming the decree of the Assistant Collector, First Class, Lucknow, dated the 15th November 1921.

Mr. *Gaya Prasad*, for the Appellant.

Mr. *P. C. Gupta*, for the Respondents.

JUDGMENT.—This is a second appeal, The suit was brought under section 108 clause 15 of the Oudh Rent Act for profits. The plaintiff is a co-sharer to the extent of 8 pies in a Mahal of 3 annas and 6 pies under-proprietary right. The suit was for profits of three years 1325 to 1327 F. The total amount claimed was Rs. 480. The first defendant P. Iqbal Narain was sued as a *lambardar*, the second defendant Kailash Narain was sued as a co-sharer. In the plaint itself this is not entirely clear. A decree based on gross rental is claimed against "the defendants." But as the case stands now after evidence has been taken, the plaintiff asks for a decree against the second defendant to the extent to which he has made collections in excess of his share and demands that she should get the balance of her claim from the first defendant as *lambardar* on a basis of gross rental. No relief is

claimed against his legal representative. We are not concerned now with the pleadings of defendant No. 3. Defendants Nos. 1 and 2 filed a separate written statement. The defence on which the decision of the Courts below turns is that these two defendants who were already superior proprietors acquired under-proprietary rights in this *Mahal* and that there has been a merger of the under-proprietary rights so that there is no longer any relationship between the parties as co-sharers, in virtue of which a suit could be brought under section 108 clause 15 of the Oudh Rent Act. I do not propose to devote much attention to this finding. The learned District Judge has ignored the provisions of section 124 C which provides that if a suit is instituted in a wrong Court and the appeal lies to the District Judge, the District Judge shall dispose of the appeal as if the suit had been instituted in the right Court. That is what I propose to do in the second appeal. The question, therefore, resolves itself into this:

> Whether the share of the profits to which the plaintiff is entitled have been realized by defendants Nos. 1 and 2 so as to give the plaintiff a just claim to recover them by a decree?

I am no longer concerned with the question whether the decree ought to be one of a Revenue Court or of a Civil Court. The respondents are not being taken by surprise. An issue was framed. "To what sum was plaintiff entitled?" and evidence was given on this point. The main evidence is the statement of account filed by the *patwari*. This account shows that on the basis of gross rental the plaintiff is entitled to Rs. 271-14-4. There is no rebutting evidence. I accept this account. There remain two questions for decision.

The first is the extent of the liability of defendant No. 2. That is set forth in the account as Rs. 141-8-2. There is no evidence to the contrary.

The second question is whether defendant No. 1 as a *lambardar*, ought to have been held liable on gross rental. The *patwari* has sworn that the defendant No. 1 is *lambardar* and there is no express denial of the fact in his pleadings. He is described in the plaint as the Government Pleader of Shahjahanpur. There is no evidence that this is correct. But I am prepared to assume that he is a literate person and that he ought to have filed accounts. As he has not done so, he is liable to have a decree passed against him based on gross rental This was held in *Ubaid Ul'ah Khan* v. *Nazir Husain*(1).

I accept the appeal and grant the plaintiff a decree against the defendant No. 2 for Rs. 141-8-2 and against the defendant No. 1 for Rs. 326-12-2. The plaintiff will receive full costs. The difference of Rs. 11 odd is not worth taking into account. The costs will be distributed proportionately between defendants Nos, 1 and 2 and will include costs in all the three Courts.

The provisions of section 124 B and C of the Oudh Rent Act appear to be frequently ignored by the District Judges. This is the second case that has come under my notice this week. They are salutary provisions intended to save litigants from being bandied about from Court to Court and they should be strictly observed by the District Judges.

N. K. *Appeal allowed.*

(1) 24 Ind. Cas. 15; 1 O. L. J., p. 184.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 27 OF 1916.

July 31, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

K. VENKATRAO SETHUPATHY—DEFENDANT—APPELLANT

versus

KHIMJI ASSUR VIRJI—PLAINTIFF—RESPONDENT.

Letters Patent (Bom.), Cl. 12—Mortgage suit—Suit for land—Property and mortgagor outside jurisdiction—High Court, power of—Personal jurisdiction.

Suits by mortgagees to enforce their rights under their mortgages are not suits for land within the meaning of Cl 12 of the Letters Patent of the Bombay High Court. [p. 443, col. 2.]

VENKATRAO SETHUPATHY *v.* KHIMJI ASSUR VIRJI

The Bombay High Court can entertain a mortgage suit even though the mortgagor resides, and the mortgaged property is situate, outside its territorial jurisdiction, where the cause of action has arisen within its jurisdiction. [p. 444, col. 1.]

Case-law reviewed.

The personal jurisdiction of the Bombay High Court is exercised under clause 12 of the Letters Patent not only in cases where the defendants or some of them reside permanently within the jurisdiction but in cases where, according to the provisions of the Letters Patent, they have been lawfully caused to appear upon summons where the cause of action or part of it has arisen in Bombay. [p. 443, col. 2.]

Mr. *Jinnah*, (with Mr. *Strangman*) and Mr. *Vibhakar*, (with Mr. *Vaidya*), for the Respondents.

JUDGMENT.—The plaintiffs who are mortgagees of the land, building and machinery of a Mill situate at Bellary under a mortgage of December 18, 1912, in the English form, have obtained the usual mortgage decree against the mortgagors, providing that on the defendants or any of them paying into Court on behalf of the plaintiff the sum of Rs. 1,11,302-12 6 for debt and interest thereon at the rate of six per cent. from January 1, 19 6, with six monthly rests until payment and the costs of this suit when taxed and noted in the margin together with interest on such costs at six per cent. per annum from the date thereof till payment, the plaintiff do reconvey to the defendants the property in the mortgage comprised free and clear of and from all incumbrances done by the plaintiff or any person or persons claiming by, from or under him, and if default shall be made by the defendants in paying into Court such principal, interest and costs by the time named, then the plaintiff will be entitled to apply for a decree absolute for sale.

It may be inferred from the mortgagees' power of sale under the mortgage which is confined to the mill machinery treated as removeable plant that the plant was the valuable part of the security granted and assigned.

The first respondent, however, appeals against the decree on the ground that the suit is a suit for land at Bellary and, therefore, not within the jurisdiction of the High Court under clause 12 of the Letters Patent and he challenges the correctness of the decision of this Court in *Holkar* v. *Dadabhai Cursetji* (1) and the later case of *Sorabji Cursetji Sett* v. *Rattonji Dossabhoy Karain* (2). The decision in *Holkar* v. *Ashburner* has for many years been followed in this Court as establishing that suits by mortgagees to enforce their rights under their mortgages are not suits for land within the meaning of clause 12 of the Letters Patent. We are bound by that decision. Speaking for myself, it appears to me difficult to understand how a suit in which the mortgagee seeks to have the land vested in him under his mortgage sold to somebody else by the agency of the Court is a suit for land. It is a suit to realise and dispose of his and his debtors' interests in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realise the security which has been vested in him. I can see no more reason for treating such a suit as a suit for land than there was in *Nistarini Dasi* v. *Nundo Lall Bose* (3) where the plaintiff sought to set aside leases granted by the defendant-executors for land outside the jurisdiction for holding it a suit in which the Court had no jurisdiction. Mr. Justice Stanley observed that the Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam* either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him. The Judicial Committee in appeal expressly upheld this ruling of the Calcutta High Court in reference to jurisdiction: *Benode Behari Bose* v. *Nistarini Dassi* (4).

It has been suggested for the defendants, however, that the Court here cannot act *in personam*, inasmuch as, although the cause of action arose wholly or in part within the jurisdiction and leave has been obtained to sue, he and the other defendants reside not in Bombay but in Bellary.

But the personal jurisdiction of the Court is exercised under clause 12 of the Letters

(1) 14 B 353; 7 Ind. Dec (N.S.) 695.
(2) 22 B 701; 11 Ind. Dec. (N S) 1030.
(3) 26 C. 891; 3 C. W N. 670; 15 Ind Dec. (N.S) 1171.
(4) 38 C. 180; 2 C. L. J. 189; 9 C. W N. 961; 15 M. L. J. 331; 7 Bom. L. R. 887; 32 I. A 193 (P.C.).

Patent not only in cases where the defendants or some of them reside permanently within the jurisdiction but in cases where, according to the provisions of the Letters Patent, they have been lawfully caused to appear upon summons where the cause of action or part of it has arisen in Bombay.

The observations of Sir Charles Sargent in *Girdhar Damodar* v. *Kassigar Hiragar* (5) are instructive upon this point and it is to be observed that his judgment is referred to with approval by Lord Lindley in delivering the judgement of the Judicial Committee in *Annamalai Chetty* v. *Murugasa Chetty* (6). The Appellate Court in Madras in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar* (7) have also held that jurisdiction was rightly exercised by the Madras High Court in an administration suit *inter alia*, in respect of land situate outside the Madras Presidency (see the judgment of Subramania Ayyar, J. at p 280), not only on the ground that the defendant had temporary residence within the jurisdiction but also because he was sued upon a cause of action, part of which had arisen within the jurisdiction. The decision was affirmed by the Judicial Committee in *Srinivasa Moorthy* v. *Venkata Varadai Aiyangar* (8). Lastly, I may refer to the judgment of Byrne, J. in *Duder* v. *Amsterdamsch Trustees Kantoor* (9) as showing that where a defendant is lawfully brought before the Court, the Court would not be deterred from making an order *in personam* with respect to land situate outside the jurisdiction merely by the fact that the person so brought before it has his residence in another country.

The appeal must be dismissed with costs.

N. H. *Appeal dismissed.*

(5) 17 B. 662 at p. 668 ; Chitty's 5 C. C. R. 375 ; 9 Ind. Dec (N. S.) 434.

(6) 26 M. 534 ; 7 C. W. N. 754 ; 30 I. A. 220 ; 8 Sar P. C. J. 523 ; 13 M. L. J 287 ; 5 Bom. L R. 494.

(7) 20 M 239 ; 1 M. L. T. 71 ; 16 M L J. 238.

(8) 11 Ind. Cas 447 ; 34 M. 257 ; 15 C W. N 741. 8 A. L. J. 774 ; 13 Bom L R. 520 ; (1911) 2 M. W. N. 375 ; 14 C. L J 64 ; 21 M. L J. 669 ; 10 M. L. T. 268 (P.C.)

(9) (1902) 2 Ch. 132 ; 71 L. J. Ch. 618 ; 87 L. T. 22 ; 50 W. R. 551.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 61 OF 1923.

August 30, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

KUBER SINGH—JUDGMENT-DEBTOR —APPLICANT

versus

BACHU RAM—DECREE HOLDER AND BISHESWAR—AUCTION-PURCHASER —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, r. 89—Execution of decree—Sale—Arrangement between parties—Sale, whether can be set aside—Inherent power of Court.

The law cannot make express provision against all cases that may possibly arise and there is, therefore, always an inherent jurisdiction in Courts of law to make orders *ex-debitio justitiae* so that real and substantial justice may be done, to do which alone all Courts exist. Where, before an auction sale is confirmed the judgment-debtor and the auction-purchaser arrive at an arrangement whereby the decree-holder is paid off and the parties agree in applying to the Court that the sale should be set aside, the Court has inherent jurisdiction to set aside the sale under section 151 of the Civil Procedure Code, notwithstanding that the procedure prescribed in r. 89 of O. XXI of the Code has not been complied with [p. 445, col. 2.]

Revision against the judgment and decree of the District Judge, Hardoi, dated the 15th February 1923, upholding the decree of the Subordinate Judge, Hardoi, dated the 7th July 1922.

Mr. *M. A. Khan*, for the Applicant.

Mr. *Moti Lal Saksena*, for the Opposite Party.

JUDGMENT :—This is an application in revision. The proceedings reveal a startling condition of things. The applicant had a decree for a sum of about Rs. 2,000 against him. The decree-holder in execution of that decree brought to sale immoveable property of the applicant. The sale was held after some adjournments at the request of the decree-holder and the judgment-debtor on the 20th May, 1922. The property sold at the auction fetched Rs. 4,300 as the price on payment of which Bisheshwar became the purchaser. On the 20th June, 1922, the purchaser and the

judgment-debtor applied to the officer in charge of the sale proceedings that they were agreed that if the judgment-debtor deposited the purchase money and the additional penalty by the 30th June 1922 the sale may be set aside. On the 30th of June they again presented a petition to the same officer reciting the terms of a settlement which they contemplated to be effected between them. By the proposed settlement the judgment-debtor was to execute a deed of sale in regard to certain properties in favor of the auction-purchaser the consideration for which was obviously to be equivalent to the amount due to the decree-holder. The petition proceeded to say that out of the purchase-money fetched at the auction the amount due on the decree will be paid to the decree-holder and the balance will be repaid to the auction-purchaser and the sale will be set aside. It further recited that the stamp for the execution of the deed of sale had been purchased but a week's time was required to complete the conveyance. The prayer of the application was that the sale may not be confirmed till the 7th July 1922, and that a similar application will be presented to the Court of the Subordinate Judge whose decree was being executed. On the 7th July, the judgment-debtor Kuber Singh and the auction-purchaser Bisheshwar presented the promised application to the Court of the Subordinate Judge of Hardoi. This application said that the auction-purchaser had purchased the properties for Rs. 4,300 but that now he and the judgment-debtor had come to terms. It was prayed that the claim of the decree-holder be satisfied out of the sale proceeds and the balance of the purchase money be refunded to the auction-purchaser and the sale be ordered to stand cancelled. I am informed that the private sales contemplated in the application of the 30th June 1922, already mentioned were effected on the 1st of July following. The Counsel for both the parties before us are agreed on this. Yet the order which the Court of first instance passed on the application of the 7th July 1922 was as follows :—

> "The judgment-debtor has not deposited the decree-money within 30 days as required by O. XXI, r. 89 of the Code of Civil Procedure. No such application can be entertained. The application is rejected and sale is confirmed."

No order more unjust than the one just now quoted can be conceived. It has, however, been confirmed on appeal by the learned District Judge of Hardoi. The application before me is again resisted on the ground that the sale could not be set aside because the terms of O. XXI, r. 89 were not complied with. What do the facts which I have stated above lead to? The auction-purchaser has obtained by means of a private sale properties of the judgment-debtor for so much of the purchase money as was paid to the decree-holder in satisfaction of his decree and if this sale is now confirmed he would further obtain the properties sold for the total amount of the purchase-money. It will be deplorable if the Courts of Justice should have no power to redress a wrong such as was committed in this case. The Courts below have thought that they have no such power. In my opinion, this is a case of a lamentable refusal to exercise jurisdiction inherently vested in a Court of Justice. That Jurisdiction would be found to be conferred on Courts by section 151 of the Code of Civil Procedure. It is as follows :—

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

It is obvious that the law cannot make express provisions against all cases that may possibly arise and there is, therefore, always an inherent jurisdiction in Courts of law to make orders *ex debitio justitiæ* so that real and substantial justice may be done and to do which alone all Courts exist.

It should not be supposed that my order would have been different if I were not informed that the auction purchaser has taken deeds of sale from the judgment-debtor with regard to certain properties of the latter. My order would be founded on the fact that both sides were agreed that the sale be not confirmed and that in consideration thereof the judgment-debtor was ready with the consent of the auction-purchaser as he expressed in his application of the 30th June 1922 to privately adjust the transaction between him and the auction-purchaser. The decree-holder was obviously not concerned in this matter. He had to look only to the realisation of the money due to him under his

decree. That he realised. A similar situation arose in the case of *Ram Prasad* v. *Ram Charan Singh* (1) and Sir Lawrence Jenkins then Chief Justice of the High Court of Judicature of Calcutta made the following observation :—

> " Over and above that, we have the important circumstances that notwithstanding the fact that there had been a sale yet prior to its confirmation, Radhe Misser, the decree-holder, was paid by the judgment-debtor the decretal amount. That decretal amount was accepted by the decree holder in full satisfaction of his decree, and the decree-holder, as any honest man would do, brought this to the notice of the Court and asked that the sale should be set aside. The learned Judge before whom this reasonable application was made seems to have felt that this action was paralyzed, because this particular predicament did not fall within the precise words of the rule 89 onwards of O. XXI. But I venture to think that where a case of that kind arises, it certainly is open to the Court not to confirm the sale and to treat the sale as being of no effect, that being the concurrent wish of the parties and the obvious requirement of the case".

I, therefore, allow this application, set aside the orders passed by the Courts below and pass the following order in lieu thereof.

The auction-purchaser Bisheshwar will be entitled to recover the difference between the price paid by him for the properties purchased by him at the auction-sale and the amount of the decree paid to the decree-holder either from the hands of the Court if that sum is still in deposit with the Court or from the judgment-debtor if he or any of his creditors have recovered that sum or a portion of it from the hands of the Court. In case it is found that the judgment-debtor has to pay to the auction-purchaser the whole or a portion of the money stated above he shall deposit that sum within three months from this day. In case this order is complied with by the judgment-debtor the sale shall stand cancelled otherwise this application shall stand rejected. It may be mentioned that the original judgment-debtor Kuber Singh died during the pendency of this application. His representatives have already been brought on the record and are now the applicants in place of the deceased Kuber Singh. I make no order as to costs in this Court.

Z. K. *Orders set aside.*

(1) 27 Ind. Cas. 601.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 675 OF 1923.

November 6, 1923.

Present :—Mr. Justice Sulaiman.

THAKUR MAHIPAL SINGH—PLAINTIFF—APPELLANT

versus

ATHAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145, O. XXI, r 40—Arrest of judgment-debtor—Release on furnishing security—Surety, liability of, extent of—Court, whether can go behind terms of bond.

A judgment-debtor was arrested in execution of a decree pending an appeal against that decree and was brought before the executing Court, which passed an order that he should be released provided he filed a security bond with two sureties for a certain sum. A bond signed by two sureties was accordingly filed in Court and the judgment-debtor was released. After the dismissal of the appeal, the decree-holder applied for execution of the decree against the sureties, but it was discovered that the only undertaking given by them in the surety bond was to produce the judgment-debtor in Court after the dismissal of his appeal; and that if they failed to produce him they would be liable to pay the decretal amount ;

Held, that it was not open to the decree-holder or the Court to go behind the terms of the bond and that the sureties could not be held liable for anything more than what they had undertaken in the bond. [p. 447, col. 1].

Appeal against the decree of the First Subordinate Judge, Cawnpore, dated the 10th January 1923.

Mr. *V. S. Bajpai*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal arises out of certain execution proceeding. Mahipal Singh

brought a suit for recovery of a simple money-decree against Raghunandan which was decreed some time ago. An appeal was presented to the District Judge, and was dismissed. While a second appeal was pending in this Court the decree was put in execution and the judgment-debtor was arrested and brought to the Court of first instance. On his behalf an application was made that the proceedings should be stayed inasmuch as a second appeal was pending in the High Court. The learned Munsif passed an order that the judgment-debtor should be released provided he deposited in Court a security bond for Rs. 800 as well as furnished sureties for the same. On the 8th April, 1921, a security bond signed by two persons Hardeo Singh and Athal Singh was presented which was accepted as sufficient by the Court and the judgment-debtor was released.

The second appeal was ultimately dismissed on the 23rd June 1921, and after its dismissal the decree-holders applied to the Court of first instance for execution of the decreee against the sureties. On objections being raised by the sureties, the application was dismissed as against them. That order was upheld in appeal; and the decree-holders have now come up in execution second appeal and urge that the sureties are liable.

It is true that the security bond was not quite in conformity with the order of the Court. No objection to it however was raised on behalf of the decree-holders and it was accepted as sufficient by the Court. It is now impossible to go behind it and hold that the sureties are liable for anything more than what they had undertaken under this deed. Under this deed they undertook to produce the judgment-debtor in Court on the date the appeal was dismissed, and if they failed to produce him they held themselves liable to pay the decretal amount. It is not disputed that after the dismissal of the appeal no notice was ever sent to the sureties to produce the judgment-debtor in Court. It was practically impossible to know before-hand on what date the appeal would be finally disposed of by the High Court. The decree-holders since then took no steps to call upon the sureties to produce the judgment-debtor in Court. A reasonable construction of the document is that the sureties undertook to produce him in Court after the dismissal of the appeal when they were called upon to do so. Before the lower Appellate Court the learned Vakil for the decree-holders was expressly asked whether he wanted the judgment-debtor to be brought into Court inasmuch as the sureties were ready to produce him. The reply was that he did not want him as he had become an insolvent, and it was no use having him up in Court. In these circumstances I am unable to hold that the sureties made a default and are liable to pay the decretal amount. It may be that the judgment-debtor got himself released on furnishing security which was really not in strict compliance with the order of the Munsif. It was, however, to some extent the fault of the decree-holders themselves that they did not examine the security bond at the time. The appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 143 OF 1922.

April 24, 1923.

Present:—Mr. Dalal, J. C., and
Mr. Simpson, A. J. C.

MAHADEO BAKHSH SINGH—
DEFENDANT—APPELLANT
versus
SURAJ BAKHSH SINGH AND ANOTHER—
PLAINTIFFS AND BHAIRON BAKHSH
SINGH—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family property—Mortgage by grandfather—Foreclosure decree against mortgagor's son—Mortgagee, possession delivered to—Subsequent suit to recover possession by grandsons—Plaintiffs what must prove—Onus—Pious duty of sons, nature of.

A Hindu grandfather mortgaged ancestral property and the mortgagee having obtained a decree for foreclosure against the sons of the mortgagor entered into possession. The grandsons then sued the mortgagee to recover possession without asking to set aside the foreclosure decree which they treated as a nullity:

Held, that the burden lay on the plaintiffs to prove the illusory character or immorality of the debt

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contracted by the grandfather and as they made no attempt to do so, their suit must fail. [p 449, col. 2.]

Gur Narain v *Gulzari Lal*. 25 Ind. Cas. 917 ; 17 O. C. 318 ; 1 O. L J 503 : *Drigpal Singh* v *Sukhnandan Lal*, 56 Ind Cas 299 ; 7 O L. J. 164 ; 2 U. P. L. R (J. C.) 96 ; *Bharath Singh* v. *Prag Singh*, 43 Ind. Cas. 291 ; 2 O C. 911 ; 5 O. L J 9 ; *Harpal Singh* v. *Harakh Bahadur Singh*, 59 Ind. Cas 705 ; 22 O C. 16 ; 1 U. P L. R. (O.) 32, distinguished

Ganpat Lal v *Bindbasini Prashad Narain Singh*, 56 Ind. Cas 274 ; 47 C. 924 ; 18 A. L J. 555 ; (1920) M. W N. 982; 12 L W. 69 ; 47 I. A. 91 ; 39 M. L. J. 108 ; 2 U. P. L. R. (P C.) 103 ; 24 C. W. N 954 ; 28 M. L. T. 330 (P. C.); *Rupkishore* v. *Khankaiya Lal*, 74 Ind. Cas. 568 ; 10 O L J 141; (1923) A. I. R O) 227 ; 26 O. C. 266 ; 9 O & A. L. R. 384 ; *Lala Surja Prosad* v *Golab Chand*, 2 C. 721 ; 4 C. W. N. 701 ; 14 Ind. Dec. (N. S.) 475, followed.

Sheo Shankar Ram v. *Jaddo Kunwar*, 24 Ind Cas. 504 ; 36 A 383 ; 12 C. W. N 968 ; 16 M. L. T. 175 ; (1914) M. W N 593 ; 1 L. W 645 ; 20 C. I J. 282 ; 32 A L J. 1179 ; 16 Bom L. R 810 ; 41 I. A 216 (P. C.); *Sahu Ram Chandra* v *Bhup Singh*, 39 Ind. Cas 980; 3) A. 437 ; 21 C. W. N. 608; 1 P L W 557; 15 A L J 487 ; 19 Bom L. R. 498 ; 26 C L J. 1; 33 M. L J 14 ; (1917) M. W N 430 ; 22 M. L. T. 22 ; 6 L. W. 213 ; 44 I. A. 126 (P. C.); *Jogi Das* v. *Ganga Ram*, 42 Ind. Cas 791 ; 21 C. W. N. 957 ; (1917) M. W. N 739 (P. C.), referred to.

Per *Dalal, J. C.*—The doctrine of a pious duty is not independent of the legality of the mortgage by the manager of a Hindu family. [p 451, col. 2.]

Per *Simpson, A. J. C.*—Where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted, for immoral purposes, and that the purchaser had notice that they were so contracted." [p. 453, col. 1.]

Appeal from the decree of the Third Additional District Judge, Lucknow, dated the 26th January 1922, modifying the decree of the Subordinate Judge, Unao, dated the 8th April 1921.

Mr. *L. S. Misra*, for the Appellant.

Pandit *Gokaran Nath Misra* and Mr. *K. P. Misra*, for the Respondents.

JUDGMENT.

Dalal, J. C.—This appeal has been heard by a Bench of two Judges upon a reference made by one of us. The correctness of two reported cases of this Court a Bench case, *Gur Narain* v. *Gulzari Lal* (1) and a single Judge case, *Drigpal Singh* v. *Sukhnandan Lal* (2) was questioned at the Bar ; we shall show in the course of our judgment that the facts of both those cases are distinguishable from the case before us.

The facts of this case and the one question arising for decision are capable of a clear statement. A Hindu grand-father mortgaged ancestral propety and, after his death, the mortgagee obtained a preliminary decree for foreclosure against the two sons of the mortgagor. A final decree for foreclosure was subsequently passed and the mortgagee entered into possession. At the time of the mortgage there was one grand-son in existence, and two grand-sons at the time of the suit brought by the mortgagee. In this suit by the grand-sons the question at issue is on what grounds can the decree for foreclosure be impeached. The question resolves itself into one of burden of proof, whether under such circumstances it is for the mortgagee to prove the binding character of the debt on joint family property or on the grand-sons to prove that the debt was contracted for immoral purposes or was of an illusory nature. The names of the family members are :—

Raghubar Singh, Mortgagor (dead)

Bajrang Singh (died after foreclosure decree.)	Bhairon Singh (still alive.)
Suraj Bakhsh Singh (Plaintiff 1.)	Benimadho Singh (Plaintiff 2.)

The defendant is the mortgagee who has obtained possession in pursuance of a final decree for foreclosure. The mortgage was possessory for a sum of Rs. 1,920 payable at the end of 5 years. It was executed on 21st June 1909.

The preliminary decree for foreclosure was passed on the basis of a compromise on 21st March 1917, and the final decree on 10th August 1918. The present suit was instituted on 1st July 1920.

(1) 25 Ind. Cas. 917 : 17 O. C. 318 ; 1 O. L. J. 503
(2) 56 Ind. Cas. 299 ; 7 O. L. J. 164.

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In the plaint the foreclosure decree was not impeached but was treated as a nullity. There was no prayer for the setting aside of the decree. The plaintiffs sued for possession of the property without any payment, or in the alternative on the payment of a sum which the defendant-mortgagee can prove to have been borrowed by the mortgagor for purposes binding on the joint family property. The suit in reality was one for redemption as if no decree had been passed against the father and uncle of the plaintiffs. It is now admitted that the property in suit was the ancestral property of Raghubar Singh, and that his sons and one grand-son were members of a joint Hindu family at the time of the execution of the mortgage.

The Trial Court threw the burden of proving legal necessity on the defendant and held that a sum of Rs. 343-14-0 out of the mortgage consideration was payable by the plaintiffs and decreed their suit for possession on payment of that amount. On appeal the learned Additional District Judge of Lucknow held that the entire debt was binding on the joint family property because according to him the burden lay on the plaintiffs to prove the illusory or immoral nature of the debt. He, therefore, amended the Trial Court's decree and decreed possession to the plaintiffs on payment of the entire amount of consideration of the mortgage-deed.

The opinion of the lower Appellate Court cannot be supported. If the mortgage consideration is not binding on the joint family property there would be a reason for the setting aside of the decree but there would be none if the consideration is held to be binding on the property and, consequently, the decree on the plaintiffs. This was the view of their Lordships of the Privy Council in *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (3). In that case the manager of a joint Hindu family governed by the *Mitakshara* mortgaged certain immoveable property forming part of the family property of an undivided Hindu family. The debt was rightfully incurred by him as head of the family. The mortgagee instituted a suit against the mortgagor and his two brothers and after obtaining a decree for sale purchased the property himself at Court-sale. Subsequently the sons of the mortgagor sued and the suit in its final form was in effect a claim to come in and exercise a right to redeem the whole property without setting aside either the mortgage-decree or the sale. Their Lordships restored the decree of the Subordinate Judge and held that the plaintiffs could not redeem. They observed: "The Subordinate Judge rightly says that the plaintiffs do not impeach the mortgage-decree. Their pleadings show that they could not at any time have done so and their prayer does not ask to do so. All that they ask is to exercise their alleged right to redeem. And here they have to face the fact that they refuse to seek to set aside the sale. Their Lordships have no doubt that while the decree for sale stands and sale has taken place under it, the right to redeem is extinguished unless the sale be set aside. If the sale has taken place the owner holds as purchaser, and is entitled to raise all the defences that belong to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action the Court cannot interfere with the possession which has been given him by the purchase." It may be noted that the purchaser there was the original mortgagee just as the defendant in possession of the property in the present case is a person in whose favour the mortgage was executed. This case supports the proposition that the foreclosure decree in the present case could not be considered a nullity simply because the plaintiffs were no parties to the suit in which the decree was passed. If the debt was such as the manager of the joint Hindu family had authority to contract and for which he could bind the joint family property the decree cannot be disturbed merely on the ground that the plaintiffs, minor members of the family at the time of the suit, were not impleaded in the suit.

The real question is one of burden of proof; on whom lies the burden to prove or disprove the binding character of the debt contracted by the manager of the family. In February last this Bench held in *Rup Kishore* v. *Kanhaiya Lal* (4). (First Civil Appeal No.

(3) 56 Ind. Cas. 274 : 47 C 924 ; 18 A. L. J. 555 : (1920) M. W. N. 382 ; 12 L. W. 59 ; 47 I. A. 91 ; 29 M L J 108 ; 2 U. P. L R. (P. C.) 103 ; 24 C. W. N. 954 ; 28 M. L. T. 330 (P. C.).

(4) 74 Ind. Cas. 563 ; 10 O. L. J. 141 ; (1923) A. I. R. (O.) 227 ; 26 O. C. 266; 9 O & A. L. R. 384.

70 of 1921) that according to the principles of Hindu Law a Hindu son cannot escape liability under a decree obtained against his father and *karta* of the family unless he proves that the debts were contracted for immoral or illegal purposes. We shall repeat what we said then and examine now arguments advanced by the learned Counsel for the respondent in this appeal.

The distinction between the son's liability under a mortgage executed by a father in a joint Hindu family and his remedy after proceedings taken against the father on foot of the mortgage was fist stated by Lord Hobhouse in the Privy Council judgment of *Nanomi Babuasin* v. *Modhun Mohun* (5). "It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

In 1888 their Lordships quoted in their judgment this principle of law laid down in the previous case (*Bhagbut Pershad Singh* v. *Gurja Koer* (6).

In that case the property had been sold and purchased by a stranger in execution of a decree against the father alone, but the purchaser had notice of the sons' existence, so their Lordships considered what would happen in the execution proceedings. Their Lordships observed "Now although at the time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the father had no right to mortgage it, still the question arises whether under the execution of the decree under which the property was ordered to be attached it was for the purchaser to show that there was a necessity for the loan or whether it was not necessary for those who claimed on behalf of the children to show that the debt was contracted for any immoral or illegal purpose. If it was necessary to show that the debt was so contracted the plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that according to the decision in the case of Suraj Bansi Kuar it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose."

In the case of *Lala Surja Prosad* v. *Golab Chand* (7) a minor son sued for a declaration that a decree against his father to which he was no party on foot of a mortgage executed by the father alone was not binding on him because he was not a party to the suit brought against the father. In considering the state of law existing at the time of the enactment of the Transfer of Property Act in 1885 with a view to interpret the provisions of section 85 of the Act, Mr. Justice Ghose made an elaborate examination of the Hindu Law on the subject of a son's liability and deduced the following principles from these cases :—

"First, that in the case of a joint *Mitakshara* family consisting of a father and minor sons, the father is necessarily the manager of the joint family, and as such, for all purposes, is representative of the family, second, that, in the case of a joint *Mitakshara* family, where the father, the managing member, mortgages family property for an antecedent debt and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity ; and third, that if a son, after a decree being obtained against the father, upon a mortgage executed by the father, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution of such a decree, sues to recover possession of his share, he cannot succeed, unless he proves that the debt was contracted for immoral or illegal purposes, or that the debt was of an illusory character."

(5) 13 C 21 ; 13 I. A. 1 ; 10 Ind Jur. 151 ; 4 Sar. P. C. J. 682 ; 6 Ind Dec (N. S.) 510 (P C).

(6) 15 C. 717 ; 15 I. A. 99 ; 12 Ind. Jur. 289 ; 5 Sar. P. C. J. 186 ; 7 Ind. Dec. (N. S.) 1062 (P. C.)

(7) 27 C. 724 ; 4 C. W. N. 701 ; 14 Ind. Dec. (N. S.) 475.

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In *Sheo Shankar Ram* v. *Jaldo Kunwar* (8) an absolute decree for foreclosure was passed against the father and the mortgagee was in possession. Their Lordships held that the sons were bound by the foreclosure decree on the ground, that the joint family was effectively represented in the suit. "There seems to be no doubt to their Lordships upon the Indian decisions that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."

It was argued by the respondent's learned Counsel that the opinion of Mr. Justice Ghose in *Lala Surji Prasad* v. *Golab Chand* (7) was dissented from by a Bench of the Calcutta High Court in the appeal from that judgment reported in *Lala Surji Prasad* v *Golab Chand* (9) and that the decision in *Sahu Ram Chandra* v. *Bhup Singh* (10) has altered the view to be taken of effective representation. The Bench decision in 23 Cal. found that the mortgage was valid as against the sons and dismissed the appeal though it held that the minor ought to have been made a party to the mortgage suit. All that the Bench pointed out was that the representation by the father was not absolute but that the son could bring the suit to impeach the mortgage on the ground that the advance was for an illegal or immoral purpose. (See page 529 of the report). This is the very principle we have enunciated in First Civil Appeal No. 70 of 1921 and desire to reaffirm here. We do not say that the son is precluded from challenging the decree if he could do so by pointing out that the debt was such as would not be binding on joint family property.

We have quoted from the Privy Council ruling in 36 All. that there are occasions when the manager of a joint Hindu family effectively represents all other members of that family. On this observation of their Lordships the learned Counsel has based an ingenious argument. He said that it was the doctrine of the pious duty of a son to pay his father's debt which was the foundation for the doctrine of representation. It was formerly thought that this pious duty attached to the son even in the lifetime of a father, but this doctrine was negatived in Sahu Ram Chandra's case. If it was the pious duty of a son to pay his father's debt even in the lifetime of the father Bhairon Singh in the present case would effectively represent the plaintiffs because both he and the plaintiff would be bound to pay the debt of Raghubar Singh. Subsequent to 1917, the date of the decision in Sahu Ram Chandra's case, the liability of Bhairon Singh and of the plaintiffs would be different because at the time of the suit Bhairon Singh's father was dead and the plaintiffs' father was alive. Bhairon Singh therefore was not in a position to raise the defence which was open to the plaintiffs to put the mortgagee to proof of the validity of the mortgage debt. This argument proceeds on two unsound assumptions. First of all it may be pointed out that the suit was not one for a money debt but was for the enforcement of a mortgage. There was no debt which it would be the pious duty of a son to pay. Secondly the law is clear that the doctrine of a pious duty is not independent of the legality of the mortgage by the manager of a Hindu family. In *Jogi Das* v. *Ganga Ram* (11) their Lordships observed in referring to Sahu Ram Chandra's case "In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt in the mortgage itself, and that in consequence the transaction in that case could not stand and it was added that the mere circumstance of a pious obligation does not validate the mortgage." This was the opinion of their Lordships though during argument it was pointed out that some of the mortgagees were dead and the pious obligation of the sons had arisen in consequence. This principle was re-affirmed by their Lordships in

(8) 24 Ind. Cas. 504; 36 A 383 ; 18 C. W. N. 968 16 M. L T. 175 ; (1914) M. W. N 593 ; 1 L. W. 645 ; 20 C. L. J. 282 ; 12 A. L. J. 1178 ; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

(9) 28 C. 517 ; 5 C. W. N. 640.

(10) 39 Ind. Cas. 280; 39 A. 437 ; 21 C. W. N. 693; 1 P L. W. 557 ; 15 A. L J. 437 ; 19 Bom. L. R. 498 ; 26 C. L. J. 1 ; 33 M. L. J. 14 ; (1917) M. W. N. 439 ; 22 M. L. T. 22 ; 6 L. W. 218 ; 44 I. A. 126 (P. C.).

(11) 42 Ind. Cas. 791 ; 21 C. W. N. 957 ; (1917) M. W. N. 739 (P. C.).

the case of *Chet Ram* v. *Ram Singh* (12). Thus Bhairon Singh was in as good a position to put the mortgagee to proof of the validity of his debt as the plaintiffs would have been if they had been made parties to the suit for foreclosure.

The other arguments of the learned Counsel were that because of the compromise in the foreclosure suit substantial justice was not done to the plaintiffs and that the property had not passed out of the family because the original mortgagee was in possession at present as owner. There is no allegation of fraud or collusion, so a compromise decree is as effective as one after contest. Sahu Ram Chandra's case was one where the mortgagee had sued to enforce his motgage against Hindu sons who were no parties to the mortgage and was put to the proof of the validity of the mortgage consideration. The point for decision before their Lordships was the nature of the antecedent debt In discussing the question of burden of proof their Lordships made it clear that much, if not all, of the law upon this subject (that is, exception to the rule that if the debt was not for the benefit of the estate then the manager should have no power either of mortgage or sale of that estate in order to meet such debt) has arisen from the necessity of protecting the right of third persons, say the purchasers of the property who have taken the title for onerous consideration and in good faith. The learned Counsel pointed to this observation to support his argument that the onus shifted on the sons only where the person in possession was some one other than the mortgagee who had acquired title in good faith and for onerous consideration. Their Lordships however were considering the question of antecedent debt and not of the burden of proof after a decree on a mortgage had been passed. These are general observations on a subject which was not directly before them for decision. Their Lordships had no intention to overrule numerous authorities such as the cases of *Nanomi Babuasin* (5) and *Bhagbut Pershad* (6); they were summing up the principles of those rulings and not laying down new principles of law.

The two decisions of this Court reported in *Bharat Singh* v. *Prai Singh* (13) and *Harpal Singh* v. *Harakh Bahadur Singh* (14) were referred to on behalf of the respondents They are not relevant for our purposes because in the former case there was a money decree and the family property had not passed out of the family and in the latter case no decree had been passed on the mortgage.

In the case reported in *Gur Narain* v. *Gulzari Lal* (1) the mortgagee was in possession in pursuance of a decree in enforcement of his mortgage and the property had not passed out of the family. That case is clearly distinguishable from the present case where the property has passed out of the family. In *Drigpal Singh* v. *Sukhnandan Lal* (2) the appointment of a married woman as a guardian of minor defendant for the litigation in 1919 was held to amount to an absence of representation of the minors in the suit. If that decision went on to hold that such minors can maintain a suit for redemption after the joint property has been sold in execution of a decree against the father on foot of a mortgage of that property executed by the father alone we are unable to follow it. Such a finding would be in direct conflict with the ruling of their Lordships of the Privy Council in *Ganpat Lal* v. *Bindhasini Prasad Narayan Singh* (3).

I would hold that the burden lay on the plaintiff's sons to prove the illusory character or immorality of the debt contracted by their grand-father, and as they made no attempt to do so their suit must fail. I would set aside the decree of the lower Court and dismiss the plaintiff's suit with costs of all the Courts. The cross-objections would necessarily fail and be dismissed accordingly without costs.

Simpson, A. J. C.—I agree, In my view the joint family was effectively represented in the suit for foreclosure. I see no valid distinction between this case and *Sheo Shanker Ram* v. *Jaddo Kunwar* (8).

The other point is one of some difficulty. There is a long current of decisions which lay

(12) 67 Ind. Cas. 569; 27 C. W. N. 150 ; 3 P. L. T. 363 ; 31 M. L. T 50 ; 43 M L J. 98 ; 16 L. W. 89 ; (1922) M. W N 465 ; 2 U P. L. R. (P. C.) 64 ; 44 A. 365 ; 1922) A. I. R. (P. C.) 247 ; 3 P. L. R. 1922 ; 24 Bom. L. R. 1231 ; 49 I. A. 248 ; 21 A. L. J. 114 ; 37 C. L. J. 79 (P. C.).

(13) 43 Ind Cas. 291 ; 20 O C. 311 ; 5 O. L. J. 9.
(14) 50 Ind. Cas. 795 ; 22 O. C. 16; 1 U. P. L. R. (O.) 32.

down "That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purpose, and that the purchasers had notice that they were so contracted."

Now it is true that the doctrine of antecedent debt has been elucidated in some recent rulings of the Privy Council and I should require further consideration if it was necessary to decide what the sons would have to prove where the property had passed out of the possession of the family under a conveyance executed by the father in consideration of an antecedent debt. Probably it would be open to them to prove that the debt was not antecedent because it was borrowed on the security of the family property itself. But this is a case of foreclosure and I do not think that the recent decisions have in any way unsettled the law as regards suits where the property has passed out of the possesssion of the family under a decree.

Dalal, J. C., and Simpson, A. J. C.—We set aside the decree of the lower Court and dismiss the plaintiffs' suit with costs of all the Courts. The cross-objections are dismissed without costs.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 49 OF 1923.

February 19, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BHASKAR MAHADEV PARSEKAR—
PLAINTIFF—APPELLANT
versus
SHANKAR VITHAL PEDNEKAR—
DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens—Court sales.

The doctrine of *lis pendens* is applicable to a sale effected by the Court in execution of a decree. [p. 454, col. 1.]

Byramji v. *Chuni Lal*, 27 B. 265 ; 5 Bom. L. R. 21, relied on.

Appeal from the decision of the First Class Subordinate Judge, A. P. Ratnagiri, in Appeal No 199 of 1921, confirming the decree of the Second Class Subordinate Judge, Vengurla, in Civil Suit No. 28 of 1920.

Mr. *A. G. Desai*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover from the defendant possession of the plaint property by removing his obstruction, and if necessary by setting aside the order in Miscellaneous Application No. 2 of 1918, with costs and future profits. The defendant is the purchaser of the land in suit from one Khatkhate. The original owner of the property was one Narayan. Khatkhate sued Narayan in Suit No. 124 of 1916 for specific performance of a contract of sale of the suit land, for execution to him of a duly registered sale-deed, and for possession of the land in suit. A decree was passed in that suit for specific performance on December 15, 1917. As Narayan failed to execute a sale-deed an order was passed, under O. XXI, r. 34, sub-rule (5), of the Code, for the execution of a sale-deed in favour of Khatkhate, and this was executed on February 26, 1918.

Meanwhile one Ankush got a money-decree against Narayan on September 15, 1916, and on July 27, 1917, the property now in suit was attached in execution of that decree. By a Court sale the plaint property was sold to the plaintiff on January 23, 1918. It was confirmed on February 26, 1918, the same day on which the sale-deed was executed under the decree in Suit No. 124 of 1916 in favour of Khatkhate. The plaintiff obtained a sale-certificate on February 27, 1918.

The question, therefore, in this suit is whether the plaintiff's title should prevail over the defendant's who claims through Khatkhate, the plaintiff in Suit No. 124 of 1916. The plaintiff's suit has been dismissed in both Courts.

It is argued before us that those decisions are wrong, because the doctrine of *lis pendens* does not apply to a sale effected by the Court in execution of a decree. Reliance was placed on the decision of this Court in *Lalu Mu'ji Thakar* v. *Kashibai* (1). The facts in that case were entirely different, as the purchaser at a Court-sale, who eventually succeeded, purchased the property when it has been freed from the attachment in favour of the original plaintiff. But that case and other cases on the same point have been considered in *Byramji* v. *Chunilal* (2). The learned Judges after referring to the decisions of the Privy Council in *Radhamadhub Ho'dar* v. *Monohur Mukerji* (3) and *Moti Lal* v. *Karrabuldin* (4) and also the provisions of section 52 of the Transfer of Property Act came to the conclusion that it might be taken as settled law that the rule of *lis pendens* was applicable to Court-sales.

There is no doubt that Narayan in this case could not have disposed of the property pending the suit filed against him by Khatkhate, but it is suggested that what Narayan the owner could not do, the Court could do by selling his interest in the property in execution of a decree in favour of a third party. Apart from that an explanation would seem necessary how it came to pass that the Court confirmed the sale of the same property to the present plaintiff, and directed a sale deed to be executed in favour of Khatkhate practically on the same date.

We think that, on the authority of *Byramji* v. *Chunilal*, (2) it must be taken to be perfectly clear that while the dispute was pending between Narayan and his purchaser Khatkhate, Narayan's interest in the property could not be sold to a third party so as to deprive Khatkhate of the fruits of his decree. It is not a question of a purchaser without notice of a prior contract of sale by his vendor. It seems to be a matter of no importance whether the plaintiff knew or whether he did not know of the proceedings which were pending between his vendor and Khatkhate. What the vendor Narayan could not do in order to give a title to a third party not claiming in the suit, could not be done by the Court by selling the property which was the subject-mater of the litigation then before it. We think, therefore, that the Court below was right and the appeal must be dismissed with costs.

Shah, J.—I agree.

N. H. *Appeal dismissed.*

(1) 10 B. 400 ; 5 Ind. Dec. (N. S.) 655.
(2) 27 B. 206 ; 4 Bom. L. R. 2 .
(3) 15 I. A. 97: 15 C. 756 : 12 Ind Jur. 297 ; 5 Sar. P. C. J. 211 ; 7 Ind. Dec. (N. S.) 1038 (P. C.).
(4) 25 C. 179 ; 24 I. A. 170 ; 1 C. W. N. 639 ; 7 Sar. P. C. J. 222 ; 13 Ind. Dec. (N. S.) 121 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 106 OF 1923.

September 17, 1923.

Present :—Mr. Dalal, J. C.

NAWAB HAIDER MIRZA—JUDGMENT-DEBTOR—APPLICANT

versus

PANDIT KAILASH NARAIN DAR—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, O XXIII, r. 4—Adjustment of decree, meaning of—Execution Court, whether can amend decree.

Order XXI, r. 2 of the Civil Procedure Code only contemplates satisfaction of the decree in whole or in part or an adjustment thereof which may amount to a payment of whole or part of the decree. The word 'adjustment' in the rule signifies some kind of satisfaction or payment of the decree. [p. 455, col. 1.]

No order of amendment of a decree can be passed under r. 2 of O. XXI of the Civil Procedure Code. The provisions of O XXIII, r. 3 of the Civil Procedure Code relating to adjustment of suits do not apply to proceedings in execution of a decree. [p 455, cols. 1 and 2.]

Revision against the Order of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 17th May 1923.

Mr. *Anant Prasad*, for the Applicant.

Mr. *Manohar Lal*, for the Opposite Party.

JUDGMENT.—One Nawab Murtaza Begam obtained a decree against Nawab Haider Mirza on 18th December 1909. On appeal the decree was upheld by this Court on 28th

NAWAB HAIDER MIRZA *v.* PANDIT KAILASH NARAIN DAR

November 1910. The decree-holder transferred her interest in the decree on 23rd April 1911 to Pandit Kailash Narain Dar. His name was substituted in the decree. On 15th October 1914 he put in an application purporting to be one under O. XXI, r. 2. In the first para. he certified receipt from the judgment-debtor of Rs. 1,35 ; the decree was a money-decree. In the second para. certain arrangement arrived at between him and the judgment-debtor was narrated. The executing Court summoned the judgment-debtor who accepted the arrangement. On 7th November 1914 the Court passed an order summarizing the arrangement and directing that payment will henceforth be made according to the terms settled. The Court did not direct any amendment of the decree.

On 5th February 1923 the decree-holder presented the present application for amendment of the decree under sections 151 and 152, Civil Procedure Code on the basis of the order of 7th November 1914. The learned Subordinate Judge directed such an amendment and this application is presented for a revision of that order.

It is not apparent how the lower Court derived jurisdiction to amend the decree. The decree was upheld by this Court, so if any amendment was to be made it could be made only by an order of this Court and not by an order of the Court of first instance. There is no order passed by the executing Court for amendment of the decree on 9th November 1914. It is a mistake of the lower Court to believe that it was only through an oversight that the decree was not amended. In proceedings under O. XXI. r. 2 no order of amendment of a decree can be passed. That provision of law only contemplates satisfaction of the decree in whole or in part or adjustment thereof which may amount to payment of whole or part of the decree. In its ordinary sense adjustment is a word of wide significance, but obviously in O. XXI, r. 2 it is used to signify some kind of satisfaction or payment of the decree. Action is directed to be taken by Court only on an application of the decree-holder without issuing any notice to the judgment-debtor. If such an adjustment were included in the provisions of that rule so as to turn a money-decree for instant payment into a decree for instalment, provision would have been made for issue of notice to the judgment-debtor. No decree can be modified on the basis of a compromise. Rule 4 of O. XXIII specifically lays down that nothing in that order relating to withdrawal and adjustment of suits applies to any proceedings in execution of a decree or order Under O. XX, r. 11 (2) after the passing of a decree the Court may on the application of the judgment-debtor and with the consent of the decree holder order that payment of the amount decreed shall be postponed or shall be made by instalments, etc. as it thinks fit. Such an application however must be made within six months of passing of the decree under Article 175 of the Limitation Act while the decree-holder's application of 1914 was made nearly 5 years after the passing of the decree. Long arguments with reference to reported cases were addressed to me to prove that if a decree is amended on the basis of an agreement between the decree-holder and the judgment-debtor the judgment-debtor is bound by the amended decree In the present case, however, this amendment itself is disputed and the question is not one of action on a decree which has already been amended rightly or wrongly by a Civil Court.

The question before me is not whether the decree-holder can take action on a decree amended without jurisdiction, but whether the lower Court had jurisdiction to pass an order of amendment. There is considerable difference in these two positions. I hold that the Court on 7th November 1914 did not amend the decree and it was not through an oversight that the amendment of the decree was left out. At the time when the lower Court passed an order on 17th May 1923 it had no jurisdiction to interfere with the decree passed by that Court on 13th December 1909 and upheld by this Court on 28th November 1910.

I set aside the order of the lower Court and dismiss the decree-holder's application of 5th February 1923 with costs of both Courts.

Z. K. *Order set aside.*

BAKSHO *v.* PIARO

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2 OF 1919.

October 29, 1920.

Present :—Mr. B. C. Kennedy, J. C., and Mr. E. Raymond, A. J. C.

BAKSHO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PIARO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, applicability of—Revisions, abatement of.

The theory of abatement is inapplicable to revision applications, and the provisions of O. XXII, Civil Procedure Code do not apply to such applications. [p. 457, col. 1].

Application for abatement in an appeal filed from an order of the first Class Sub-Judge, Sukkur, in Suit No. 115 of 1912, disallowing an application for judgment being reviewed and amended so as to conform to the decree.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Kimatrai Bhojraj*, for the Respondents.

JUDGMENT.—In this case there was a suit for partition and in that suit judgment was written and a decree passed. The decree was sent to the Collector for execution and that decree contained a provision that *mesne profits* were to be determined by the Collector. Defendants Nos. 1 to 6 objected to this and on reference to the judgment they discovered that the judgment did not contain any provision for the award of *mesne profits*. Application was thereupon made on the one side for the plaintiffs and on the other side for the defendants No. 1 and 6 to bring the judgment and the decree into harmony according to their respective views as to what the Court originally intended. Ultimately the Court amended the decree under section 152, Civil Procedure Code by striking out the provision as to the *mesne profits*. The plaintiff has now made the present application to us in the form of an appeal againt this order amending the decree and he appeals also against the order refusing to amend the judgment. A preliminary objection was taken at the hearing of this application or appeal on the ground that two of the respondents *viz.*, Piaro and Khushal were dead and their legal representatives had not been brought on the record.

We are now dealing with the preliminary objection and it is attempted to be urged that these orders are orders under execution and that, therefore, the necessity for putting on the legal representatives of the deceased respondents does not arise. But there seems to us to be no doubt that though the question arose during execution, these orders cannot be said to be orders under execution inasmuch as they affect the decree itself and not the consequence of an attempt to execute the decree as it stands. But it seems to us that the appellants who have also applied in revision have a right to say that this is an application in revision, because as a matter of fact it does not appear that any of these orders are likely to be appealed against and if any injustice is done in any way by granting or refusing these orders the only way in which the matter can be remedied is by a revision application. It does not appear to us there can be any question of abatement in a revision application. It is urged that there is no procedure laid down for revision applications and that, therefore, the procedure laid down in the case of appeal must necessarily apply. There is no doubt a great deal of analogy between revision applications and appeals but they are not identical. In the case of an appeal the matter is one between parties and it is obviously for the parties to see that all necessary materials for the Court to decide are before the Court. In the case of a revision application the matter is different. An order in revision, is made by the Court, of its own motion, to redress grievances which come to its notice. The order in revision is of its very nature an essential act of the Court. No doubt the Courts do not pass orders which would prejudice any party to the proceedings without hearing them and, therefore, it will be necessary to issue notices to all the parties, and this seems rather a reason why the Court, if it discovered that certain of the parties were dead and

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not properly represented, should see that they were properly represented. It seems to us, therefore, that the whole theory of abatement is inapplicable to revision applications and that disposes of the preliminary objection. It is true that a Bench of this Court expressed an opinion that the appeal had abated by an order of the 24th September 1919, but that is not a final order. The final application is dated the 20th September 1920 to have this appeal dismissed with costs on the ground of abatement and we reject that application. On the other hand we direct that the heirs of Piaro and Khushal be added to the revision application within a fortnight. Costs to be dealt with in the final order.

S. D. *Application rejected.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 359 OF 1922.

September 19, 1923.

Present :—Mr. Dalal, J. C.

BHIM SHANKAR DATT—DEFENDANT—APPELLANT
versus
MANI RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (1 *of* 1872), *s.* 90—*Registration Act*—(*XVI of* 1908) *ss* 58, 60—*Document more than thirty years old*—*Registration endorsement*—*Execution*—*Presumption.*

In the case of a document more than thirty years old the registration endorsement is evidence under section 60 of the Registration Act that proper proceedings were taken under section 58 of the Act and that the person purporting to execute the document admitted the execution thereof before the Sub-Registrar, from which it may be presumed that the person who purported to sign the document on behalf of the executant did so under the authority of the executant. [p. 457, col. 2].

Appeal against the judgment and decree of the Subordinate Judge, Unao, dated the 12th August 1922, upholding the judgment and decree of the Munsif, South Unao, dated the 3rd September 1921.

Mr. *Bisheshar Nath*, for the Appellant.

Mr. *Ali Mohammad*, for the Respondents.

JUDGMENT.—Two grounds of appeal are urged before me in this second appeal (1) that the sale-deed (Exhibit 1) alleged to have been executed by Ganga Ghulam in favour of Suddhu and Har Prasad has not been proved according to law and (2) that the possession of the plaintiffs—respondents within the period of limitation was not proved.

The sale-deed is more than 30 years old and the lower Appellate Court drew the presumption under section 90 of the Evidence Act because in its opinion it was produced from proper custody. The presumption drawn was that the document was duly executed. It was argued that the executant not being literate one Dhanwant Tewari had signed on his behalf and there was no evidence to prove that Dhanwant Tewari was given authority by Ganga Ghulam to sign the document. I think that the lower Court was justified in presuming such authority from the fact that the document was registered. The registration endorsement is evidence under section 60 of the Registration Act. This certificate is evidence of the fact that under section 58 of the Registration Act proper proceedings were taken and that the person purporting to execute a document admitted the execution thereof in the presence of the Sub-Registrar. If Ganga Ghulam had not given authority to Dhanwant Tewari to sign on his behalf he would not have admitted execution before the Sub-Registrar. My attention was drawn to a judgment delivered by a single Judge in this Court and reported in *Hori Lal* v. *Thakur Bhagwan Bakhsh* (1). So far as the report goes no reference is made therein to any presumption under section 90 of the Evidence Act. It is not necessary therefore to examine the validity of that ruling. The case here is different. The only point for me to satisfy myself about is whether the Lower Court was justified in drawing a pre-

(1) 84 Ind. Cas. 281; 19 O. C. 28.

sumption from the registration endorsement that Ganga Ghulam had authorised Dhanwant Tewari to sign on his behalf.

On the point of possession the lower appellate Court has noted the witnesses of the plaintiff whom he trusted. It considered that the evidence of these witnesses was more reliable than oral testimony produced on behalf of the defence. It was said that the plaintiffs' name did not appear in the annual *khasra* within 12 years of the suit. Even so when the Appellate Court believed the oral testimony it cannot be said that it acted wrongly in believing it in preference to the conclusion to be drawn from the absence of the plaintiffs' name from the annual *khasras*.

I do not think that there is any reason for interference in second appeal.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 4 OF 1923.

March 7, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

IBRAHIM MOHIDIN MHATE—
DEFENDANT—APPELLANT
versus
KRISHNAJI LAXMAN BHAGWAT—
PLAINTIFF—RESPONDENT.

Khoti Settlements Act (Bom I of 1836), s. 9—Transfer of permanent tenancy—Consent by managing Khot *whether sufficient.*

The managing *Khot* can validly give consent to a transfer of a permanent tenancy under section 9 of the *Khoti* Settlements Act. [p. 458, col. 2.]

Appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 279 of 1920, modifying the decree of the Subordinate Judge, Deorukh, in Civil Suit No. 25 of 1919.

Mr. P. B. Shingne, for the Appellant.

Mr. A. *G. Desai*, for the Respondent.

JUDGMENT.—The question in this second appeal is whether defendant No. 4, the present appellant, is entitled to rely on Exhibit 36 as preventing a forfeiture of the lands conveyed to him under a sale-deed referred to in that exhibit on the ground that the consent of the *Khot* had not been obtained. Exhibit 36 was given to the appellant by defendant No. 5 the managing *Khot* for a consideration of Rs. 100. It has been contended that although he was a managing *Khot* he did not execute the deed in his representative capacity but that is a mere formality and could not be regarded as fatal to the appellant's contention. Admittedly defendant No. 5 at the time he executed Exhibit 36 was the managing *Khot*, and therefore, the real question is whether his consent to the transfer came within the meaning of section 9 of the *Khoti* Settlement Act which provides that permanent tenancies shall be heritable, but not otherwise transferable without the consent of the *Khot*, unless certain facts can be proved.

It has been urged for the respondent that the consent of the *Khot* meant the consent of the whole body of the *Khoti* sharers. But the result of such a contention, if upheld, would be that the transfer of a permanent tenancy would practically be prohibited as the consent of the whole body of the *Khoti* sharers could not ordinarily be procured. We do not see why it should not be within the ordinary duties of a managing *Khot* to consent to a transfer of a permanent tenancy. In this case Rs. 100 were paid to the fifth defendant as consideration for the consent, and undoubtedly he holds that Rs. 100 on behalf of the whole body of the *Khoti* sharers. Reference may usefully be made to section 26 of the Act :—

"When a village is held by two or more cosharers jointly, the said sharers shall be jointly and severally responsible for the jama, but one of their number shall be nominated every year to receive inferior holders' rents, to pay the Government dues, and generally to perform all acts requirsd by this Act or by any other law or rule having the force of law, to be performed by the *Khot*. The sharer so nominated shall be called, the 'managing Khot."

The managing *Khot* would, therefore, be entitled to give consent to the transfer of a

permanent tenancy which is an act required by the Statute to be performed by the Khot in order to validate the transfer.

We think, therefore, that defendant No. 4 is entitled to resist the plaintiff's claim and that the suit should be dismissed with costs throughout.

N. H. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 128 OF 1922.

December 16, 1922.

Present :—Mr. Daniels, A. J. C.

ABHAYRAJ KUNWAR, THAKURAIN—PLAINTIFF—APPLICANT

versus

DATA DIN—DEFENDANT—OPPOSITE PARTY.

Stamp Act (II of 1889), ss. 2 (5) (c), (22), Sch. II, Art. 5—Agreement to deliver grain on demand, unattested, whether agreement, bond or promissory note.

A document by which a person binds himself to deliver a certain quantity of grain to another on demand, and which is not attested by a witness, is neither a bond within the meaning of section 2(5) (c) nor a promissory-note within the meaning of section 2 (22) of the Stamp Act. It is an agreement falling under Article 5 of Schedule I to the Stamp Act. [p. 459, col. 2].

Revision from the decree of the Munsif, Kunda, sitting as Small Cause Court Judge, dated the 7th July 1922.

Mr. *H. C. Sen*, for the Applicant.

Mr. *Radha Krishna*, for the Opposite Party.

JUDGMENT.—This is an application for revision of a decree of a Small Cause Court. The suit was one on the basis of a document described as a pro-note by which the defendant bound himself to deliver 10½ maunds of grain on demand. The document was treated as a promissory-note liable to a stamp duty

of one anna, and as the one anna stamp which it bore was not cancelled it was technically unstamped and could not be received in evidence even on payment of duty and penalty. It is now admitted that the instrument was not a promissory-note as defined in section 2, cl. (22) of the Stamp Act, inasmuch as a promissory-note must be an undertaking to pay a definite sum of money and unlike a bond does not include an undertaking to deliver grain. Under the erroneous impression that the instrument could not be admitted even on payment of penalty, the learned Munsif allowed the plaintiff an opportunity to prove the debt apart from the instrument, and as he failed to do so dismissed the suit. The instrument for the reasons given is not a promissory-note. It is also not a bond under cl. (*c*) of the definition because it is not attested by a witness. It appears to be an agreement requiring a stamp of 8 annas under Article 5, and this is the view taken in Donough's Commentary on the Stamp Act, 6th edition, page 49. As the learned Munsif's decision proceeds on an erroneous view of the instrument, I set aside the decree of the Court below and send the case back to it for decision *de novo*. Costs here and heretofore will abide the result.

Z. K. *Case remanded.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT NO. 372 OF 1915.

June 22, 1920.

Present :—Mr. Justice Rankin.

ROBINDRA DEB MANNA—PLAINTIFF

versus

JOGENDRA DEB MANNA—DEFENDANT.

Civil Procedure Code (Act V of 1908), Sch. II, Cl. 3—Scope of—Arbitration proceedings—Court, control of—Court's functions, whether can be delegated—Misconduct, whether can be enquired into—Reference, whether can be recalled.

ROBINDRA *v.* JOGENDRA

Under the second schedule of the Civil Procedure Code the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed. [p. 461, col. 2].

It is very much better that no interference should take place with the arbitration proceedings during the period limited to the arbitrators. [p. 462, col. 2.]

The limit of time is the condition or the form of the Court's control over the arbitrators, and the Court is not authorised either to abandon control or to substitute any other form of control. [p. 462, col. 2].

It is necessary that the Court should inform its own limit upon the arbitrators. [p. 464, col. 2].

Raja Har Narain Singh v. *Chandrain Bhagwant Kuar*, 13 A. 300 at p. 303 ; 18 I. A. 55 ; 6 Sar P. C. J. 14 ; 15 Ind. Jur. 283 ; 7 Ind. Dec. (N.S.) 189 ; *Lachman Das* v. *Abparkash*, 30 A. 169 ; 5 A. L. J. 144 ; A. W. N. (1908) 59, followed.

Co-operative Hindustan Bank Ltd. v. *Bhola Nath Barooah*, 31 Ind. Cas. 597 ; 19 C. W. N. 165, dissented from.

It is not competent to the Court to delegate to the arbitrators its own function of control as to time. [p. 465, col. 2].

Matters in dispute between the parties were referred to the arbitrators under the Second Schedule to the Code. The order provided that the arbitrators should make their award in writing within six months from the date on which an office-copy of the order of reference be served on them or within such further time as they may allow themselves by endorsement on the said office-copy order. The arbitrators held many sittings during the course of two years, but nothing was decided. The plaintiff then applied that the reference should be recalled or superseded :

Held, that the order of the Court allowing the arbitrators to extend the time fixed for filing the award did not comply with the provisions of clause (3) of the Second Schedule to the Code and was consequently bad in law ;

(2) that by consenting to the order of reference the plaintiff was not estopped from making the application and the reference must be superseded. [p. 467, col. 1].

Advocate-General and Mr. *J. Bonnerjee*, for the Plaintiff.

Sir *B. C. Mitter* and Mr. *P. N. Chatterjee*, and Mr. *B. C. Chatterjee*, for the Defendant.

Mr. *R. Mitter*, for Mr. *B. L. Mitter*, for the Arbitrator.

JUDGMENT.—This suit was brought in 1915 on the 24th of March. It is an administration and partition suit between brothers as regards the family estate descending to them from their grandfather and under their father's Will. Jogendra, the first defendant, may be said to be the main defendant as his intromissions with the joint estate are apparently the main object of attack. Nogendra, defendant No. 2, appears to side with him : the other brothers support the plaintiff. A Receiver of the estate has been appointed by the Court at an early stage of the suit.

By order, dated 27th July 1917 and made on the plaintiff's application, the matters in difference in the suit were referred to two arbitrators under the second schedule to the Code. The order provided that the arbitrators should make their award in writing within six months from the date on which an office-copy of this order of reference be served on them or within such further time as they may allow themselves by endorsement on the said office-copy order. In case of difference of opinion between the arbitrators, they were to nominate an umpire who was to make his award within three months of the date of reference to him.

The joint remuneration of the arbitrators was agreed upon at Rs. 160 per sitting for the first ten sittings and thereafter Rs. 100 per sitting. Two clerks were appointed at Rs. 32 per sitting. The arbitrators appear to have held the sittings in the evening and for about two hours at a time. They began on the 20th December 1917 and on the 13th September 1919 they held the 122nd sitting. By this time they had not finished the plaintiff's case : indeed they had heard two witnesses only, *viz.*, the plaintiff and one Jugal Kishore Pyne. The cross-examination of the third witness had only lasted for nine sittings and had not been completed. The manner in which the time has been expended can be found in the affidavits whose contradictions on detail leave the general result an undoubted scandal. The plaintiff was examined-in-chief for some 15 sittings and cross-examined for 33. Many sittings seem to have been expended in other ways than in taking evidence, *e.g.*, 10 days on discussions as to amending pleadings. The arbitrators' fees had amounted to about Rs. 16,700-0-0. The total law costs of the parties are put by the plaintiff at a further sum of Rs. 30,000. Robust optimism on the part of the main defendant puts it at Rs. 6,000 only. The

plaintiff says he has six more witnesses to call (making nine in all) though the main defendant undertakes to deny this. In any case, four years after action brought, two years after the order of reference, 122 sittings having been held, the arbitrators in September 1919 were not yet in sight of the defendants' case.

Since then nothing has been done. So far as the arbitrators are concerned, the reasons are as follows. Applications in connection with the Receivership and certain other matters came before me in January and again in May 1919, and I appear to have commented upon the unfortunate position. Moreover, in the absence of any decision about the estate or the parties' rights, and with costs apparently running mountains high, I could not see my way to order the Receiver to make distribution among the parties. These comments appear to have been carried to the arbitrators who, on the next day, 28th May 1919, enlarged their time for making their award till the end of the year and passed the following order :—

"The plaintiff does not produce the witness Babu Benode Behari Banerjee, nor is there any application on his behalf although he verbally states that the witness is ill. It seems that the proceeding before us cannot go on in this way; the fees of the arbitrators and of their clerks have not been paid for a considerable period, and it does not appear that some of the parties are at all willing to pay them. Under the circumstances we adjourn the further sittings *sine die*."

Shortly afterwards this spirit of hopelessness took for a passing moment the form of a spirit of compromise and the good offices of the arbitrators seem to have been employed in assisting a settlement. At a sitting on the 9th July the parties present—not all were present—were thought to have come to terms. The arbitrators recorded in their minute :—"The parties discussed and settled the terms of settlement. It is proposed that a petition should be made before the arbitrators embodying the terms of settlement herein. Next meeting on Friday 18th instant." The terms—many and complicated, as they necessarily were—were not at the time reduced to writing by the arbitrators or, as far as I can find, by anybody else. Only the plaintiff and defendants Nos. 1 and 5 were present. Each side, accordingly, drew up "without prejudice" a statement of terms of settlement, and these were widely discrepant. The plaintiff maintained that there was a settlement, and pointed to the arbitrators' minutes and demanded that the arbitrators find out what it was. The main defendant (and defendant No. 2 who sides with him and who was not even present at the sitting) denied that any final settlement had been completed. The arbitrators in the end found—very rightly, as I think—that no settlement had been concluded. The plaintiff on this and on other matters desired to apply to the Court and objected to the arbitration going on: then the mother of this contending family died. This made no real difference to the case—none that could not have been adjusted in a few minutes—but the plaintiff took six months to reconstitute the suit, and his application to the Court is filed on the 12th April 1920. From June 1919 to April 1920 the time has been wholly lost, and I give judgment now in June 1920 after the sheer waste of a year.

The plaintiff applies to me in the first place to record, under O. XXIII, r. 3, his version of the terms of settlement, or some other to be found upon the evidence. I think it clear that there was no concluded settlement and no proof even of authority to settle as regards defendant No. 2.

But the plaintiff further applies that the reference should be re-called or superseded, first by reason of misconduct of one of the arbitrators in giving private interviews to the first defendant, and secondly by reason of the scandal, mishandling, expense, and delay of the arbitrators' proceedings. The charge of misconduct relates to visits to the arbitrators' house by the first defendant on five occasions in August and September 1918, and on one occasion on 22nd July 1919. The allegations as to 1918 are utterly belated and their only possible effect is to discount the case upon the later incident. On the affidavits it is very difficult to decide a question upon which the reputation of a professional gentleman would depend. I am of opinion, that under the 2nd Schedule the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed, and I think, it would be wrong of me to pass

any judgment whatsoever at this stage upon the point.

The main question is, whether in view of the hopeless waste of time, money and effort, I have any power to supersede the arbitration. The Advocate-General has pressed me strongly to do so and although I see no reason to think that the plaintiff is not equally to blame with the other parties whose contentiousness and loquacity have utterly overcome the arbitrators, I think so little of the chance of any reasonable termination of the proceedings that I should have no hesitation in so doing if it is within my power. The arbitrators have failed to cope with their task. It was a difficult task, but they have made no adequate effort in the matter. Long ago they should either have retired or insisted on sitting *de die in diem*, and making some headway with the case. It is obvious that with sittings for two hours only at a time, half the time is lost. In (say) another year the case will have become so stale and overloaded that neither they nor anybody else will have much chance of arriving at a right decision.

Sir Benode Mitter for the main Defendant contends that there is no power to interfere at this stage. He points to cl. 3 of the 2nd Schedule and contends that the doctrine of an inherent power in the Court to interfere at any stage with the arbitrators is without warrant in the Schedule and contrary to its intention. His client is apparently willing to promise to be more reasonable and expeditious : but he objects to the costs already incurred before the arbitrators being thrown away, and he suggests that the plaintiff desires to get rid of the arbitration merely because he is getting the worst of the battle.

Upon considering the 2nd Schedule it strikes one at once that the Court is in a position in which the Statute intended that no Court should ever be. The scheme of the Schedule is simple and effective. When an order of reference is made, the Court is to fix a reasonable time for the making of the award. When that time elapses, either there is an award or there is not. If there is, the award can be set aside for certain well-defined reasons. If not set aside, it can be confirmed. If, on the other hand, the time originally fixed by the Court as reasonable has elapsed and there is no award, the matter comes back to the Court and thus is founded the right of the Court either to enlarge or not to enlarge the time. If in its discretion it refuses any further time, the reference is at an end and the suit must be re-instated for trial. There is no need whatever in this scheme for any power of interference during the period limited to the arbitrators, and it is very much better that no interference should take place. The arbitrators are to be given their chance to make their own award. There are not to be two different authorities in operation at this stage doubling the litigation and expense ; the Court checking the arbitrators thoughout or riding them on the curb. The Court will stay its hand altogether until the time limited has expired ; it can part with control temporarily because the time limit will bring the matter back to the Court after no more than a reasonable time either to deal with the award or to consider whether more time should be given, or whether the reference should be superseded. The pivot of the whole scheme is the limit of time, and I can see no reason to suppose that any better scheme could be devised. That limit is the condition or the form of the Court's control over the arbitrators. The Court is not authorised either to abandon control or to substitute any other form of control.

In the present case after about three years of ill-directed labour and expense, the Court is said to be without control. There is no provision in the 2nd Schedule under which I can interfere, now, or for that matter in another two years' time, why? Because the order of reference imposed no limit of time by which the arbitrators (collectively) are bound. They were given unlimited power to extend the time at their own hand. This they have exercised and, as the main defendant contends, can go on exercising till they see fit to stop. Pressed by the plaintiff with the argument that the Court in such a case must have inherent power on some terms and at some time to end a scandal, and by the main defendant with the argument that the right to interfere is not merely absent from the 2nd Schedule and incapable of inference therefrom, but is negatived by the terms of cl 3, I suggested at the argument that there was a third view, possibly more correct than either, *viz.*, that this reference as ordered

flouted a cardinal principle of the 2nd schedule from the outset. This view was adopted for the plaintiff and was fully argued. It was resisted for the main defendant whose Counsel laid stress on the fact that many orders of reference have been made in the same terms ; and argued that even if such an order be wrong, there is no defect of jurisdiction. A strict compliance with cl. 1 is matter of jurisdiction, but on this view a strict compliance with cl. 3 is not. There is also a fourth view possible, *viz.*, that in fixing six months from the date of service of the order, the Court fixed the time which it thought reasonable and that the order is only bad in so far as it purports to delegate to the arbitrators the Court's own duty to decide as to the enlargement of the time. On this view the Court could not enlarge the time, or supersede the reference under cl. 8.

There seems to be no doubt that in this Court a great many orders have been made in the present form. The reason is not far to seek. Apart from express limit contained in the submission, an arbitrator had at common law his whole life in which to make his award. But at common law all submissions were revocable at will. By the Arbitration Act of 1889 a submission is not revocable without leave, and unless the submission provides otherwise the award must be made within three months or within such further time as the arbitrators may in writing allow themselves from time to time. The Indian Arbitration Act follows this in principle. But in cases under these Statutes there is always power in the Court to give leave to revoke the submission, and this is the proper remedy where excessive delay or other injustice can be shewn. If, however, this well-known form as to time-limit be incorporated into the 2nd Schedule and if the last part of cl. 3 and the general scheme of the Schedule deprive the Court of any inherent power of revoking the reference, it is obvious that what was right and reasonable in the one class of cases is altogether out of the question in the other. If the main defendant's contention be right, the Court has not in this case that control over a reference in this suit which it would have had in similar circumstances had the arbitration been an ordinary private arbitration. The present difficulty would seem to be the result of a false analogy.

By the first part of third clause of the 2nd schedule two matters are dealt with *uno flatu*. First, that when section 1 has been complied with, the Court must make the order of reference. Secondly, that the Court by its order must fix such time as it thinks reasonable for the making of the award. The same clause by its second part forbids the interference of the Court save in the manner and to the extent provided in the schedule. Here there are three things which go together ; the Court must part with its jurisdiction to decide ; it must part with it for a specified time and no more; during that time it must stand aside. If a Court should wrongly refuse an order of reference and insist upon deciding the suit, I apprehend that its decree would be bad apart from any question of the merits. If after an order of reference a Court wrongly proceeded to try the suit, it would contravene an express prohibition. If by the order of reference no time is fixed at all, the error is of the same class: no time-limit means no control; and the Court is not authorised to abandon control save to the extent and upon the terms laid down. In *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1), the Privy Council dealt with this matter upon the terms of section 508 of the Code of 1882. They reversed the decision of the High Court at Allahabad that the words of that section were directory only, that is, that they amounted "to no more than the imposition of a public duty on the presiding officer of a Court of Justice," and that "the neglect of it could not affect the substantiality of the proceedings of the arbitrators," *Har Narain Singh* v. *Bhagwant Kuar* (2). The judgment delivered by Lord Morris, after pointing out that the case must be decided entirely upon the construction of the sections, says : "Their Lordships are of opinion that section 508 is not merely directory but that it is mandatory and imperative. Section 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to Their Lordships that this section would be rendered inoperative if section 508 is to be treated as merely directory." On the facts of that case this ruling was not applied: the actual decision

(1) 18 A. 300 at p. 303; 18 I. A. 55; 6 Sar. P. C. J. 14: 15 Ind. Jur. 288; 7 Ind. Dec. (N. S.) 189.

(2) 10 A. 137 at p. 140; A. W N. (1888) 28; 6 Ind. Dec (N S.) 92.

was that after an award had been made the Court could not enlarge the time under section 514, and that, as the time had run out before the making of the award, it was invalid under section 521 and no Court could make a decree upon it. This latter question was undoubtedly put upon a new footing in some respects by the Code of 1908. Cl. I5 of the 2nd Schedule altered section 521 : an award made out of time, or otherwise invalid, is no longer a nullity : it is liable to be set aside by the Court, but, if not set aside, a decree made for its enforcement is not without jurisdiction. [*Shib Kist Daw* v. *Satish Chunder Dutt* (3)]. But the wording of section 508 is retained in cl. 3 of the 2nd Schedule with two differences, upon which nothing turns for the present purpose. The question is whether what the Privy Council said of the same words is now inapplicable because section 521 has been altered. It seems to be very difficult indeed so to hold. It is still true that a part of cl. 15 would be rendered inoperative if cl. 3 is to be treated as merely directory, and on a broad view of the schedule the provision for a limit of time is a main pillar of the scheme. Without it the character of the reference is entirely changed : the power of the Court to see justice done is materially diminished : indeed, it is cut off at the very point at which the Statute intended it to be applied.

If the words of the 3rd clause have the same meaning as before, it would seem that consent of the parties will not alter the position. "We should have been disposed," said the Court in *Lachmandas* v. *Abparkash* (4), "to regard that as an irregularity which would be cured by the acquiescence of the parties . . . . . were it not for the clear and explicit language of their Lordships of the Privy Council"

If then the provision in the third clause is mandatory, what is it that is thus imperatively required—"The Court shall fix such time as it thinks reasonable for the making of the award." Is it a compliance with that provision for the Court to say to the arbitrators?—"You can have any time you like. So long as you are both agreed, the time is left wholly to you. Endorse the order yourselves, and at your own hand the time will be enlarged indefinitely and as often as you like." With all respect for the opinions of other people, I am very clear that this is no compliance at all. It is not a defective compliance or an absence of strictness in compliance. It is exactly as if the order should recite " whereas by the third clause of the 2nd schedule this Court is required to fix such time as the said Court thinks reasonable for the making of the award, now, therefore, this Court does not think fit to do so accordingly." It may be that it is open to the Court to define the time by reference to a condition ; to give the arbitrators a certain length of time after the happening of a future event, *e.g.*, the service upon them of the order. This latter form of order appears to be fairly common: in my experience it has proved an undesirable form of order, but I do not say that it is not a compliance with cl. 3. Nor where the clause has been obeyed in substance need undue stress be placed upon a mere defect of form—*e.g.*, in the case cited *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1), a date was fixed by the Court for the hearing of the case and this date was taken as the limit of time given to the arbitrators. But what is necessary is that the Court should impose its own limit upon the arbitrators. In the present case, it seems to me that the Court has either not applied its own mind as to what is a reasonable limit or in any case it has refused to fix or specify it and has flatly declined to impose it upon anybody. There would seem to be one thing which cannot serve as a condition by reference to the Court to fix the time, and that is the will of the arbitrators. To leave the arbitrators (collectively) with a free hand as to time, subject to no limit imposed by the Court, is exactly what the Statute is taking measures to avoid.

I cannot assent to the view assumed in the case of *Co-operative Hindusthan Bank* v. *Bhola Nath Borooah* (5) that upon this form of order the Court must be taken to have fixed six months as the time which it thought reasonable. It gave "six months or such further time, etc." If it had really decided that six months was reasonable it had no right to give any more. It was bound by the Statute to limit the arbitrators in accor-

(3) 18 Ind. Cas. 69 ; 39 C. 822.
(4) 30 A. 169; 5 A. L. J. 144; A. W. N. (1908) 59.

(5) 31 Ind. Cas. 597; 19 C. W. N. 165.

dance with that opinion. But in any case it seems impossible to say that it either fixed or specified in the order six months as the time for making the award. The words of cl. 3, "shall fix such time as it thinks reasonable for the making of the award "—mean "shall fix such time for the making of the award as it thinks reasonable in that behalf." They are not complied with by mentioning a time and in the same breath letting some one else impose a different time as that within which the award may be made. This is clear, if only from cl. 15, where the time is referred to as "the period allowed by the Court."

If the intention of this form of order is to simply comply with cl. 3, but to throw away cl. 8, I think the attempt is impossible. In my view no time is "fixed" or "specified" within the meaning of cl. 3, unless it be so fixed and specified for the making of the award, that on the expiry of a period laid down by the Court, because the Court itself thinks it sufficient, the Court will have power under cl. 8 to supersede the arbitration.

If the words now in cl. 3 are not merely directory, it can make no difference whether the order is said to have failed entirely to comply with an imperative requirement or to have contravened an express prohibition. The same thing has a positive and a negative aspect. The Court must preserve a certain form of control; it does not do so. The Court has no authority to abandon control: it professes to do so.

I desire, however, to put the matter on a broader footing than a mere construction of cl. 3. The question then arises in the form whether it is competent by consent to delegate to the arbitrators the Court's function of control as to time. Upon this there is a dictum of Chitty, J., sitting at first instance in this Court, [*Co-operative Hindusthan Bank* v. *Bhola Nath Borooah* (5)]. In that case the arbitrator under the present form of order had purported to enlarge his own time after it had expired. The decision was that he could only do so beforehand. Having expressed this opinion the learned Judge makes the following observation *obiter* :—"It was suggested that the order of this Court was *ultra vires* in so far as it permitted the arbitrator to enlarge the time for making his award. I do not think that is so. The Court proceeded by consent of the parties and there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired." I gather that the learned Judge was not put by the circumstances of that case or by the argument in sight of any objection at all to the course which he describes. He deals with none: as he was proceeding on another ground they mattered little at the time. The circumstances of the present case put me in a very different position, and I cannot take shelter under this dictum. I find what I think to be a scandal proceeding under the authority of this Court and in connection with a suit which this Court has yet to decree and I am told that I cannot interfere because the pivot of the 2nd schedule has been removed. "The functions of the Court with regard to the enlargement of time" are the functions of the Court with regard to superseding the arbitration (cl. 8). To delegate a function of control to the party to be controlled is not in general a process to which objection is far to seek. If the argument be that because the Court has power to enlarge the time which it has fixed, it must, therefore, have power by consent and at the outset to let the arbitrators enlarge it without a limit: this is merely to argue that because the Court has a duty to control the arbitrators, it has, therefore, power to throw the control away. The parties to a particular suit are not the only persons interested in the question whether a statutory duty shall be abandoned by the Court. If all parties desire to have a suit dismissed by consent and then to go to arbitration, no doubt there are ways in which this can be done. But under the 2nd schedule the suit is still a suit, the arbitration is under the Court and the award will be binding, if at all, by virtue of an order of the Court. In any suit and particularly when as here a Receiver has been found necessary, interminable delay in the arbitration may mean a large number of quite unnecessary applications to the Court. For these reasons it cannot be assumed that it is no part of the intention of the Statute to limit the power of the Court as to what it may do by consent of parties. On the contrary, the general object is to lay down the terms upon which a reference may be ordered when all parties do consent, and the language

of section 89 as well as that of the schedule leaves little room for doubting that the statutory scheme is, in all its main features, compulsory. If so, the Court cannot by consent abandon control while retaining the suit; this would be to abandon the general principle which governs the character of the reference which is authorised by the Code. I cannot agree with Sir Benode Mitter that the only thing in the 2nd Schedule which cannot be changed by consent is the first clause.

I do not think that such a case as *Official Trustee of Bengal* v. *Kumudini Dasi* (6) is really in point here. That the Probate Court does not act without jurisdiction in the sense of section 50 of the Probate and Administration Act or in the general sense when it gives a grant to a person who is not entitled to it or who is an improper person to take it, is no doubt a clear and correct decision. But I do not understand this case to lay down, as applicable to all subject-matters, that jurisdiction to entertain an application involves jurisdiction to do anything whatever by order made upon such application, statutory prohibitions notwithstanding. It is a mistake to suppose that a matter does not go to jurisdiction because it affects the limits, and not the mere existence, of jurisdiction. To delegate the functions of the Court, or, as I should prefer in this case to say, to declare in advance that a certain function of control shall not be exercised at all, is to do an act of a class altogether different from those which a Court authorised to hear an application for a reference is empowered to do. Jurisdiction is involved because the order professes to abrogate jurisdiction. A forum competent to entertain an application to refer a suit is not clothed with jurisdiction to throw the suit "out at window." It is not in the least necessary, so far as general principles are concerned, to hold that the whole order of reference is bad. But the professed abandonment of control is nugatory. Further, I am far from saying that because cl. 3 has not been complied with or because the abandonment of control as to time was wholly without jurisdiction, that an award in this case if made and not set aside under cl. 15 would not give rise to a decree valid and unappealable under cl. 16. Under the Code of 1882 that may have been the position, but steps have been taken to alter this. Now, where there is an award, cl. 16 where it applies, cures invalidity in the interest of finality. However invalid the award, the decree can be valid because on applications under cl. 15 the Court has jurisdiction to determine whether the award is invalid in consequence of non-compliance with cl. 3, or for any other reason.

I have proceeded upon the footing that there is no inherent power on the part of the Court to supersede this reference. On this point I desire to adopt what was said by Piggot, J., in *Chaturbhuj* v. *Raghubar Dayal* (7). "In an arbitration conducted under the orders of the Court, the Court has very large powers of control. Against interminable delays at any rate it can provide at once by its order specifying the period within which the award is to be returned. It seems to me unsound on general principles to invoke the inherent jurisdiction of the Court in a matter for which provision appears to be made in the Code itself." If this inherent power does exist I should in this case recall the arbitration. If, as I think, it does not exist, then the Court's control as against interminable delays is entirely dependent upon the limit of time, and the minimum result of the considerations which I have canvassed is that the unlimited authority to extend the time is bad and of no effect, if it is to be read as given to the arbitrators irrevocably, and without reservation to the Court of any shred of its original control. If it should so be read, as the original six months have long ago elapsed, I can supersede the arbitration now. If, however, the reservation can be implied, the same result follows, as the office-copy order served on the arbitrators is indorsed with extensions of time which run out on the 30th June 1920, and the award cannot be completed within the next few days (*cf.* cl. 8).

According to a recent Patna case [*Patto Kumari* v. *Upendra Nath Ghose* (8)], where an application is made under cl. 15 to set aside an award as having been made out of time, questions of estoppel may arise, and the Court is not then obliged to set the award aside.

(6) 6 Ind. Cas. 973; 37 C. 387.

(7) 23 Ind. Cas. 758; 36 A. 354 at p. 360; 12 A. L. J. 529.

(8) 50 Ind. Cas. 52; 4 P. L. J 265.

JOGI RAM *v.* MOHAMMAD RAFI

Assuming that this doctrine founded on the cases under the Common Law Procedure Act is correct and that it also applies in all cases where the award is "otherwise invalid," I would point out that the position here is very different. The whole of the present difficulty arises because there is no award and no more than a distant prospect of any. By consenting to the order of 27th July 1917 and by his conduct under it till last September, the plaintiff is not estopped from objecting to the continuance of the proceedings *ad infinitum*, or after they have proved themselves incorrigible. Nothing that he can do will entitle any one else to insist as against the Court upon the continuance of discreditable and inept proceedings under the Court's authority, and in a suit which is still before the Court.

The order will be that all proceedings under the order of reference, dated 27th July 1917 be discontinued and that the suit be restored to its proper prospective list for trial. Liberty to apply for any incidental directions or for a speedy trial or otherwise as the parties may be advised. Each party to bear his own costs of this application: there will be no order as to the costs thrown away in connection with the reference.

K. S. D. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 145 OF 1922.

October 12, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

JOGI RAM—PLAINTIFF—APPLICANT
versus
MOHAMMAD RAFI—DEFENDANT—RESPONDENT.

Stamp Act (II of 1899), s. 2 (21) Sch. 1, Art. 48 (d)—Power of attorney in favour of three persons—Stamp payable.

In computing the stamp duty payable on a power-of-attorney the Legislature takes no account of the number of persons executing the power. It is the number of agents appointed and the powers of such agents which determine the amount of the stamp duty. [p. 467, col. 2.]

A general power-of-attorney executed by two persons authorising three persons to act jointly or severally falls under clause (*d*) of Article 48 of Schedule I to the Stamp Act. [p. 467, col. 2.]

Revision against the decree of the Munsif, Utraula, sitting as a Judge, Small Causes Court, dated the 25th August 1922.

Mr. *Moti Lal*, for the Applicant.

JUDGMENT.—This is an application under section 25 of Act IX of 1887. The applicant was the plaintiff in the suit out of which this application arises. His plaint has been rejected and the order of rejection says that this has been done under O. VII, r. 11, of the Code of Civil Procedure. The ground of the order is that the general agent, who presented the plaint, was not authorised to do so for the reason that the power-of-attorney, which he held, was on a stamp paper of Rs. 5 only and it was on behalf of two persons while the plaint was being filed only on behalf of one of such two persons, that is, the plaintiff in the case.

I am of opinion that the order complained of cannot be sustained. As to the stamp duty, I think the duty of Rs. 5 paid on the power-of-attorney is the proper amount payable under clause (*d*) of Article 48 of Schedule I of Act II of 1899. The definition of power-of-attorney in section 2, sub-section (21), of the Act and the classification of such powers in the said Article makes it clear that in computing the stamp duty payable on a power-of-attorney the Legislature takes no account of the number of persons executing the power. It is the number of agents appointed and the powers of such agents which determine the amount of the stamp duty. In the present case the power authorised only three persons to act jointly and severally in more than one transaction or in other words generally. I am, therefore, of opinion that the duty of Rs. 5 paid in respect of the power-of-attorney in question was the proper duty.

On the question whether one of the three persons appointed as agents under this power-of-attorney can act separately. I am of opinion that on a proper construction of the power-of-attorney each agent is authrised to act severally as well as they are all authorised to act jointly.

I, therefore, allow the application, set aside the order of the Court below and direct that Court to restore the suit to its original number in the register of suits and to proceed to dispose of it according to law. As the opposite party has not appeared I make no order as to costs in this Court.

Z. K. *Revision allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 83 OF 1923.

March 7, 1924.

HOSHANNA DEVANNA NAIK
—PLAINTIFF—APPELLANT
versus
DEVANNA BANAPPA NAIK—
DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara—Partition—Step-mother, share of.

Under the Hindu *Mitakshara* law, on a partition of joint family property the stepmother is entitled to a share. [p. 468, col. 2.]

Jairam Nathu v. *Nathu Shamji*, 31 B. 54 ; 8 Bom. L. R. 632, relied on.

Appeal from the decision of the District Judge, Kanara, in Appeal No. 85 of 1923, amending the decree passed by the Subordinate Judge, Karwar, in Civil Suit No. 266 of 1919.

Messrs. *G. P. Murdeshwar* and *D. R. Ugrankar*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff filed this suit for partition against the first defendant his father and defendants Nos. 2 to 6 his step-brothers: He claimed one-seventh share in the family lands, house, moveables, ornaments and trade of the joint family. Honamma, the wife of the first defendant, was afterwards added as a party respondent in the appeal. The lower Court passed a partition decree directing that the plaintiff should be declared the owner of the one-seventh share in all the properties of the joint family.

In appeal, the question arose whether Honamma was entitled to a share in the partition. In *Jairam Nathu* v. *Nathu Shamji* (1) a partition suit was filed by a Hindu son against his father and brothers. It was held that the father's wife on partition was entitled to a share equal to that of the son, but from her share the value of any *stridhan* received by her as a gift from her father-in-law or husband would have to be deducted. The parties were Bhatias and would presumably be governed by the *Mayukha*. But it seems to have been conceded in the argument that the claim of the mother or step-mother for a share in the partition should be admitted. The provisions of the *Mitakshara*, which govern the present case, are perfectly clear: Ch. I, section 2, pl. 8, is as follows:—

"Two sorts of partition at the pleasure of the father, namely equal and unequal have been stated. In the case of equal partition if it makes the allotment equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions."

It appears to have been urged by the plaintiff-appellant that as Honamma was his step-mother, she was not entitled to share in the partition. But if plaintiff had been her son, undoubtedly she would be entitled to a share, and it seems to me there can be no reason for depriving her of her share in the partition because the plaintiff was the son of the first defendant by another wife, now deceased. We think the District Judge was right in holding that Honamma was entitled to share in the partition, and in directing the clause awarding past *mesne* profits to be deleted. The appeal, therefore, fails and must be dismissed with costs.

Shah, J.—I agree. I desire to add that this case comes from the District of Kanara and the parties would be governed by the *Mitakshara*. The case of *Jairam Nathu* v. *Nathu Shamji* (1) was governed by the *Vyavahara Mayukha*. But it is sufficient to state that on this point there is no difference between the *Vyavahara Mayukha* and the *Mitakshara*, and that this conclusion is based upon the express text of *Yajnavalkya*.

N. H. *Appeal dismissed.*

(1) 31 Bom. 54 ; 8 Bom. L. R. 632.

GANGA PRASAD *v.* BACHCHU LAL

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 17 OF 1923.

September 11, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

GANGA PRASAD—DEFENDANT—APPELLANT
versus
BACHCHU LAL—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901) *s.* 164—*Suit for profits against* Lambardar—*Negligence—Burden of proof.*

Where in a suit for profits against the *Lambardar* a co-sharer wishes to charge the *Lambardar* beyond what is admitted, on the ground that he has collected more, or might, but for gross negligence or misconduct, have collected more than what is admitted, it lies on the co-sharer to prove how much more the *Lambardar* has collected or might have collected, but for his gross negligence or misconduct, than is admitted. [p. 469, col. 2.]

Arjun Singh v. *Ganga Bakhsh*, 4 O C 1, followed. *Dayal* v. *Must. Bittu*, 3 O. & A. L. R. 297 ; *Suraj Prasad* v. *Debi Dayal*, 65 Ind. Cas. 739 ; 25 O. C. 49; 8 O. L. J. 485; (1922) A. I. R. (O.) 149, referred to.

Appeal against the judgment and decree of the Second Additional District Judge, Unao, dated the 29th March 1923, confirming the judgment and the decree of the Deputy Collector, Unao, dated the 18th August 1922.

Mr. *Aliuddin*, for the Appellant.

Mr. *Mohammad Arabi*, for the Respondent.

JUDGMENT.—The appellant, Ganga Prasad, is the *lambardar* of village Behta Mujawar in the district of Unao. The respondent, Bachchu Lal, is co-sharer of that village. He brought the suit for profits against Ganga Prasad and his other co-sharers in respect of *rabi* 1325 F. to *kharif* 1328 F. The amount of profits claimed was Rs. 739-1 on the basis of gross rental. The evidence showed that on the basis of the same rental it came to Rs. 668-5-6. The Court of first instance decreed the claim against the appellant for this amount. The appellant was dissatisfied with the decree of the Court of first instance and consequently he appealed. His appeal was, however, dismissed by the Second Additional District Judge of Lucknow. This is a second appeal from the decree of the last-mentioned Court.

The appellant admits his liability on the basis of actual realizations, the total amount of which comes to Rs. 376-1-6. The appeal in this Court as in the Court below challenges the appellant's liability for the difference between Rs. 668-5-6 and Rs. 376-1-6, that is Rs. 292-4. Both the Courts below have presumed negligence on the part of the appellant on the basis of the vast difference between the gross rental and the actual collections. There is no other evidence as to the *lambardar's* negligence. I am of opinion that the presumption is not well founded. There is no allegation whatsoever either in the plaint or anywhere in the oral pleadings as to a charge of negligence against the *lambardar*. In the case of *Arjun Singh* v. *Ganga Bakhsh* (1) Mr. Spankie, A. J. C., held that when a co-sharer wishes to charge the *lambardar* beyond what is admitted on the ground that he has collected more or might but for gross negligence or misconduct have collected more than what is admitted it lies on the co-sharer to prove how much more the *lambardar* has collected or might have collected but for the gross negligence or misconduct than is admitted. In the case before him the view of the Court of first appeal was that "when a *lambardar* says 'I have collected Rs. 50 out of Rs. 100. I think the *onus* is on the *lambardar* to show that he did not collect more and that he was not guilty of gross negligence." Mr. Spankie made the following observations in relation to the remarks quoted above : If the proposition of the Second District Judge, when the *lambardar* admits that he has only collected 50 per cent. of the rent-roll means, that, where the co-sharer alleges that the *lambardar* has collected or might but for gross negligence have collected 100 per cent., or say 80 per cent. the *lambardar* must prove that he did not collect 100 per cent., or 80 per cent. or was not guilty of gross negligence in not doing so, it is erroneous." The view taken by Mr. Spankie has not authoritatively been dissented from in any case that I am aware of. On the contrary, the principle laid down by him was accepted by a Bench of this Court in the case of *Dayal*

(1) 4 O. C. 1.

v. *Must. Bittu* (2). The case of *Suraj Prasad* v. *Debi Dayal* (3) does not, in any manner, shake the authority of the decision of Mr. Spankie.

In the Court below it was argued on behalf of the appellant that the year of 1326 F. was a famine year. As regards this the learned Judge observes that a perusal of the statements filed by the *patwari* does lend some support to this contention. The percentage of arrears of rent in other years is not at all remarkable while it is extraordinarily large in the year 1326 F. This fact though for the first time brought to the notice of the learned Judge of the Court should certainly have been taken into consideration in forming the presumption on which alone the judgment of the learned Judge is founded. I hold that the Court below had no evidence before it to show that the *lambardar* is guilty of negligence or misconduct.

I, therefore, allow the appeal, set aside the decree of the Courts below and in lieu thereof grant a decree to the respondent for the sum of Rs. 376-1-6 only. The parties will receive and pay costs in all the three Courts in proportion to their success and failure.

Z. K. *Appeal allowed.*

(2) 3 O. & A. L. R. p. 297.
(3) 65 Ind. Cas. 739 ; 35 O. C. 49 ; 8 O. L. J. 485 ; (1922) A. I. R. (O.) 149.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 282 OF 1923.

February 4, 1924.

Present :—Mr. Kinkhede, A. J. C.

KANHAIYALAL KALAR—APPLICANT

versus

LACHHI—NON-APPLICANT.

Civil Procedure Code (Act V of 1908) s. 47—Defendant—Name struck off, whether party under s. 47—

A defendant against whom the claim is not dismissed but whose name is struck out from the record at the plaintiff's own instance is not and cannot be regarded as a party to the suit or the decree within the meaning of section 47 of the Civil Procedure Code, as there is no formal expression of an adjudication which, so far as he is concerned, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. [p. 470, col. 2.]

Krishnappa Mudaly v. *Periaswamy Mudaly*, 39 Ind. Cas. 297 ; 21 M. L. T. 121 ; 5 L. W. 369 ; 32 M. L. J. 532 ; 40 M. 964 : *Laxman* v. *Ganpat*, 52 Ind. Cas. 736 ; 15 N. L. R. 146, relied on.

Revision against an order of the District Judge, Hoshangabad, dated the 25th September 1923.

Mr. *A. V. Khan*, for the Applicant.

Mr. *W. R. Puranick*, for the Non-applicant.

ORDER.—I think the order sought to be revised is correct and I do not see any valid reason to set it aside. The Court below had jurisdiction to pass it, under law and I am not prepared to hold that that Court has acted in the exercise of its jurisdiction, illegally or with material irregularity which would call for interference in revision. Moreover the point appears to me concluded by the previous decision of this Court reported in *Laxman* v. *Ganpat* (1). A defendant against whom the claim is not dismissed but whose name is struck out from the record at the plaintiff's own instance, is not and cannot be regarded as a party to the suit or the decree, as there is no formal expression of an adjudication which, so far as regards the Court expressing it, *conclusively determines* the *rights* of the parties with regard to all or any of the *matters in controversy* in the *suit*. Here as soon as the present non-applicant asserted that she was not a necessary party to the suit, the plaintiff—applicant at once amended the plaint and struck out her name. She thus ceased to be a party to the suit. The mere fact that this is mentioned in the decree, or that her name is shown in the decree, and that costs awarded to her by the order directing her discharge, are also mentioned therein as ordered to be paid, do not make her a decree-holder, because the definition of a "decree-holder" requires that he or she must be a person in whose favour a decree has been passed. It is argued that she is a "decree-holder" because in her favour an order capable of execution has been made. But an "order"

(1) 52 Ind. Cas. 736 ; 15 N. L. R. 146.

is not a " decree " so as to *conclusively determine* the *rights* of the parties in respect of any *matters in controversy* in the *suit*. I do not, therefore, see any reason to hold that the applicants' remedy lay under section 47, Civil Procedure Code. The view taken in *Krishnappa Mudaly v. Periaswamy Mudaly* (2), which was followed by Mitra Additional Judicial Commissioner in the aforesaid reported case appears to me to be sound. The view taken in *Vaddadi Sannamma v. Kaduganti Radhabhayi* (3), does not necessarily conflict with the view which I take as the facts here found also fall within the scope of the principle recognized there.

The application is, therefore, dismissed with costs.

Z. K. *Application dismissed.*

(2) 38 Ind. Cas. 297 ; 21 M. L. T. 121 ; 5 L. W. 869 ; 32 M. L. J. 532 ; 40 M. 964.

(3) 43 Ind. Cas. 935 ; 41 M. 418 (F. B.) ; 22 M. L. T. 532 ; 34 M. L. J 17; (1918) M. W. N. 23 ; 7 L. W. 234.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 278 AND 332 OF 1922.

May 28, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

RAM NATH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM HARAKH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family property—Mortgage by one member—Legal necessity, proof of—Recital in deed, whether sufficient—Creditor, duty of—Proof impossible by lapse of time—Recital, when can be relied on.

A recital in a mortgage-deed executed by one member of a joint Hindu family is not a substitute for evidence of necessity, and the creditor must prove facts which embody the representations of the alleged needs of the estate, and the motives influencing the immediate loan. [p. 478, col. 2].

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind Cas. 280 ; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437 ; 19 Bom. L R. 498 ; 26 C. L. J. 1 ; 33 M. L. J. 14 ; (1917) M. W. N. 439 ; 22 M. L. T. 22 ; 6 L. W. 213 ; 89 A. 487 (P. C.) ; *Hunoomanpersaud Panday* v. *Mussammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 420 ; 18 W. R. 81 N. ; Sevestre 25 N. ; 2 Suth. P. C. 29 : 1 Sar. P. C. J. 552 ; 19 E. R. 147, relied on.

Brij Lal v. *Inda Kunwar*, 23 Ind. Cas. 715 ; 36 A 187 ; 26 M. L J. 442 ; 18 C. W. N. 649 ; 12 A. L. J. 495 ; 19 C. L. J. 469 ; (1914) M. W. N. 405 ; 15 M. L. T. 395 ; 16 Bom. L. R. 352 ; 1 L. W. 794 (P. C.), referred to.

Where proof of the facts justifying legal necessity or representations in respect of such a necessity has become impossible by lapse of time the rental will be sufficient evidence to support the deed provided that there are independent circumstances which are such as could justify a reasonable belief in the truth of the recital. [p. 474, col. 1.]

Nanda Lal Dhur Biswas v. *Jagat Kishore Acharjya Chowdhuri*, 36 Ind. Cas. 420 ; 44 C. 186 at p. 196 ; 20 M. L. T. 335 ; 31 M. L. J. 563 ; (1916) 2 M W. N 336 4 L. W. 458 ; 18 Bom. L. R. 868 ; 14 A. L. J. 1103 ; 24 C. L. J. 487 ; 1 P. L. W. 1 ; 21 C W. N. 225 ; 10 Bur. L. T. 177 ; 43 I. A. 249 (P. C.), followed.

Appeals from the decree of the District Judge, Rae Bareli, dated the 31st July 1922, reversing the decree of the Munsif, Partabgarh, dated the 30th June 1921.

Mr. *Ali Mohummad* and Dr. *J. N. Misra*, for the Appellants.

Mr. *Radha Krishna*, for the Respondents.

JUDGMENT.—The facts are as follows. Rajpal Singh defendant No. 1 is a member of a joint Hindu family consisting of his father, his sons his brother and his brother's sons. All these persons are defendants to the suit out of which these appeals have arisen. On the 31st October 1907 he executed a deed of mortgage in favour of the plaintiffs' father for a sum of Rs. 150 carrying interest at the rate of 2 per cent. per mensem. This suit is brought for the purpose of enforcing that mortgage by sale of the mortgaged property. The other defendants are prior and subsequent transferees of the property in suit. The suit was dismissed by the Court of first instance but on appeal the District Judge has reversed the decree of the Court of first instance and decreed the suit. This is an appeal from the last-mentioned decree. In the decree of the lower Appellate Court the plaintiffs' costs of both the Courts

are directed to be paid by the defendants. Amongst these defendants are included defendants Nos. 4 and 5, who were impleaded as prior mortgagees. Appeal No. 278 is by them and the only ground urged before me to-day by the learned pleader for the appellants is the question of costs. The learned pleader for the respondents accepts the validity of the objection by the appellants as against the decision of the Court below in the matter of costs. That appeal will, therefore, be allowed and the appellants will be discharged from any liability to pay the costs of any other party to the suit. I am not prepared to go further than that and award costs to the appellants as against the other parties.

The property mortgaged is admittedly the joint family property and the decree with which I am now concerned raises the question as to whether the loan for the security of which the mortgage was executed or any part of it was incurred by Rajapal Singh for legal necessity. The details of the entire sum of Rs. 150 may be gathered from the deed of mortgage to be as follows:—

(1). To meet the expenditure of the suit *In re Ram Singh* v. *Kandhai Singh* in the Court of the Subordinate Judge of Partabgarh.....Rs. 25; (2) Price of grain seed taken from the the mortgagee for the purpose of the cultivation of the *sir* and *khudkasht* of Ram Sing, the father of the executant..... Rs. 50: (3) Taken in cash on the date of the execution of the deed for the purpose of paying the pleader's fee in the case mentioned above.....Rs. 75.

It was admitted that the defendant No. 1 had paid Rs. 300 through Chandrapal Singh defendant No. 7 who is a subsequent transferee, as stated before, the plaintiffs towards the debt due under the bond in suit (*Vide* paragraph 7 of the plaint) and it is common ground between the parties that this payment was made on the 14th October 1916. The plaintiffs have given credit for this amount to the mortgagee.

As to the first item, the Court of first instance held that no legal necessity with reference to it was established and it declined to treat the recital in the deed as sufficient evidence of legal necessity in the particular circumstances of this case. As regards the third item, that Court came to the conclusion that a sum of Rs. 60 out of Rs. 75 was for legal necessity as having been paid to the pleader in the case mentioned in the deed towards the payment of his fee. As regards the second item, that Court held that there was no reliable evidence *aliunde* the deed to prove that that amount was taken for the purposes mentioned in the deed. In conclusion, it held that the only part of the money borrowed under the mortgage in suit was the sum of Rs. 60 paid to the pleader in the case which is mentioned in the document. But in view of the fact that the plaintiffs had already received a sum of Rs. 3000 towards the satisfaction of the debt in suit which amount was more than was validly binding on the family property it dismissed the plaintiffs' suit altogether. The plaintiffs appealed to the Court of the District Judge of Rae Bareli. That Court has held that the whole of the amount borrowed under the mortgage in suit was for legal necessity.

As regards item No. 1, that is the sum of Rs. 25, I am of opinion that the finding of the lower Appellate Court that it was borrowed for legal necesssity is correct. Exhibit 2 is the plaint of the suit mentioned in the document. It was filed on the 25th June 1907 and the recital in the mortgage deed is that this item was borrowed on the 23rd June 1907. It is, therefore, reasonably probable that this sum of Rs. 25 was borrowed for the purpose of the suit which began by the plaint of the 25th June 1907 and the recital contained in the deed with reference to this sum is true.

As regards item No. 3 it is admitted before me that the sum of Rs. 60 borrowed for the object of paying the pleader's fee was borrowed for legal necessity and, therefore, it is effective as against the family property. But it is contended that there is no evidence outside the recital in the deed in suit to prove legal necessity with reference to the remaining sum of Rs. 15.

As regards the second item of Rs. 50 it is contended that apart from the recitals there is no evidence whatsoever to justify the finding that this sum represents the price of grain seed utilised in the cultivation of the family *sir* and *khudkasht* lands. The decision of the learned District Judge in respect of the two points just now mentioned is exclusively based on the recitals contained in the deed. The learned pleader for the plaintiffs-respondents

attempted to support the finding with reference to the evidence of a witness as well. That witness is Chandrapal Singh (P. W. 2). The Court of first instance rejected his evidence on this part of the case as unreliable and gave excellent reasons for doing so. The judgment of the learned District Judge makes no reference to that evidence except in the sentence : The story of accounting for the grain debts, whether true or not, does not affect the question of the grain purchased for sowing *sir* and *khudkasht* as set forth in the recital of the mortgage-deed". The story referred to in this quotation is the one which was narrated by the witness Chandrapal Singh. The Court of first instance disbelieved this story and the inference from the observation of the learned District Judge is that he was not prepared to believe it either. I must, therefore, not allow that evidence to be used in second appeal before me.

The point of law in which this appeal resolves itself is this : Has the lower Appellate Court properly applied the rule of law allowing the recitals in the deed of mortgage to be used as evidence against the other members of the family ? In the case of *Sahu Ram Chandra v. Bhup Singh* (1) Lord Shaw made the following observation in respect of the powers of the manager and head of a joint family with regard to the joint family property :—" The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth* or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interest justified, the expenditure, then those entitled to the estate are bound by the transaction." On the question of the onus of proof His Lordship quoted the following passage from the judgment of Lord Justice Knight Bruce from the well-known case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (2) :— " The presumption proper to be made will vary with circumstances and must be regulated by and be dependent on them. Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir ; namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan."

The rule of law, therefore, is that the creditor must prove facts which embody the representations of the alleged needs of the estate and the motives influencing the immediate loan. The question in this case is 'Has this onus been discharged by merely reading the recitals in the deed in suit.' I am clearly of opinion that a recital is not a substitute for evidence of the facts which a creditor must prove under the dictum of Lord Justice Knight Bruce quoted above. If it were not so the principle of the protection of the joint family property enunciated by the *Mitakshara* will become wholly illusory for it will be always possible for a creditor to prepare the deed charging the family property in a manner so as to make it contain both the representations and the motives influencing the loan and thereby be entitled to the verdict of having discharged the onus that law placed on him. In the case of *Brij Lal* v. *Indar Kunwar* (3) Mr. Ameer Ali in delivering the judgment of Their Lordships of the Privy Council made the following observation :—" The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale-deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*." At the best such recitals may serve as an aid in the determination of the question of legal necessity provided that there are circumstances or direct

(1) 39 Ind. Cas. 280; 44 I. A. 126 ; 21 C. W. N. 698; 1 P. L. W. 557 ; 15 A. L. J. 437 ; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).

(2) 6 M.I.A. 393 at p. 420; 18 W. R. 81 N. Sevestre 25 N. 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(3) 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442 ; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395 ; 16 Bom. L. R. 352; 1 L. W. 794 (P. C.).

evidence *aliunde* the deed in suit supporting the truth of the recitals. In cases where "time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside"—*per* Lord Buckmaster in the case of *Nanda Lal Dhur* v. *Jagat Kishore Acharjya Chowdhuri* (4). No party can be asked to prove the impossible and when proof of the facts justifying legal necessity or representations in respect of such a necessity has become impossible by lapse of time, the recital will be sufficient evidence to support the deed provided that there are independent circumstances which are such as would justify a reasonable belief in the truth of the recital.

In the present case the only reason pointed out is that the mortgagee is dead. That in my opinion is not enough to attract the application of the rule laid down by Lord Buckmaster in the case just now referred to. Not only that there is no justification for a presumption that no direct evidence bearing on the transaction in question is available but on the other hand the plaintiffs adduced direct evidence in support of their case but it has been disbelieved. If the plaintiffs have a money-lending business, which they seem to have, they should presumably be possessed also of account-books relating to the business. No such account-book has been produced, nor any explanation given as to their non-production. I am, therefore, of opinion that the plaintiffs have failed to prove that the sums of Rs. 15 and 50 were borrowed for legal necessity. I also agree with the Court of first instance that inasmuch as the plaintiffs have received a sum of Rs. 300 towards the discharge of the debt in suit and as that sum is more than what will be due to them in respect of the loan of the two items of Rs. 25 and Rs. 60, that is Rs. 85 in all together with the interest at the rate of 2 per cent. per mensem from the date of the execution of the deed in suit to the date of the payment of the sum of Rs. 300, they are entitled to no decree in this suit. The result is that the appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored. The plaintiffs will bear the costs incurred by the defendants Nos. 1, 2, 8, 9, 10, 11 and 14 in all the Courts.

K. S. D. *Appeal allowed.*

(4) 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M.L.J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 863; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 205 OF 1923.

March 13, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice.

VISHNU NARAYAN DEO—PLAINTIFF—APPLICANT

versus

KESHAV GAJANAR PATBHARE—DEFENDANT—OPPONENT.

Guardian and Minor—Promissory note taken by guardian Suit by minor, whether competent.

A minor is not entitled to institute a suit on a promissory note taken by his guardian. If the guardian fails to bring the suit, the minor can on his coming of age sue him for negligence. (p. 475, col. 1).

Ramanuja Ayyangar v. *Sadagopa Ayyangar*, 28 M. 205 ; 15 M. L. J. 249, followed.

Application against the decision of the Judge of Small Cause Court, Poona, in Suit No. 4893 of 1922.

Mr. *B. G. Rao*, for the Applicant.

Mr. *A. G. Sathaye*, for the Opponent.

JUDGMENT.—The plaintiff filed this suit on a promissory note dated June 10, 1906. The promissory note was taken by his guardian when he was the minor. The plaintiff sought to prove that he was entitled to sue on the note within three years of his attaining majority. It does appear from the *Roznama* of the case that after it had been called for hearing on several occasions, Exhibit 7-A was produced purporting to be a certificate as regards the majority of the plaintiff having occurred on 9th December 1919. The Judge, however, remarks :—

MAHABIR PRASAD v. SURAJPAL SINGH

" Now minor having attained majority sues. But his birth certificate or evidence to prove his minority and to bring claim in time is not produced. This is a stale claim of 1906. Hence plaintiff must have filed his suit with all evidence ready. It is six months since suit, there is no evidence to support plaint".

I doubt very much whether Exh. 7-A could be considered as evidence that the plaintiff's birth date was 9th December 1898. But the real point in the case has not been observed, namely, that section 6 of the Indian Limitation Act does not apply. The note was given to his guardian, and his guardian could have sued on it. The minor was not entitled to institute a suit on the note. That was decided in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (1). The guardian having taken the note, he is the person entitled to sue on it, and the suit would be barred if it was not brought within the ordinary period of limitation. The only right which the minor could have on his coming of age would be the right to sue his guardian for negligence. Rule discharged with costs.

N. H. *Rule discharged.*

(1) 28 M. 205 ; 15 M. L. J. 249.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 230 OF 1922.

May 28, 1923.

Present :—Mr. Wazir Hassan, A. J. C.

MAHABIR PRASAD—PLAINTIFF —APPELLANT

versus

SURAJPAL SINGH AND ANOTHER —DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation of one member, effect of—Intention of other members—Presumption.

Under the Hindu Law there is no presumption, when one co-parcener separates from others, that the latter remain united. (p. 477, col. 1).

Where however the disruption of the share of every member of a joint Hindu family is made incidentally with the sole object of determining the share of the outgoing member, and the intention of the other members is to continue to be joint, a division amongst them does not follow as a necessary corollary of law from the fact of separation of one member only. But there is no presumption of a continuance of jointness either. (p. 476, col. 2)

Palaniammal v. *Muthuvenkatachala Maniagarar*, 43 Ind Cas 833 ; 33 M. L. J. 259 ; *Balabux* v. *Rukhmabai*, 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R 469 ; 8 Sar P. C. J. 470, followed.

Appovier v. *Rama Subba Aiyan*, 11 M. I. A. 75 ; 8 W. R P. C 1 ; 1 Suth P. C. J. 657 ; 2 Sar. P. C. J. 218 ; 20 E R. 30 ; *Joy Narain Giri* v. *Grish Chunder Myti*, 5 I. A. 228 ; 4 C. 434 ; 3 Sar. P C. J. 871 ; 3 Ind. Jur 81 ; 2 Ind. Dec. (N. S.) 276 (P. C.) referred to.

Appeal from the decree of the District Judge, Rae Bareli, dated the 7th April 1922, upholding the decree of the Subordinate Judge, Rae Bareli, dated the 16th January 1922.

Mr. *Muhammad Wasim*, for the Appellant.

Mr. *Bishambar Nath Srivastava*, for Mr. *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—This is an appeal against the decree of the District Judge of Rae Bareli dated the 7th of April, 1922, confirming the decree of the Subordinate Judge of the same place dated the 16th of January 1922, by which the suit of the plaintiff-appellant was dismissed.

The relief prayed for in the plaint was a decree for sale in respect of the property covered by the deed of mortgage dated the 19th of January 1909 admittedly executed by Surajpal Singh, defendant No. 1, in favour of the plaintiff. Defendant No. 2, Bhagwat Prasad, is the first cousin of the plaintiff.

The plaintiff's case is that the mortgage in suit is the joint property of the plaintiff and the defendant No. 2 for the reason that it was executed at the time when they formed a joint Hindu family and the consideration proceeded from the funds belonging to the family. The defence which has prevailed in the Courts below was that the joint character of the family broke up as far back as 1882-1883 and the mortgage in suit was the exclusive property of the defendant No. 2.

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On the pleadings, as briefly stated above, the simple issue which arises for decision is: Were the plaintiff and the defendant No. 2 members of a joint Hindu family on the date of the mortgage? This issue on the face of it involves a simple question of fact and it has been answered by both the Courts below concurrently in the negative. *Prima facie* therefore the decision is not liable to be challenged in second appeal. The line of attack, however, is this. The finding is primarily based upon two documents, Ex. 14 and Ex. B1, which evidence a disruption of the joint family according to the judgment of the lower Courts; but it is contended that on a correct interpretation of these documents it would appear that only Makhan one of the three sons of Risal, grandfather of the plaintiff and the defendant No. 2, had separated and the other members continued to constitute a joint Hindu family. A few more documents were read before me but if the contention as regards the interpretation of Ex. 14 and Ex. B 1 fails, the finding of the lower Courts must be maintained.

It will now be desirable to state a short pedigree.

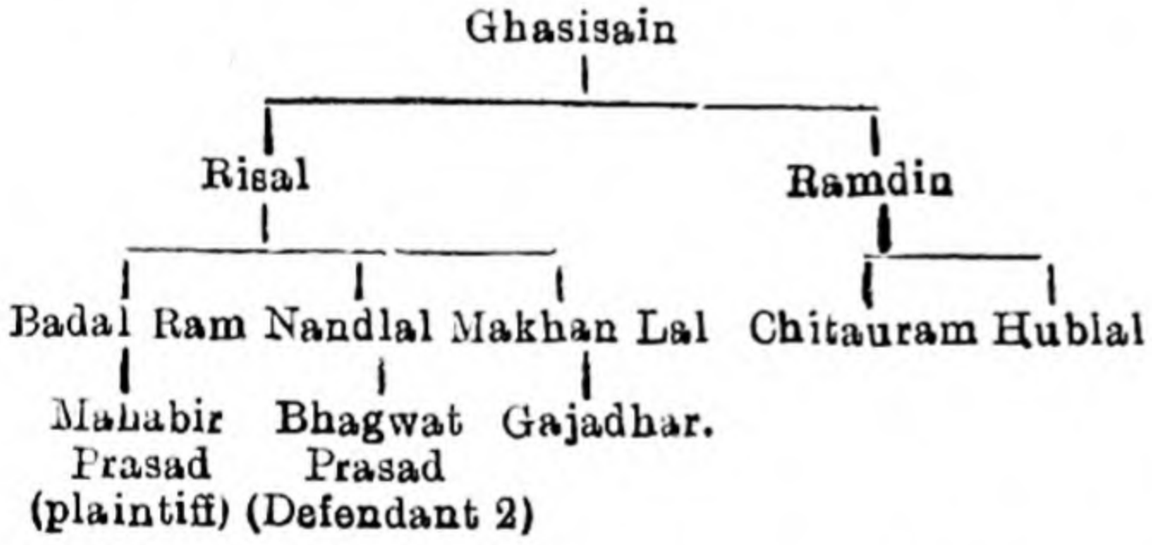

Exhibit 14 is an award dated the 23rd September 1883, in an aribitration between Makhan and Badal, two sons of Risal. It is admitted that the effect of the award is the separation of Makhan. In my judgment, it is the disruption of the entire joint family. The terms of the award distinctly show that Makhan had separated a year before the award and Badal represented the rest of the members of the family in those proceedings. The operative portion of the award is the allotment of shares in the entire ancestral joint family property in the first instance between Risal and the descendants of Ramdin in equal moieties and then a sub-division of the moiety allotted to Risal into four equal shares amongst Risal and his three sons, Badal, Makhan and Nandlal. The words of the award are: "The mode of partition which we (the arbitrators) have determined is that Chitto and Hublal, sons of Ramdin deceased are declared to have half share in the entire joint assets and in the remaining moiety four equal shares are declared for Risal, Badal, Makhan and Nandlal". The award winds up with a further declaration that in the event of Risal dying intestate the one-fourth share allotted to him shall devolve on the three brothers. Badal, Makhan and Nandlal. The award recites the then existing condition of things that with the exception of Makhan the descendants of Risal and Ramdin are still living in one house messing together and their property is still held joint and undivided. Reliance is placed on this recital as showing that only Makhan had separated and the rest of the family continued to be joint. This argument necessarily drifted into the question of the effect of separation of one member on the rest of the family and the subsidiary question of reunion. The cases of *Santara* v. *Narpat Singh* (1). *Ranganatha Rao* v. *Narayanasami Naicker* (2), *Durga Dei* v. *Balmakund* (3), *Rangasami Naidu* v. *Sundararajulu Naidu* (4) and *Palaniammal* v. *Muthuvenkatachala Maniagarar* (5) were cited in support of the proposition that the separation of one member does not necessarily effect a disruption of the entire joint family in all cases. I agree with the opinion held in the case of *Palaniammal* v. *Muthuvenkatachala Maniagarar* (5) that there is no reason for the view that even if a case where the disruption of the share of every member of the family is made incidentaly with the sole object of determining the share of the outgoing member and the intention of the other members is to continue to be joint there is a division amongst them as a necessary corollary of law following from the fact of separation of one member only. But there is no presumption of such a continuance either. To my mind the judgment of Lord Davey in *Balabux* v. *Rukhmabai* (6) is perfectly clear. He said:

(1) 9 O. C. 216.
(2) 31 M. 482.
(3) 29 A. 93; 3 A. L. J. 683; A. W. N. (1906) 287.
(4) 35 Ind. Cas. 52; 31 M. L. J. 472.
(5) 43 Ind. Cas. 833; 33 M. L. J. 259.
(6) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470.

"It appears to their Lordships that there is no presumption, when one co-parcener separates from others, that the latter remain united. In many cases it may be necessary in order to ascertain the share of the outgoing member to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." On the question of reunion the finding of the lower Court is: "There is absolutely no evidence on the record to prove reunion which is the alternative case set up on behalf of the plaintiff." This finding being one of fact must be accepted by me as conclusive.

To come back to the award. To the facts which float on the surface of the document, the observations of Lord Westbury in the leading case of *Appovier* v. *Rama Subba Aiyan* (7) apply with full force; "But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided". In my judgment therefore the award effects a division of the entire joint family.

Ex, BI. is the will of Risal dated the 23rd of March 1886. It is a disposition in respect of his one-eighth share, *i. e.*, $\frac{1}{4}$th of the $\frac{1}{2}$ which he received under the partition made by the award of 1883 (Ex. 14). It recites the division in terms of the award, in fact the language used is almost the same as of the award, and proceeds to make a devise of 'my one-eighth share' in favour of his two grandsons, Mahabir and Bhagwat, the plaintiff and the defendant No. 2 of this case. It also recites the residence, mess and property of the sons of Ramdin, Risal's own descendants and of his own self as still joint. Now the will of Risal admits of no ambiguity whatsoever. The real significance of it is that he makes a disposition of one-eighth share which became his own since the partition of 1883. In the case of *Joy Narain Giri* v. *Grish Chunder Myti* (8), their Lordships of the Privy Council regarded the making of a Will as a fact indicating that the testator "himself considered that a separation had taken place." The joint residence, the joint mess and the absence of any actual partition of any property are all consistent with tenancy in common. As Lord Davey observed in the case of *Balkishen Das* v. *Ram Narain Sahu* (9). "They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it. Consistently with the broad principle laid down in Appovier's case, this was determined by the allotment to them of defined shares which, to use Lord Westbury's illustration, "converted them from joint holders into tenants in common." I am, therefore, of opinion that the ground of attack fails and the finding stands.

The appeal is dismissed with costs.

K. S. D. *Appeal dismissed.*

(7) 11 M. I. A. 75; 8 W. R. P. C. 1; 1 Suth. P. C. J. 557; 2 Sar. P. C. J. 218; 20 E. R. 30.

(8) 5 I. A. 223; 4 C. 434; 3 Sar. P. C. J. 871; 3 Ind. Jur. 81; 2 Ind. Dec. (N.S.) 276 (P.C.).

(9) 30 C. 738; 30 I. A. 139; 7 C. W. N. 578; 5 Bom. L. R 461; 8 Sar. P. C. J. 489 (P.C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 551 OF 1922.

February 25, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SUBBA RAMA HEGDE—PLAINTIFF—APPELLANT

versus

VENKATSUBBA HEGDE—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 52, 123 —Gift, when complete—Donor, whether can revoke gift

SUBBA RAMA HEGDE *v.* VENKATSUBBA HEGDE

before registration—Injunction restraining donee from getting gift-deed registered, grant of—Lis pendens, *doctrine of, application of.*

It is open to a donor to revoke the gift before it is completed. (p. 480, col. 1).

A gift of immoveable property under section 123 of the Transfer of property Act can only be effected by a registered instrument. Therefore a donor can, if he is so minded, revoke the gift before registration, and obtain an injunction from the Court restraining the done from getting the gift-deed registered. (p. 479, col. 1).

Venkati Rama Reddi v. *Pillati Rama Reddi*, 38 Ind. Cas. 707 ; 40 M. 204 ; 31 M. L. J. 690 ; 4 L W. 465 ; 20 M. L. T. 450 ; (1917) M. W. N. 112, *Ramamirtha Ayyan* v. *Gopala Ayyan*, 19 M. 433 ; 6 M. L. J. 237 ; 6 Ind. Dec. (N. S.) 1007, distinguished.

Per Macleod, C. J.—A transfer of immoveable property effected by a donee, by getting the gift-deed registered during the pendency of a suit for injunction restraining him from getting registration, is vitiated by section 52 of the Transfer of Property Act. (p. 480, col. 1).

Appeal from the decision of the District Judge, Kanara, in Appeal No. 66 of 1921, confirming the decree of the Subordinate Judge, Honavar, in Civil Suit No. 248 of 1919.

Mr. *H. C. Coyajee*, with Mr. *S. S. Patkar*, for the Appellant.

Mr. *Dhirajlal Thakore*, with Mr. *Ratanlal Ranchhoddas*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff in this suit was one Subraya Hariappa Hegde. He alleged in the plaint that when his relation Madappa was absent from the village the defendant told him that his interest would suffer if he acted according to the opinion of Madappa and that the defendant would manage his property in such a way as would safeguard his interest. Having given this improper advice, thedefendant had forciby taken him to Honavar about the beginning of the month of Ashadh (Shake year 1841) and had got a document written and took his signature by a thumb impression thereon ; that he did not understand what was written in the document, and received nothing in return in connection with it from the respondent. The defendant, in whose favour the document was signed, is the cousin of the plaintiff. Thereafter the plaintiff wished to get the document back and objected to its being registered. Accordingly his prayer was that it should be declared that the document which the defendant got written from him was void and should be given back into his possession and that a permanent injunction should be issued to the defendant restraining him from completing the document by getting it registered.

The suit was filed on July 21, 1919. The same day the defendant presented an application for registration. On July 24, notice was issued calling upon the defendant to produce the document in Court. In other words that was an application to the Court to prevent the defendant pending the suit from registering it. However, before any order was passed on the notice Subraya died in November. Thereafter proceedings took place beforethe Registrar for registration of the document. Eventually it was registered in June 1920.

At the hearing of the suit, which was continued bythe plaintiff's brother's son to whom Subraya had given the property by Will, the allegation that the plaintiff had passed the document under undue influence and misrepresentation was negatived, and the decree was passed dismissing the plaintiff's suit. An appeal from this decree was unsuccessful.

We are only concerned in this second appeal with a point of law, which shortly put is as follows :—

Can a donor of immoveable property, when the gift can only be effected by a registered document, resile from his action before the document has been registered, and if the donee refuses to give back the document, can the donor obtain an injunction from the Court restraining the donee, from proceeding to register the document ?

The real point in the case has not been observed by either of the Courts below. Both the learned Judges seem to think that the case was governed by the decision in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (1). There a deed of gift was registered by the donee after the death of the donor without the leave of the legal representative of the donor, and it was held that there was nothing in section 123 of the Transfer of Property Act which required the donor to be concerned in the registration of the document ; all that was required was that he should have executed it. Once

(1) 38 Ind. Cas. 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465 ; 20 M. L. T. 450 ; (1917) M. W. N. 112.

such an instrument is duly executed, the Indian Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of the execution.

If nothing further had been done by Subraya except to object to the registration, and to refuse to appear before the Registrar and admit execution, then undoubtedly the donee could have succeeded in getting the document registertered even against the consent of the donor. But neither that decision, nor the decision in *Ramamirtha Ayyan* v. *Gopala Ayyan* (2), which is considered as overruled by *Venkati Rama Reddi* v. *Pillati Rama Reddi* (1), have dealt with the point which is before us. It is true that in *Ramamirtha Ayyan* v. *Gopala Ayyn* (2) the Court was of opinion that "a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete. To do so, it is necessary, *inter alia*, that it should be registered; but he can be no more compelled to register the deed than to execute it in the first instance. The registration of the present deed contrary to the supposed donor's wishes, which was ordered by the Registrar, was therefore void."

It is not necessary to go so far as that in this case, because Subraya filed the suit before the document was registered, and if he could obtain from the Court an injunction restraining the donee from registering the document, clearly any subsequent registration during the pendency of the suit would be subject to the final decision of the Court.

Now it has been argued for the respondent, that once a donor has executed a deed of gift of immoveable property and handed over the deed to the donee, it is not in his power to withdraw the gift, and as there is no necessity for him to take part in the registration of the document, the donee is entitled to get the document registered whether the donor consents to it or not.

It is necessary, therefore, to examine the provisions of the Transfer of Property Act in respect of gifts to see whether this argument can prevail. Under section 122 "gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Therefore there are two things, essential to a gift (1) transfer of property, and (2) acceptance by the donee.

Under section 123, for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

Therefore a gift is a transfer, and the transfer of immoveable property gifted cannot be effected except by a registered instrument. It must follow that the gift is incomplete until the document is registered, although when the document is registered, by virtue of section 47 of the Indian Registration Act, the date of the gift is carried back to the date of the execution of the document. But section 126 has been relied upon as showing that a gift cannot be revoked except under the provisions of that section, none of which apply to this case. But clearly when the section says that "a gift save as aforesaid cannot be revoked," it must refer to a complete gift and not to an inchoate gift. For instance, if the donee has not accepted the gift, clearly it is not complete and the donor can revoke it. So if the property has not been transferred, the gift is still inchoate, and in my opinion the donor is entitled, if he so wishes, to prevent it from becoming complete The donee who is to get the property without consideration, has nothing to complain of, if, before the gift is completed so as to effect a transfer of the property, the donor expresses his wish to withdraw.

It seems to me that Subraya was entitled in this case to revoke the gift before the donee had got the document registered, and the filing of the suit would in effect prevent Venkat from getting the document effectively registered against Subraya until the suit was decided one way or the order.

Under section 52 of the Transfer or Property Act:—

"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any

(2) 19 M. 433; 6 M. L. J. 287; 6 Ind. Dec. (N. S.) 1007.

right to immoveable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

Clearly the provisions of that section apply to a transfer by the defendant of the suit property to himself. When this suit was filed the title to the property was in the plaintiff, and the defendant by getting the document registered transferred the property to himself, and it is such a transfer which is clearly prohibited by the section.

In my opinion, therefore, the appeal succeeds and the plaintiff is entitled to a decree. The document (Exhibit 56) to be restored to his possession by the Registrar. The endorsement of registration with reference thereto to be cancelled. Copy of this decree to be sent to the Registrar under section 39 of the Specific Relief Act. The plaintiff has not succeeded in rescinding the gift on the ground taken in the plaint, and we think that no order as to costs should be made.

Shah, J.—I agree. I desire to add that quite apart from section 52 of the Transfer of Property Act, the conclusion reached in this case would be the same. I am not clear as to the application of section 52 of the Transfer of Property Act to the facts of the present case. I prefer to reserve my opinion on that point and to base my decision upon the broad ground that it is open to the donor to revoke a gift before it is completed. In the present case before it was completed by registration, he took steps to revoke it and filed a suit to restrain the defendant from getting the document registered and from completing the gift. There is no decision which lays down that the donor cannot revoke it before it is completed.

N. H. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 51 OF 1921.

March 22, 1923.

Present:—Mr. Dalal, A. J. C., and Mr. Simpson, A. J. C.

Babu RAM RAJ SINGH—PLAINTIFF —APPELLANT

versus

Babu AVADH BIHARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu law—Joint family—Son and father—Property, presumption as to.

There is a presumption that a Hindu and his father are joint in estate but there is no presumption that the joint family which they constitute possesses any property at all. (p. 481, col. 1).

Appeal from the decree of the Subordinate Judge, Partabgarh, dated 30th July 1921.

Mr. *Hari Kishan Dhaon*, for Mr. *Hardhian Chandra*, for the Appellant.

Messrs. *Radha Krishna* and *Ram Sarup Nigam*, for the Respondents.

JUDGMENT.—This is a first appeal by the plaintiff, Babu Ram Raj Singh. The suit was one for a declaration that a certain deed of gift is void against the plaintiff. The following two pedigrees will show the relationship between the parties.

Madho Singh.

Babu Sukhdeo Singh (Defendant 2.)	Har Mangal Singh.
Babu Ram Raj Singh (Plaintiff.)	
Babu Oudh Behari Lal (Defendant 1.) = *Musammat* Kausilla Kuar	
Daughter = Babu Hanuman Prasad.	

The deed of gift executed by Babu Sakhdeo Singh, defendant 2, father of the plaintiff, in favour of Babu Oudh Behari Lal defendant I on the 8th July 1919. The property gifted was the whole village of Jogapur. The third defendant was impleaded because he filed a

pre-emption suit in which he asserted that this gift was in reality a sale. The plaintiff then filed the present suit to set aside the gift. His suit was dismissed by the learned Subordinate Judge on two grounds. The first is that this village is not joint family property but is the self-acquired property of Sukhdeo Singh defendant No. 2, the donor. The second is that, even if it were joint family property the transaction would be binding on the plaintiff. The plaintiff comes here in appeal.

The appeal fails. This village was bought in Sukhdeo Singh's own name and there is nothing to suggest that it was joint family property. The original burden rests upon the plaintiff to prove his allegation. No doubt there is a presumption that the plaintiff and his father are joint in estate, but there is no presumption that the joint family which they constitute possessed any property at all. The plaintiff, therefore, set out to prove that his grandfather Madho Singh was a man of property. The first witness examined was Babu Sukhdeo Singh defendant 2. He is a contractor, an Honorary Magistrate and Assistant Collector of Partabgarh. We regret to add that he is not a truthful witness. In the array of parties he figures as a defendant but really he is on the plaintiff's side. It is quite clear that the present transaction was entered into to evade pre-emption. Sukhdeo Singh defendant 2 wished to sell this village of Jogapur to Oudh Behari Lal defendant 1, who was a leading pleader of Partabgarh. On 12th February 1918 the defendant No. 2 executed a sale-deed of this property in favour of *Musammat* Kausilla Kuar, wife of the defendant No. 1, for Rs. 16,000. The sale-deed contains a stipulation that if the sale-price remained unpaid in the month of Jeth the sale would become null and void. In fact the price was not paid. The sale-deed became null and void and the defendant No. 1 got a refund of the stamp from the revenue authorities. We are unable to follow this tortuous proceeding. It is not likely that there was any real difficulty in finding the money which was forthcoming in June.

On 25th June 1918 the defendant No. 2 executed a possessory mortgage-deed of the same property in favour of Babu Hanuman Prasad, son-in-law of Defendant No. 1, for the same consideration of Rs. 16,000. Then a year later on the 8th July 1919 defendant 2 executed the deed of gift now in suit in favour of defendant 1. The only reason given for the gift was his friendship for defendant 2. Defendant 1 was directed to redeem the mortgage.

The correct interpretation of these transactions is that a sale was split into a mortgage and a gift in order to evade pre-emption. But we are not immediately concerned with that point. For the present what is to be noted is that the plaintiff, defendant 1 and defendant 2 are all really arrayed against the pre-emptor defendant 3 and that the present suit is brought for the purpose of defeating the pre-emptor. For this reason the evidence of Babu Sukhdeo Singh must be regarded as partisan evidence. He states that his father did money and grain lending business to the extent of rupees forty or fifty thousands and that at the time of his death he left *zemindari* property in Patkholi, under-proprietary rights in Bhaironpur, mortgagee rights in Atarsan and mortgagee rights in Khabor, the whole of which the witness says he himself got together with Rs. 30,000 cash. His brother Har Mangal Singh took the rest of their father's cash and the grain. This separation is said to have taken place after the death of the father and the witness goes on to say that he purchased *Mauza* Jogapur (which is the property in suit) with the money which he received from Bhagwan Bakhsh Singh and Rampal Singh through Raja Partab Bahadur Singh on account of simple money bonds in favour of the witness's father. Har Mangal Singh gives a very different account of the matter. He says that Sukhdeo Singh took all the money left by their father which was Rs. 50,000 or Rs. 40,000. He mentions the *zemindari* in Bhaironpur and Patkholi and mortgaged land in two or three villages. But he does not say to which brother these lands came.

But we have positive evidence that the statements of the two brothers are false. These are Exhibits C10 and C11. On 31st July 1907 Har Mangal Singh filed an application for mutation of the whole share of his father in village Patkholi, that is to say for all the *zamindari* which Madho Singh possessed, for if there were any rights in Bhaironpur they were only under-proprietary, and there is no

evidence of their existence except these oral statements. In this application Har Mangal Singh made his brother Sukhdeo Singh the defendant, and he stated that, in the lifetime of Madho Singh the father, Sukhdeo Singh had separated without taking any share and that, at that time, Madho Singh had handed over the entire ancestral share in village Patkholi to Har Mangal Singh as a gift, and since that time Sukdeo Singh has been in possession of his entire self-acquired property, and there is no other property which could be described as joint family property. On this ground he asks to have his brother's name expunged from the *khewat*.

Ex. C11 is Sukhdeo Singh's statement in reply. He said "What is stated in the application is correct. My name is no doubt recorded in Khewat but I am not in possession. Name of Har Mangal Singh may be recorded in Khewat with respect to I anna $3\frac{1}{3}$ pies share the ancestral property. My name may be removed from the Khewat. I have no objection".

These statements are very clear. When the defendant No. 2 Sukhdeo Singh was cross-examined on them he could only say that he had admitted the correctness of Har Mangal Singh's application without having read it. The appellant's Counsel admitted that he could not expect the Court to believe this.

It appears, therefore, from Sukhdeo Singh's own statement that he separated in the lifetime of his father taking no share in the father's property and secondly that the funds out of which he acquired the village of Jogapur were self-acquired. He has offered no evidence about the simple money bonds due to his father from which he deposes he got this money. It is also evidenced that he borrowed Rs. 1,600 during the same month of November 1905 in which he made the purchase. The appeal fails on this ground that the property is not joint family property at all.

The case is not quite so clear if the property was considered to be joint family property. But we are prepared to agree with the Court of Trial that even in that case the suit ought to be dismissed. It is admitted in paragraph 4 of the plaint that the mortgage dated 25th June 1918 was for legal necessity. Now we do not consider that, in substance, the gift can be separated from the mortgage and treated as a gift of the equity of redemption which can be separately attacked by a member of the joint family. We consider on the contrary that the mortgage and the gift are merely an analysis of a single transaction, which was the sale of the property for Rs. 16,000 thrown into this form in order to evade pre-emption; and the plaintiff's admission that the mortgage was for legal necessity must be taken as an admission that the gift which he was attacking was also for legal necessity.

In the result the appeal fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 172 OF 1922.

March 11, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

CHHOTUBHAI BHAIMBAI —APPELLANT

versus

DAJIBHAI UKABHAI— RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 9—Bombay Provincial Insolvency Rules, r. 27 (4)—Adjudication application—Failure to make deposit—Return of application—Procedure—Appeal against adjudication order—Insolvent, whether necessary party.

An application to adjudicate a person insolvent presented without a deposit of the necessary amount required under r. 27 (4) of the Bombay Provincial Insolvency Rules should not be returned to the petitioner. The petitioner or his pleader should be told to make the deposit within a certain time, and then if he fails to do so the petition might be dismissed. The insolvent is a necessary party to an appeal by a creditor against the adjudication order. (p. 483, col. 1.)

Appeal from the decision of the District Judge, Surat, in Miscellaneous Application No. 3 of 1921.

Mr. *M. H. Mehta*, for the Appellant.

Mr. *M. B. Dave*, for the Respondent.

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JUDGMENT.—One Dajibhai Ukabhai presented a petition that Manibhai should be adjudicated insolvent. The petition was opposed by another creditor in whose favour Manibhai had executed certain mortgage bonds. The petitioner alleged that these mortgage bonds had been executed in order to defeat or delay Manibhai's. An order of adjudication was passed on the petition. Chhotubhai has filed an appeal against that order, but he has not made the insolvent a party to the appeal. Consequently the appeal is not competent. Even if it were, there is no ground for reversing the decision of the Court below as the petition was presented within three months of the alleged act of insolvency. Under rule 27 (4) framed by the High Court under the Provincial Insolvency Act, the petitioner had to deposit Rs. 150. The petition was returned to the petitioner in order that it might be presented with the necessary deposit. As the Court was closed on April 24, 1921, for vacation, the petition which was returned during the vacation was re-presented on June 6, 1921, with the necessary deposit.

It is suggested now that the petition was presented on June 6, that is to say, more than three months after the alleged act of insolvency. The Judge, after discussing the provisions of sections 9 and 54 of the Act and section 10 of the General Clauses Act, held that the petition was presented within the prescribed time. Further he said :—

"Besides, I would, if necessary, treat the first presentation valid as it was not absolutely necessary to return the petition. I may mention that the order for the return of the petition was made by me in Chambers in the absence of the petitioner's pleader, and I would not have made it if I had foreseen that it would lead to the present difficulty."

The petition should not have been returned. The petitioner or his pleader should have been told to make the deposit ordered by the rules within a certain time, and then if the rules were not complied with, the petition might have been dismissed. In any event this appeal must be dismissed with costs.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 255 OF 1922.

May 9, 1923.

Present :—Mr. Dalal, J. C.

JANKA, *MUST.*—PLAINTIFF—APPELLANT
versus
SHIAM KISHORE LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901) ss. 107, 233 (k) —Partition—Mortgagee, position of—Mortgage, whether can be enforced against share allotted to mortgagor.

Parties to a partition suit cannot re-agitate the matter in the Civil Court and claim that any land was wrongly allotted at the time of partition. But a mortgagee is not a necessary party to partition proceedings and his absence from such proceedings will not result in the mortgage being extinguished. (p. 484, col. 1.)

After partition the mortgagee of a particular co-sharer cannot enforce the mortgage against any land allotted to co-sharers other than his mortgagor, but a partition would not prevent him from enforcing his lien against the land allotted to the share of his mortgagor. (p. 484, col. 1.)

Appeal against the judgment of the District Judge, Fyzabad, dated the 10th May 1922, reversing the decree of the Additional Subordinate Judge, Fyzabad, dated the 17th August 1921.

Mr. *Aditya Prasad*, for the Appellant.

Messrs. *Ram Bharose Lal* and *R. S. Sinha*, for the Respondents.

JUDGMENT.—The plaintiff sued for mortgagee possession of 5 *biswas* 3 *biswansis* and odd share in *mouza* Samra, or in the alternative of any share to which she may be found entitled by the Court. This alternative prayer was added because when the mortgage was made the *mouza* was joint property of several co-sharers while at the time of the institution of the suit there had been a partition between the mortgagors and their co-sharers.

The Court of first instance of the Additional Subordinate Judge of Fyzabad granted her a decree for 19 *biswansis* and 1 *anwansi* share as against the defendant Shiam Kishore son of

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Thakur Prasad, one of the three original mortgagors, and the donees Brij Kishore and Kandhaia Lal minors under the guardianship of Udai Bhan Prasad. These donees had taken their title from Shiam Kishore. This decree was set aside on appeal by the learned District Judge of Fyzabad on the ground that at the time of the partition the plaintiff was not allotted any area of land as mortgagee and that, therefore, her claim for mortgagee possession was barred under the provisions of Section 233 (*k*) of the Land Revenue Act.

In my opinion both the lower Courts have misunderstood the operation of the provisions of that sub-section. Parties to a partition suit cannot re-agitate the matter in the Civil Court and claim that any land was wrongly allotted at the time of partition. When the Revenue Court during partition exercises the jurisdiction of a Civil Court and decides a question of title, the decision, if not appealed against, would be final and would be binding on the Civil Court. In the present case, however, there is no adjudication of the Revenue Court, as the operative nature or otherwise of the mortgage in favour of the plaintiff mortgagee. In fact her title as mortgagee was not questioned in the partition proceedings. Where mortgagee is not a party to partition proceedings such absence will not result in the mortgage being extinguished. The mortgagee can always follow up his claim against the property allotted to the mortgagor. In case no property is jointly or separately allotted to the mortgagors the mortgagee would naturally have no remedy, but such is not the case here. A mortgagee without the consent of the mortgagor cannot have the land in his possession placed in a separate lot, so a mortgagee is not a necessary party to partition proceedings. After partition the mortgagee of a particular co-sharer cannot enforce the mortgage against any land allotted to co-sharers other than his mortgagor, but a partition would not prevent him from enforcing his lien against the land allotted to the share of the mortgagor. It has been held by both the Courts that Shiam Kishore is the successor-in-interest of the mortgagor Thakur Pershad, so in spite of the partition the plaintiff can enforce her mortgagee-rights against the property separately allotted to Shiam Kishore, or to his donees (subsequently to the mortgage). There is a large mass of papers relating to the partition proceedings but what really happened there may be shortly put. It appears that *Must.* Janka put in an appearance at the commencement of the proceedings but as her name was not entered in the village record she was directed to have an entry of her name made in the record before she could be heard by the partition Court, because partition can be carried out only among recorded co-sharers of a mahal (Section 107, Land Revenue Act). She was very dilatory and appeared in Court, subsequent to mutation proceedings after the partition proceedings had been completed and sanctioned by the Collector. The Trial Court, however, accepted her application and noted her mortgagee share in two of the lots (Exhibits 14 and 15). On appeal, however, the Commissioner held that the plaintiff had appeared too late in the partition proceedings and that the partition Court ought not to have made any order in her favour. This order was upheld by the Board of Revenue, which pointed out further that the plaintiff could not have obtained a separate allotment of land as she had not obtained the consent of her mortgagor. The result is that the plaintiff was no party to the partition proceedings. In such circumstances, when the partition Court had not adjudicated upon her rights, she can certainly enforce her right as a mortgagee against the property separately allotted to the mortgagor or any successor-in-interest of the mortgagor, though she could not claim that any property allotted to any other co-sharer fell within her mortgage For this reason the decree of the District Judge must be discharged. I do not agree with the reasoning of the Trial Court in its finding on issue No. 6 that the plaintiff's claim should be limited to 19 *biswansis*, 1 *anwansis* share, only, because that was the share which was once allotted to her by the Revenue Court. That order was set aside and as I have already pointed out, the plaintiff was in fact no party to the partition proceedings. In my opinion the plaintiff is entitled to a decree up to the share separtely allotted to the donees of Shiam Kishore. From the record this appears to be 1 *biswa*, 1 *biswansi*, 12 *kachwansis*, 16 *anwansis*. The plaintiff had objected by way of appeal in the lower Appellate Court and her objection was dismissed. This Court is, therefore, at liberty to fix her

share in excess of the decree granted by the first Court.

In the result I set aside the decree of the lower Appellate Court and varying the decree of the first Court grant to the plaintiff mortgagee possesion, against defendants Shiam Kishore, and Brij Kishore and Kandhaia Lal, minors under the guardianship of Udai Bhan Prasad, of 1 *biswa* 1 *biswansi*, 12 *Kachwansis*, 16 *anwansis* share. The plaintiff shall receive proportionate costs of all the Courts from these three defendants. I have already passed orders of dismissal of appeal against three respondents Mahabir Prasad, son of Dwarka Prasad, and Mahabir Prasad and Mangli sons of Shiam Sundar Lal. The appeal is also dismissed against Shankari Prasad and Rameshwar Tewari, but without costs because they have not put in an appearance.

Decree set aside.
Appeal partly dismissed.

Z. K.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 25 OF 1922.

December 13, 1922.

Present :—Sir Lancelot Sanderson, Kt. C. J., and Mr. Justice Richardson.

RASH BHARI KARURI—APPELLANT

versus

NARAIN DAS DORILAL—RESPONDENT.

Contract Act (IX of 1872) ss. 99, 102—Sale of goods—Stoppage in transit—Assignment of document of title to third persons—Goods faith and valuable consideration—Burden of proof—Appeal—Findings of fact—Appellant, duty of.

Where a seller has stopped goods in transit but the buyer has in the meantime assigned the document of title to the goods to a third person, the latter, in order to defeat the seller's right of stoppage must prove that when the document of title to the goods was assigned to him he was acting in good faith and that he gave valuable conisderation for the goods. (p. 488, col. 1.)

Case law discussed.

Where a case involves findings of fact it is for the appellant to satisfy the Appellate Court that the trial Court's findings of fact and the deductions which he drew from those facts were wrong (p 488, col. 2).

Appeal from the judgment of Mr. Justice Buckland, dated the 26th January 1922.

Sir *B. C. Mitter* (with Mr. *H. C. Mazumdar*), for the Appellant.

Mr. *N. N. Sarkar* (with Messrs. *S. C. Bose* and *J. N. Mazumdar*) for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendant from the judgment of my learned brother Mr. Justice Buckland, dated the 26th January 1922. The facts of the case may be taken from his judgment at pp. 268 and 269 of the paper-book, which are as follows :—

"The plaintiff firm carry on business at Chandusi in the United Provinces. The defendant carries on business as a *ghee* and sugar merchant in Calcutta. The goods were consigned to Joy Gopal Joy Kisssen, a firm formerly carrying on business in Calcutta.

"In the latter part of April 1920 Joy Gopal Joy Kissen sent their *gomostha* Ram Charan to Chandausi where *ghee* was purchased. A consignment consisting of 457 tins of which the value is stated to be Rs. 18,815-9-9 was despatched by rail to Calcutta under Railway receipt No. 19318. The Railway receipt was handed over to Ram Charan who brought it to Calcutta to his employers where it was received in the usual course of two or three days later. It is alleged that on or about the 30th April Joy Gopal Joy Kissen were closing down their business and in insolvent circumstances, and on the 2nd May a telegram was sent from Etawah where, amongst other places, business was carried on by Joy Gopal Joy Kissen, saying that that firm had failed and instructing the firm of Harnandroy Fulchand in Calcutta to detain the *ghee*. On the next day Messrs. Pugh & Co., were instructed to write a leter to the Railway Company which they did on behalf of the plaintiff to stop delivery of the goods under the Railway receipt to the consignee, as the latter had become insolvent. A telegram was also sent by the plaintiff firm on the 3rd

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May from Chandausi to the Goods Superintendent at Howrah to stop delivery of the 457 tins. In the meantime, according to the defendants' case, on the 2nd May the Railway receipt which was then in the hands of Joy Gopal Joy Kissen was endorsed by a *gomostha* of the firm of the name of Haranath in favour of the defendant who is alleged to have paid Rs. 14,000 for it. On the 5th May Doyilal the *gomostha* of the plaintiff firm arrived at Howrah for the purpose of dealing with the matter He says he could not find Joy Gopal Joy Kissen and he went to the Railway Office. The defendant's manager went for the goods, which he did' on the 3rd, 6th and 11th May, according to his evidence, but the goods had not arrived. On the 7th May Joy Gopal Joy Kissen were adjudicated insolvents and three days later, on the 10th, a further letter stopping the goods was written by Messrs. Khaitan and Co. on behalf of the Plaintiff. That letter was superfluous, in view of what already had taken place, and on the next day the Defendant's manager says, he came to know at Howrah that Joy Gopal Joy Kissen were in financial difficulties. The *ghee* arrived at Howrah on the 16th May and on the 19th May, this suit was filed. Three days later by an arrangement which I understand was made under an order of the Court, the *ghee* was delivered to the Defendant,"

It is necessary to notice, as the learned Judge has pointed out, that the goods in question were delivered under an arrangement, which was sanctioned by the Court, to the Defendant with the result that the seller found himself in the position of the Plaintiff ; and, in the suit the first prayer was for declaration that the 457 tins of *ghee* belonged to the Plaintiff firm and that the Plaintiff firm was entitled to take delivery of the same from the East Indian Railway. In the alternative, a claim was made for a decree for Rs. 18,815 which was alleged to be the value of the goods in question.

The finding of the learned Judge was as follows :—

" I do not think it is established that Rs. 14,000 were paid by the Defendant to Joy Gopal Joy Kissen for the Railway receipt ; circumstances are extremely suspicious, and I am by no means satisfied as to the *bona fides* of the Defendant in the transaction."

In the course of the case a question arose as to the party upon whom the burden of proof with respect to the two matters, which are referred to in the learned Judge's decision rested, and the learned Judge stated the question in the following manner at p. 279 :—

" Is it the duty of a seller-Plaintiff who has a right by law to stop the goods in transit to show that it has not ceased by reason of the conditions of the section not having been complied with, or is it the duty of the assignee-Defendants to show that it has ceased ?"

And upon that point his decision is to be found at p. 280 as follows :—

" In my judgment the burden of proof is upon the Defendant whose duty it is to prove that he acted in good faith and gave valuable consideration and it is not for the Plaintiff to show that the Defendant was not acting in good faith or gave no consideration. The result is that the Plaintiff firm must succeed, for the Defendant has not established that the endorsement of the Railway receipt was made either in good faith or for consideration."

I propose to consider the question which relates to the burden of proof in the first instance. It was not disputed, at all events, in this Court, that the Plaintiff was in the position of a seller. He had parted with the possession of the goods. The seller had not been paid the price of the goods. Further in this Court it was not denied that the Plaintiff gave the requisite notice to the Railway Company to stop the goods, and that at the time of such notice the buyers Joy Gopal Joy Kissen were insolvent ; and it is common ground that the goods were in transit. In short, all the conditions necessary to bring the case within section 99 of the Contract Act were fulfilled, and *prima facie* the Plaintiff had a right to stop the goods in transit. The question in this case arises by reason of the fact that it was alleged that the buyers Joy Gopal Joy Kissen had assigned the Railway receipt (which it was alleged was a document of title to the goods) to the Defendant for good consideration and by reason of the provisions which are to be found in section 102 of the Contract Act. A considerable portion of the argument of the learned Counsel for the Appellant was directed to

show that the right of the seller to stop the goods in transit was merely an equitable right. In my judgment it is not necessary to consider this question at any length nor is it necessary, for the reasons to which I will hereafter refer, to consider in detail the English cases which were cited to us. It will be sufficient for me to refer to the case of *Booth Steamship Co.* v. *Cargo Fleet Iron Co.* (1), for the purpose of showing the origin and the nature of the vendor's right of stoppage in transit.

In the judgment of the learned Chief Justice at p. 579 this passage is to be found:—

"The right of stoppage *in transitu* was introduced in the English law in the seventeenth century, and the first reported case on the subject is in the year 1690 [*Wiseman* v. *Vandeputt* (2)]. As the right arises only in the case of insolvency, it came to be recognised in our Court in the first instance through the medium of the bankruptcy jurisdiction of the Lord Chancellor which was of statutory creation. The right is not peculiar to the law of England ; it was part of the law merchant existing in most of the commercial States of Europe before it was recognised as part of our Law. In 1743, Lord Hardwicke received evidence of the custom of merchants as to stoppage *in transitu* and then applied the rule. He based his decree both upon the custom proved before him and upon the justice of the case: *Snee* v. *Prescot* (3). In 1841, Lord Abinger in *Gibson* v. *Carruthers* (4), gave a full and interesting account of the history of the introduction of stoppage *in transitu* into our law and reviewed the authorities. He referred to the opinions expressed by Courts of Equity that the right was founded upon some principle of the common law and of the practice in Courts of law to call the right a principle of equity which the common law had adopted. He pointed out the difficulty, owing perhaps to its foreign parentage, of reducing this right to some analogy with the principles which govern the law of contract as it prevails in this country between vendor and purchaser."

(1) (1916) 2 K. B. 570 ; 85 L. J. K. B. 1577 ; 115 L. T. 199 ; 32 T. L. R. 535.
(2) (1690) 2 Vern. 203 ; 23 E. R. 732.
(3) (1743) 1 Atk. 245 ; 26 E. R. 157.
(4) (1841) 8 M. and W. 321 ; 11 L. J. Ex. 138 ; 58 R. R. 718 ; 151 E. R. 1061.

It was then pointed out by the learned Chief Justice that in England some of the difficulties attached to this question had been removed by the codification of the law which is contained in the Sale of Goods Act, 1893.

Fortunately in this country the law relating to the matter in question has been embodied in the Contract Act ; and in my judgment we have to decide this question having regard to the provisions of the Contract Act, which relate to the matter in question. The Contract Act provides codification of the law relating to contracts but contains a proviso in section 1 that "nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act."

Now, section 99 of the Contract Act to which I have already referred provides that "a seller who has parted with the possession of the goods and has not received the whole price may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer." Section 104 provides the method of stopping the goods. The section runs as follows : –

"The seller may effect stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are."

Sections 106 and 107 deal with the rights of the seller after he has stopped the goods in transit. Section 106:—"Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid."

Section 107 :—" Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may after giving notice to the buyer of his intention to do so, re-sell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit which may occur on such re-sale." So that in my judgment, it appears that the giving of the notice by the seller to the carrier operates to

defeat the purchaser's right to possession and entitles the seller to hold the goods until the price is paid, or, in the event of the price not being paid in accordance with the contract, to re-sell the goods in accordance with the provisions of section 107. Then arises the question, what is the position when the buyer re-sells the goods to another purchaser? Sections 101 and 102 are material to that question. Section 101 provides: "The seller's right of stoppage does not, except in the case hereinafter mentioned,cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf." It is to be noted that section 101 constitutes the general rule that the seller's right to stop does not cease on the buyer's re-selling the goods while in transit but continues until the goods have been delivered to the second buyer or to some person on his behalf. The section, however, refers to certain exceptions: and section 102 is an exception, in my judgment to the general rule which is laid down in section 101. That section provides: —"The right of stoppage ceases if the buyer having obtained a bill of lading or other document showing title to the goods assigns it, while the goods are in transit to a second buyer who is acting in good faith, and who gives valuable consideration for them." In my judgment, there is no doubt that the proper construction to be placed upon these sections is that when the seller has stopped the goods in transit, it lies upon the second buyer to prove that when the document of title to the goods was assigned to him, he was acting in good faith and that he gave valuable consideration for the goods. The Defendant was in the position of the second buyer referred to in section 102 ; and I agree with decision of the learned Jude that the burden of proof was upon him to show that he acted in good faith and that he gave valuable consideration.

The question, therefore, arises whether the defendant discharged the *onus* which lay upon him. The decision of the learned Judge in that respect is to be found at p. 277 of the paper book as follows :—

"I do not think it is established that Rs. 14,000 were paid by the defendant to Joy Gopal Joy Kissen for the Railway receipt; the circumstances are extremely suspicious and I am by no means satisfied as to the *bona fides* of the defendant in the transaction."

And, consequently, the learned Judge decided in favour of the Plaintiff.

The learned Judge, when dealing with the question whether the Defendant had discharged the burden of proof, which rested upon him, stated certain facts which are to be found in his judgment, and the passage begins at the bottom of p. 272 as follows :—"What are the outstanding features of this story as related to me ?" The learned Counsel for the Appellant did not dispute the learned Judge's findings of fact in this respect, but he did dispute the deductions which the learned Judge made from the above-mentioned facts.

The result is that the facts to which I have referred stand uncontested, and the onus rests upon the Appellant to satisfy this Court that the deductions which the learned Judge made from those facts are wrong.

Now, the main grounds upon which the learned Counsel for the Appellant relied were the entries in the defendant's books. He pointed out that the finding of the learned Judge was that the books on the face of them deserved the commendation which was asked for them ; that is to say, (as I understand the judgment of the learned Judge) as far as could be ascertained from the entries themselves they appear to have been made at or about the time of the alleged transaction and in the ordinary course of business : in that respect they were entitled to the commendation that was claimed. The learned Judge then went on to point out that those entries were not conclusive. It appears that the defendant's business was carried on at Burrabazar where apparently the defendant carried on his *ghee* business and the defendant's son carried on another business of a financial nature and the books relating to both these businesses were kept in the Burrabazar Office, some of the monies being kept in a safe in a house at Bagbazar where apparently the defendant and his son lived. The learned Judge pointed out thatassuming for the sake of argument that this was not a *bona fide* transaction, it would be necessary to make entries in the books of the Burrabazar Office and to enter a substantial sum which could be

put forward as the consideration for the assignment of the Railway receipt: he drew attention to the fact that the money was supposed to have been taken from the safe in the house at Bagbazar, and that there was no book of account recording the extraction of the money from the Bagbazar safe except a copy book which was produced by the defendant's son for the first time when he was in the witness box; and he made certain criticisms upon that book and the way in which the entries were made.

In addition to those criticisms there seems to me a further criticism which I think was not noticed by the learned Judge. It seems to me that on the page on which this entry of Rs. 14,000 is found, the first item on the credit side, *viz.*, Rs. 97,000 must have been entered after the next four items.

It was suggested by the learned Counsel for the plaintiff that that had been done in order to make it appear that there was sufficient money on the credit side to permit the withdrawal of the Rs. 14,000 on 19th of Baisakh.

The learned Counsel for the Appellant, in my judgment, made a pertinent observation with regard to that, namely, that the witness who produced the book had not been cross-examined upon that point; and that consequently much strees ought not to be laid upon it. I agree with that observation. At the same time it is to be remembered that that book was not disclosed by the defendant in his affidavit of documents and the plaintiff's learned Counsel had no opportunity of seeing it until it was produced by the witness when he was in the witness box; and it is not surprising that in the short time which was available for examining the book, the learned Counsel did not observe the matter to which attention has now been drawn. At the same time it must be remembered that the witness had no opportunity of explaining that entry, and, consequently I do not attach an undue importance to that matter.

The main facts, (I do not intend to deal with them in detail) which emerge in this case with regard to the assignment of the Railway Receipt, are these :—The representative of the defendant whose name was Butto Lal Banerjee entered into this arrangement, apparently, according to his own account, after a short discussion. He apparently was prepared to pay the considerable sum of Rs. 14,000 in respect of the *ghee*. I desire to draw attention to a passage in his evidence which seems to me to be material (at p. 80) which is as follows :—

"Q.—Do you know that goods are sometimes sent at owner's risk and sometimes at Railway risk?

A.—Yes.

Q.—You know if it is at the owner's risk and the goods are lost, you get nothing from the Railway?

A.—Yes.

Q.—That you have known for years?

A.—Yes.

Q.—Did you enquire from Harnarain and Rajmull whether these goods were coming at Railway risk or at owner's risk?

A.—I did not consider it necessary to enquire about all these.

Q.—Did you enquire?

A.—No.

Q.—If they were coming at owner's risk, supposing they were lost or destroyed or stolen, what would you have done?

A.—On the strength of this receipt we would have called upon the Railway Company to explain.

Q.—You have told us that you know for years that if it was at owner's risk you cannot get anything from the Railway?

A.—Yes.

Q.—May I take it that you had no discussion with Harnarain and Rajmull as to what would happen if the goods did not arrive or if only a portion arrived?

A.—No. There was no talk with Harnarain on the subject.

Q.—Or with Rajmull?

A. No."

He is supposed to be a business man—he was buying a particular kind of *ghee* with which apparently his firm never dealt before. He had for some considerable time had no dealings with Joy Gopal Joy Kissen. He had no sample of the *ghee*. He did not take the trouble to enquire whether it was carried at owner's risk or at the Railway risk, nor did he even enquire about the invoice price. The invoice price at Chandausi was Rs. 90-8 annas and he bought it at Rs. 80 per maund. He then, having made so little enquiry about the *ghee* or the conditions relating to its transit, is supposed to have gone up

to the Bagbazar house, obtained Rs. 14,000 and paid it over to Harnath who was the representative of Joy Gopal Joy Kissen. This Harnath or Harnarain has not been called; but a man named Rajmull has been called. Rajmull was not connected with Joy Gopal Joy Kissen at the time, although he had been, as I understand, employed by this firm at some previous period; and, I personally do not understand why the services of Rajmull were called upon on this occasion, because, apparently, according to his own account, he did nothing except to introduce Harnath to the representative of the defendant firm. The evidence shows that the defendant firm's place of business was at a short distance from the place of business of Joy Gopal Joy Kissen. I am not at all inclined to disagree with the learned Judge's finding when he said that "Rajmull's evidence with regard to what took place and there being need for him to attend, is not to be accepted too readily."

The learned Judge seems to have thought that it was quite possible that as Harnath was not available as a witness it was necessary to have somebody who could speak to the transaction from the point of view of Joy Gopa Joy Kissen. I do not intend to deal with this part of the case in any greater detail.

Our attention was drawn to the evidence by the learned Counsel on both sides with great care, and I repeat that in this case the question involved was of fact and it was for the appellant to satisfy the Court that the learned Judge's findings of fact and thedeductions which he drew from those facts were wrong. In my judgment the Appellant has failed to discharge that *onus*, and I am by no means satisfied that the learned Judge was wrong when he came to the conclusion that he was not satisfied that the Rs. 14,000 had been paid. Even if the learned Judge was wrong upon that point, it, by no means, follows that the Defendant should succeed, because the circumstances of this case are such as to lead me to believe that the learned Judge was right in his further decision, namely, that he was not satisfied as to the *bona fides* of the transaction.

The result is that, in my judgment, this appeal should be dismissed with costs. The injunction restraining the plaintiff from withdrawing the sale price of the *ghee* which is in deposit in Court is dissolved.

Richardson, J.—I agree. The view of the evidence taken by the learned Judge who tried the case raises the question whether in this conflict between the plaintiff as seller claiming the right of stoppage in transit and the Defendant as second buyer claiming as assignee of the Railway receipt being the document showing title to the goods, the burden of proof rests on the seller to prove the negative, or on the second buyer to prove the affirmative, of the proposition that the second buyer acted in good faith and gave valuable consideration for the goods. The learned Judge, while he characterises the circumstances in which the document of title was assigned as suspicious, regarded the evidence as in this sense inconclusive, that he could not pronounce against the second buyer if the burden of proof lay on the seller nor against the latter if the burden of proof lay on the former. The learned Judge's decision was in favour of the seller because in point of law he held that the burden was on his adversary. It is not, I think, unfair to say that Sir Benode Mitter, appearing for the Appellant, the defendant, though he also argued the appeal on the facts, addressed himself in the main to the question of law so arising.

It is not now disputed that the first buyer became insolvent so that as against him the plaintiff as seller was entitled under section 99 of the Contract Act to stop the goods while they were in transit. Nor is it disputed that the goods when the plaintiff stopped them were in transit. We are not concerned, therefore, with section 100 of the Act which describes what is meant by transit. The relevant provisions will be found in the two following sections which run as follows:—

Section 101: "The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf:—

Section 102: "The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a

second buyer who is acting in good faith and who gives valuable consideration for them."

So far as the question of the burden of proof depends on the language of these provisions, the rights of the assignee of the document of title, though they are formulated in a separate section, section 102, would appear to be introduced by section 101 as an exception to the seller's general right of stoppage where the goods have been sold by the first buyer. According to the general rule, therefore, the language would appear to throw on the second buyer the burden of proving his own good faith in acquiring the document of title.

I will assume, however, that as regards the burden of proof the Act gives out no certain sound and that the question is to be decided on general principles or in the light of consideration such as those advanced by Sir Benode Mitter.

Sir Benode contended in effect that the right of stoppage in transit was an equitable right, that the legal right to the goods was in the assignee of the document of title and that it was for the seller to establish want of good faith on the part of such assignee.

It appears to me, however, that it is now too late to argue that the right of stoppage is a merely equitable right. Observations on the history of the right will be found in the judgments of Lord Reading, C. J., and Scrutton, J., (as he then was) in a case to which my Lord has already referred. *Booth Steamship Co.* v. *Carga Fleet Iron Co.* (1). Even before the right was recognised in England by the Sale of Goods Act, the better view seems to have been that it was a common law right derived from the law merchant and both in England and in India it is now not only a legal but a statutory right.

No doubt *Dickbarrow* v. *Mason* (5) and *Gurney* v. *Behrend* (6) affirm the title of the *bona fide* transferee for value of a bill of lading endorsed by the consignee. But it has still to be remembered that the right of the assignee of the document of title is apart from any mere question of language an exception to the more general rule which appears in India in section 101 of the Contract Act. The general rule is that "the seller's right of stoppage does not cease on the buyer's reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some person on his behalf."

If section 102 confers upon the second buyer who comes within the section, a title which may also be described as a statutory title, still in my opinion the title is one which he must prove as against the seller who has shown that *prima facie* he had the right to stop the goods in transit.

I agree in this case with my Lord and the learned Judge that the burden lies upon the defendant, and that he has not discharged it.

His principal witnesses are his manager Batto Lal Banerjee and his son Nando. In both cases Mr. Sircar's cross-examination at the trial was very damaging. The goods were being carried on the railway at owner's risk. No enquiry was made on this point. Batto Lal's evidence and that of the witness Padamraj Lameha as to the price of Chandausi *ghee* in Calcutta at the beginning of May 1920 is very vague. The evidence for the plaintiff is that Chandausi *ghee* was then selling at a price not far short of Rs. 100 a maund. The contract price was Rs. 90-8-0 a maund and the defendant bought at Rs. 80 a maund. The transaction was an unusually large one for the defendant to embark upon. He had never bought Chandausi *ghee* before. He had no transactions with the original buyer, the firm of Joy Gopal Joy Kissen, at any rate for five or six years previously.

It is true that the account books kept at the defendant's shop in Burrabazar purport to show that a sum of Rs. 14, 000 was paid to Joy Gopal Joy Kissen's *gomostha* Haranath Modi and that these account books appear to have been kept in the regular course of business. But the story is that the money was brought from the home-safe in the family house in Baghbazar, and the evidence that the money was taken out of that safe is at least unsatisfactory. On this point it is unnecessary for me to say more than my Lord has already said.

(5) (1793) 5 T. R, 367 ; 726 Sim. L. C. 12th Ed. 1 R. R. 425 ; 101 E. R. 206.

(6) (1854) 3 E. L. and B. L. 672 ; 23 L. J. Q. B. 265 ; 18 Jur. 856 ; 2 W. R. 425 ; 23 L. T. (O. S.) 85; 97 R. R, 687 ; 118 E. R. 1275.

Moreover, the firm of Joy Gopal Joy Kissen was a firm in a very large way of business. The *gadi* in Burrabazar was a very short distance from the defendant's shop. The Railway receipt was negotiated on the 2nd May. It is admitted that Joy Gopal Joy Kissen's *gadi* was actually closed on the 4th May. The firm or its proprietor was adjudicated insolvent on the 7th May. It is to my mind improbable that no inkling of the firm's position had reached the defendant. I agree with the learned Judge's observation made in another connection that "if it was true that Joy Gopal Joy Kissen were carrying on business untill the 4th May it ought to have been easy in the case of a firm of the standing of Joy Gopal Joy Kissen who are said to have done a very large business and to have been well-known in Calcutta, to call some independent evidence to prove the fact." The learned Judge adds that there is no evidence to that effect.

I am not satisfied that the alleged payment of Rs. 14,000 was in fact made; but even if it be assumed that this sum was paid by the defendant to Harnath Modi on account of Joy Gopal Joy Kissen, I am unable to say that it is established that the money was paid in good faith. We were referred to section 3, cl. (20) of the General Clauses Act (Act X of 1897) which says that "a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." The definition does not apply to the Contract Act which was enacted in 1872 but in the present case the facts point to more than mere negligence; they point rather to deliberate abstention from enquiries, which if made would have put the defendant on his guard or to wilful blindness in entering upon a speculative transaction which it was expected would be profitable.

I agree that the appeal should be dismissed.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 146 OF 1922.
February 12, 1923.

Present :—Mr. Dalal, A. J. C.

RAM DAYAL—PLAINTIFF—APPELLANT
versus
NIMAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Compromise decree against father, whether binding on sons—Necessity.

A compromise decree obtained against a Hindu father is no better than a transfer made by the father, and the mere existence of such a decree cannot deprive the sons of their rights in the joint family property. It must be shown that the obligation incurred under the decree was incurred for legal necesity or for payment of antecedent debts. [p. 493, col. 2.]

Appeal against the decree of the District Judge, Fyzabad, dated the 31st January 1922, confirming the decree of the Subordinate Judge, Sultanpur, dated the 8th December 1920.

Mr. *A. P. Sen*, for the Appellant.

Messrs. *M. Wasim* and *Niamat Ullah*, for the Respondents.

JUDGMENT.—The following pedigree will be of use :—

SURAJ NARAIN SINGH.

Nimar Singh, Defendant 1.	Partab Singh Defendant 2.	Raj Bahadur Singh, Defendant 3.	Bajrangi Singh, Dead.	Sher Bahadur Singh, Defendant 4.	Jantri Singh, Dead.

Narsingh Bahadur Singh, Dead.

Jagdeo Singh, Defendant 5.	Ramdeo Singh, Defendant 6.	Mahadeo Singh, Defendant 7.

RAM DAYAL *v.* NIMAR SINGH

Suraj Narain Singh executed two mortgage deeds of the property in suit in favour of the plaintiff Ram Dayal: one of 19th September 1896 and the other of a further charge of 6th August 1897. They were usufructuary mortgage-deeds; and as the plaintiff failed to obtain possession he sued for it in 1906 and obtained a compromise decree for possession and interest on 16th November 1906. The defendants to that suit were Suraj Narain Singh himself, his sons Nimar and Partabmajor, and Raj Bahadur and Bajrangi Singh, minors under his guardianship and his grand-son Narsingh Bahadur Singh also under his guardianship. Bajrangi Singh has died since. Sher Bahadur Singh was not a party to the suit and Narsingh Bahadur Singh's sons were not in existence at the time. After this compromise decree also possession was not made over to the plaintiff, so on 18th March 1909 he obtained possession through Court. Subsequently he had to bring the present suit for possession, and his plaint allegations are that in *Asarh* 1909 when he started ploughing the land the defendant Suraj Narain Singh obstructed and thereby dispossessed him. The present suit asks for relief, first as to possession and secondly as to payment of interest due to the plaintiff during the period of his dispossession.

The defence was that Raj Bahadur Singh and Narsingh Bahadur Singh were not properly represented in the suit of 1906 and that Sher Bahadur Singh was no party, so the decree of 1906 was not binding on them and a suit on foot of the possessory mortgage-deeds was time-barred. It was urged that the decree was not binding on Raj Bahadur Singh and Sher Bahadur Singh because the debts were not contracted for legal necessity or for the payment of an antecedent debt. The family being joint the other members could not bind the joint family property except for purposes which would make joint Hindu family property liable. Both the lower Courts dismissed the plaintiff's suit and he has come here in second appeal in consequence.

The grounds of appeal here are (1) that the plaintiff's suit is not barred by limitation, (2) that in any case a decree should have been passed for possession of the share of property belonging to Suraj Narain Singh executant of the mortgage deeds, (3) that the mortgage was executed for the payment of an antecedent debt, (4) that upon failure of security a money decree should be passed against the defendants.

The finding of the lower Appellate Court is not very clear, but the first Court has held that Sher Bahadur Singh was in existence in 1906. There is the testimony of defendants' witness No. 1 Akbar Khan *patwari* and of defendants' witness No. 6 Rajeshri Prasad to support the finding of the first Court. There was no evidence on behalf of the plaintiff to contradict the statement of these witnesses. The plea of the existence of Sher Bahadur Singh in 1906 was taken in the written statement of one of the defendants. So the plaintiff had full notice of this plea. I hold that Sher Bahadur Singh was in existence in 1906. It is, therefore, not necessary for me to determine whether Raj Bahadur Singh was properly represented by his father in 1906 or not. It has already been noticed that Jagdeo, Ramdeo and Mahadeo were not in existence in 1906. It was argued by the appellant's learned Counsel Mr. Sen that the father sufficiently represented the entire family in the litigation of 1906. When the sons come to Court to attack the remedy of a decree-holder against the father the presumption is that the father did represent the sons in the litigation in which the decree was obtained. A Bench of this Court has discussed this rule of law in a judgment delivered to-day (First Civil Appeal No. 70 of 1921), *Rup Kishore* v. *Kanhaiya Lal* (1). In the present case, however, the situation is different. In this case the mortgagee comes to enforce a mortgage of which the limitation has been saved by a particular decree. The sons are not attacking the decree but it is the mortgagee who having omitted to obtain the remedy under the decree has sued on the basis of his mortgage which, so to say, was revived by the force of the decree. The consideration of representation would be different in such a case. A compromise decree obtained against the father is in reality no better than the transfer made by the father, and the mere existence of the decree cannot deprive the sons of their rights in the joint family property. For these reasons I hold that the decree is not binding

(1) 74 Ind. Cas. 563; 10 O. L. J. 141; (1923) A. I. R. (O.) 227; 26 O. C. 266; 9 O. & A. L. R. 384.

on Sher Bahadur Singh. The result, therefore follows that plaintiff could not obtain possession of joint family property under the mortgage and the decree unless he can prove that the debt was contracted for valid necessity or for payment of antecedent debt. Both the Courts below have found against the plaintiff on this issue and the decision being one of a question of fact is binding on this Court.

There has been no separation of the family so a decree for possession cannot be passed against the undetermined share of any member of the joint family.

A money decree is time-barred. The suit was filed more than 12 years after the mortgage and more than 6 years after the decree. It was argued that the contract was discovered to be void during the proceedings to this suit and so the plaintiff was entitled to compensation under section 65 of the Contract Act. The contract under the decree was, however, void at the time of the passing of the decree because a certain member of the joint family was not made a party thereto. When Sher Bahadur Singh was not a party to the contract it cannot be said that the contract as regards him was discovered to be void during these proceedings.

For these reasons the appeal fails and I dismiss it with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 664 OF 1923.

November 21, 1923.

Present :—Mr. Justice Martineau.

KAPUR CHAND—PLAINTIFF—APPELLANT
versus
CHET RAM—DEFENDANT—RESPONDENT.

Appeal, second—Deed of contract—Different contract alleged—Question of fact or law.

A finding on the question whether the real contract between the parties was something different from that entered on the deed is one of fact and cannot be questioned in second appeal. [p. 495, col. 1.]

Ahmad Khan v. *Alam Khan*, 37 Ind. Cas. 297; 120 P. L. R. 1916; 115 P. W. R. 1916, relied on.

Appeal from the decree of the District Judge, Hoshiarpur, dated the 4th January 1923, reversing the decree of the Sub-Judge, Hoshiarpur, dated the 12th July 1922.

Rai Bahadur Lala *Badri Das*, for the Appellant.

Lala *Kanshi Ram*, for the Respondent.

JUDGMENT.—Ramditta defendant No. 3 executed a lease by which he granted occupancy rights in 30 *Kanals*; 7 *Marlas* of land to defendants 1 and 2 for a consideration of Rs. 2,100. The plaintiff sued for pre-emption, alleging that the land had really been sold, and the first Court decided in his favour, but the District Judge has held that the transaction was not a sale and has dismissed the suit. The plaintiff has preferred a second appeal.

It is contended that the lower Appellate Court has overlooked important facts, but it does not appear to me that this is the case. The learned District Judge has mentioned in his judgment the various points on which the first Court had relied in support of its finding, with the exception only of the fact that the consideration for the grant of occupancy rights slightly exceeded the amount at which the local Commissioner has estimated the value of the land. Although that fact was not referred to in the learned District Judge's judgment, I see no reason to think that he overlooked it. It is probable that the Commissioner's estimate was not entitled to much weight in the face of the fact that rent was payable to the lessor. Counsel for the appellant points out that the rent (excluding revenue and cesses) was only 0-8-3 *per annum* and not Rs. 2, as stated in the lower Appellate Court's judgment, but this is immaterial, for if the lessees were liable to pay rent the transaction was a lease, however small the rent may be. The learned District Judge, attached great importance to the fact that mutation had been effected in accordance with the terms of the lease, Ram Ditta being still entered as the owner of the land and that Ramditta had stated in Court that the transaction was a lease and that he retained the proprietary rights. These facts, together with the production of a receipt for rent, outweighed in the opinion of the learned

Judge all other considerations, and he therefore decided that the land had not been sold. I hold that no evidence has been overlooked.

This being so the appeal must fail as the finding is one of fact. There is no question as to the construction of the deed, for admittedly the deed is on its face a lease and nothing more. The question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed, and the finding on this point is clearly a finding of fact. See *Ahmad Khan* v. *Alam Knan* (1).

The appeal is accordingly dismissed with costs.

N. K. *Appeal dismissed.*

(1) 37 Ind. Cas. 297; 120 P. L. R. 1916; 115 P. W. R. 1916.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 87 OF 1922.

October 9, 1922.

Present :—Mr. Daniels, J.C.

PANDIT AJODHIA NATH—
PLAINTIFF—APPLICANT
versus
THE CITY MAGISTRATE OF LUCKNOW, EX-OFFICIO SECRETARY OF THE KING'S YUNANI HOSPITAL COMMITTEE, LUCKNOW,
DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) O. VII, r. 11—Charitable Endowments Act (VI of 1890) s. 14—Suit to recover money from endowment—Treasurer, whether can be sued—Suit against Secretary, whether competent.

Where the administration of a charitable endowment is in the hands of a committee, a suit to recover a sum of money from the endowment cannot be brought against the Treasurer of charitable endowments, by virtue of the provisions of section 14 of the Charitable Endowments Act. The suit must be filed against the Committee. A suit filed against the Secretary of the Committee as such will also be incompetent unless under the scheme of management the Secretary has been empowered to sue or be sued as representing the Committee. [p. 495, col. 2 and p. 496, col. 1.]

Revision from the decree of the Additional Judge, Small Cause Court, Lucknow, dated the 19th December 1921.

Mr. *H. K. Ghosh*, for the Applicant.

Mr. *Makund Behari*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order rejecting a plaint under O. VII, r. 11 in a suit of a Small Cause Court nature. The suit was filed against "The City Magistrate *ex-officio* Secretary King's *Yunani* Hospital Committee, Lucknow." The property of this hospital is vested in the Treasurer of charitable endowments under section 4 of the Charitable Endowments Act, 1890—*Vide* N.-W. P. Gazette for 1892, Part 1, p. 488. At the hearing it was suggested that the suit ought to have been filed against this officer. The plaintiff's legal adviser accepted this suggestion and agreed to the suit being dismissed. He now comes here in revision on the ground that the admission was made under an erroneous view of the law and is not binding on him. The applicant relies on section 14 of the Charitable Endowments Act which forbids the institution of any suit against the Treasurer of Charitable Endowments except (*a*) to divest him of the property on the ground of its not being subject to a charitable trust, or (*b*) to charge him with loss or misapplication of the property due to his own neglect or default.

The present suit does not come under either of these descriptions. The respondent seeks to avoid the effect of section 14 by suggesting that the section is only intended to forbid suits which seek to render the Treasurer liable in his personal capacity and in his capacity of a Corporation sole. In support of this he refers to the side note to the section—"Indemnity to Government and Treasurer."

There are several reasons why this view should not be accepted. In the first place it is not applicable to one class of suits referred to in the section, namely, suits intended to divest the Treasurer of the property. In the second place section 14 must be read in connection with the whole scheme of the Act and in particular with sections 6 and 8. Section 4 provides that the Treasurer shall not be required to perform any of the duties of the trustee in the administration of the pro-

perty. Where the property consists, as in this case, of securities for money, sub-section 2 of section 8 requires the Treasurer to apply the income in accordance with the vesting order and scheme of management prepared under the Act. These documents are printed on pages 488 and 489. Part I of the N.-W P. Gazette for 1892. They show that the administration of the property is in the hands of the Committee. The Treasurer is required to remit the entire income to the chairman and all payments are made by the chairman on bills passed by a sub-committee. The only person, therefore, who is authorised to pay the amount alleged to be due to the plaintiff is the chairman of the Committee in accordance with the conditions laid down in the scheme of management.

There is, however, another objection to the frame of the suit which justifies the order passed by the Court below. It was not necessary for the respondent to urge this objection before the Additional Judge as his first objection was accepted by the plaintiff but it has been urged and argued before me. The plaintiff can show no justification for suing the Secretary in respect of a claim which is, as he admits, directed against the Committee as a whole. There is nothing in the scheme of management empowering the Secretary to sue or be sued as representing the Committee. It is admitted that it is not sought to impose on the Secretary any personal liability. Yet it is against the Secretary alone that the claim has been preferred and the mere fact that he is described in the plaint as "*ex officio* Secretary of the King's *Yunani* Hospital Committee" would not be sufficient to enable the plaintiff to execute against the Committee any decree which might be granted in his favour. The result is that the order passed by the Court below must be upheld though not on the same ground on which it was passed. I accordingly dismiss the application with costs.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 31. OF 1918.

July 23, 1923.

Present :—Mr. Justice Harrison and Mr. Justice Zafar Ali.

KESHWA NAND, REPRESENTATIVE AND *Chela* OF ADITYA PURI, DECEASED—DEFENDANT—APPELLANT

versus

MOHAN PURI, *Chela* OF TUKAT PURI—PLAINTIFF AND MAM RAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Religious endowment—Several Shrines—Succession to one shrine, whether affects others.

The constitution of each particular shrine must govern the succession to its *gaddi* and the mere fact that a certain *chela* has succeeded to one of the shrines enjoyed by his *Guru* does not *ipso facto* entitle him to succeed to another. [p. 497, col. 2.]

Ramsork Doss v. *Permeshree Doss*, 76 P. R. 1867, relied on.

Appeal from the decree of the District Judge, Karnal, dated the 9th October 1917, affirming that of the Senior Subordinate Judge, Karnal, dated the 2nd July 1917.

Mr. *G. S. Salariya*, for Dr. *Nand Lal*, for the Appellant.

Mr. *Devi Dayal*, for the Respondents.

JUDGMENT.—The plaintiff in this case is one Mohan Puri, *Chela* of the late *Mahant* Turat Puri, and he brings this suit for possession of the land attached to the shrine known as Samadh Maujpuri situate in villlage Phurana against one *Mahant* Aditya Puri who is in possession and other formal defendants. He has been given a decree and the appeal was dismissed by the District Judge. A certificate has been given regarding the right of the villagers to appoint the *Mahant* of this shrine, and on second appeal the only point to be decided is whether the appointment admittedly made by the proprietary body of Aditya Puri defendant is valid or not.

KESHWA NAND v. MOHAN PURI

The history of the shrine is that the *Gaddi* is a Puri Gaddi, the Puris being a sub-division of the sect of Gosains. The original holder was one Maujpuri who was succeeded by his *chela* Zalim Puri. Ram Puri duly succeeded his Guru Zalim Puri and Mast Puri succeeded Ram Puri. On Mast Puri's death in 1897 no *Chela* could be discovered. The proprietary body appear to have appointed Gopal Ban and he was shown in the Revenue Record as *Mahant* of the institution, although he did not belong to this particular sect. He resigned his appointment and the shrine then remained vacant for eight years. The *patwari* and the *Naib Tahsildar* finding that the land was being enjoyed by some of the proprietors and more especially by the *lambardar* recommended that it should be forfeited to the Crown. The Deputy Commissioner passed an order that if there was any question of forfeiture at all, the land was to go to the proprietary body, but suggested that the *lambardars* should nominate a *Mahant*. In the year 1897 they elected the *Mahant* of the shrine at Pai village, ten miles distant, a man named Turat Puri, and he was duly shown as the *Mahant* of this shrine also. Two months later the died. The villagers thereupon appointed the present defendant Aditya Puri, who is a member of the Puri sect.

The plaintiff bases his case on the admitted fact that he is the *Chela* of the late Turat Puri and that the Bhek ratified his succession to the Pai shrine. He contends that inasmuch as his spiritual father held both shrines, he is entitled to succeed to this shrine also. It is noticeable that the Bhek is never said to have taken any action whatever in ratifying or appointing a successor to either of these Puri shrines until this particular occasion, and what is even more important, they took no action when the shrine was lying vacant after the death of Mast Puri. It being, therefore, perfectly clear that at the beginning *Chela* succeeded Guru as a matter of course, the question is whether the present plaintiff in virtue of his *chelaship* is entitled to succeed Turat Puri in this shrine. It is clear that up to the time when Turat Puri was elected by the *lambardars* or the proprietary body the Pai shrine had no sort of connection with the shrine. It is also clear that had the *lambardars* not taken the action which they did, the Deputy Commissioner would have directed that the land should revert to the proprietary body.

After taking everything into account we are of opinion that the definite break in the succession is all important more especially when combined with the two appointments of Gokal Ban and Turat Puri, who had no connection with the last incumbent Mast Puri beyond the fact that one of them belonged to the same sub-sect. These appointments were not objected to in any way by the Bhek or any other body of *Mahants* or others claiming to control Puri foundations. After Mast Puri's death without spiritual issue there was what amounted to a re-foundation and in accordance with the rules of that re-foundation as established by practice the villagers appointed their *Mahant*. We find, therefore, that the mere fact that Mohan Puri was a *Chela* of Turat Puri and did succeed to the Pai shrine and that Turat Puri held both the Pai shrine and this does not entitle him to succeed. As laid down in *Ramsork Dass* v. *Permeshree Dass* (1), the constitution of the particular shrine in question must govern the succession and the mere fact that a certain *Chela* has succeeded to one of the shrines enjoyed by his Guru does not *ipso facto* entitle him to succeed to another. The history of this particular shrine shows that the proprietary body are entitled to nominate the *Mahant*, this being established by their having done so on the last two occasions without any challenge or objection during a period of 20 years.

We, therefore, accept the appeal and dismiss the plaintiff's suit. The costs of the contesting defendant Aditya Puri will be paid by the plaintiff throughout.

N. K. *Appeal accepted.*

(1) 76 P. R. 1867.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
NO. 784 OF 1921.

July 10, 1922.

Present :—Mr. Justice Buckland.

LEICESTER & Co.—PLAINTIFFS
versus
S. P. MULLICK—DEFENDANT.

Contract Act (*IX of* 1872) *ss.* 23, 30—*Contract by way of wagering, nature of—Betting losses—Defaulter reported to R. C. T. C.*—Hundi *in consideration of withdrawing report—Suit on* hundi, *whether maintainable.*

Where at the desire of the promisor the promisee promises to do or to abstain from doing something [Contract Act, section 2 (*d*)], the sum of money which the promisor reciprocally promises to pay whatever it may be and however it may be determined, is a good consideration for the promise of the promisee. [p. 501, col. 1.]

A contract by way of wagering and gaming is void and not illegal. [p. 501, col. 2.]

Juggernath Sew Bux v. *Ram Dayal*, 9 C. 791 at p. 796 ; 8 Ind. Jur. 42 ; 4 Ind. Dec. (N. S.) 1175, followed.

Defendant having failed to pay the sum of Rs. 8,500 which he owed to the plaintiffs on account of horse races was reported by the latter to the Royal Calcutta Turf Club who threatened to proceed against him if he did not settle his accounts. Defendant, therefore, executed a *hundi* in favour of the plaintiffs for Rs 8,500 in consideration of the latter withdrawing his name from the R. C. T. C. Plaintiffs then sued to recover the amount.

Held (1) that the consideration for the *hundi* in suit was a legal consideration and plaintiff was entitled to recover. [p. 502, col. 1.]

Hyams v. *Stuart King*, (1908) 2 K. B 696 ; 77 L J. K. B 794 ; 99 L. T. 424 ; 24 T. L. R. 675, followed.

(2) that there was nothing illegal in the agreement made by the plaintiffs and the suit was maintainable. [p. 503, col. 1.]

Mr. *S. C. H. Meyer*, for the Plaintiffs.

Sri *B. C. Mitter*, Messrs. *S. N. Banerjee* and *S. N. Bhattacharjee*, for the Defendant.

JUDGMENT.—There is not much dispute about the facts of this case and they are simple. The plaintiffs sue as a firm and are described in the cause-title as carrying on business in co-partnership as Turf Accountants, a business otherwise known as that of book-makers, which consists of gambling on horse races, the profits of which they share. The defendant engages in horse racing ; he owns race horses and bets on horse races in considerable amounts. On the 20th October 1920 he owed the sum of Rs. 8,500 which he had lost to the plaintiffs at the Barrackpore races. As he did not pay, the plaintiffs reported him to the Barrackpore Turf Club, by the Secretary of which he was, it has been stated, though no formal proof has been given of the fact, reported to the Royal Calcutta Turf Club. On the 6th December, the defendant received a letter signed by the Secretary of the Royal Calcutta Turf Club referring to the report received from the Secretary, Barrackpore Races as to considerable sums owing from the defendant to several book-makers, among whom the plaintiffs are included, amounting to Rs. 45,220 in all, and informing him that if that sum was not paid into the office of the Royal Calcutta Turf Club by the 22nd February he would be posted as a defaulter and notice to that effect would be published in the Sheet Racing Calendars. Pending settlement of his account he was informed that the entries of his horses for certain races had not been accepted and that in the mean time he was not to bet or enter the race enclosures. The authority for such a letter or that the Royal Calcutta Turf Club was entitled so to deal with the defendant upon such a report, has not been questioned and the hearing has proceeded upon the basis that the letter and the penalties prescribed were in order. On the 20th December the defendant went to the Albert Club, which I am informed is an institution to which persons carrying on the business of book-makers resort, and there he found the plaintiff and his other book-maker creditors. He executed *Hundies* in favour of his several creditors for the amounts of his losses, among them one for Rs. 8,500 in favour of the plaintiff and at the same time wrote letters addressed to them, in a form drafted by Mr. Goodman of which the letter addressed to the plaintiffs is in the following terms :—

"The Albert Club, Ltd.,
'Grosvenor House,'
Calcutta, 20-12-1920.

To

Messrs. Leicester & Co.

Dear Sir,

In consideration of your withdrawing my name from the R. C. T. C. and thereby preventing my becoming posted as a defaulter, I agree to pay you the sum of Rs. 8,500 (rupees eight thousand five hundred only) and hand you my promissory note herewith for the amount named.

Yours faithfully,

S. P. Mullick."

Subsequently the defendant's name was withdrawn and he has been able to enter the race enclosures and to bet, and has done so, but he has not paid the amount for which he drew the *Hundi* in suit. The only dispute on the facts is as to how the defendant came to write that letter and to draw the *Hundi*. The plaintiff's account of the matter is that the defendant came of himself and wanted to have his name withdrawn from the Royal Calcutta Turf Club and the defaulters' list, and in consideration of the plaintiff promising to take steps to have that done, the defendant signed the *Hundi* and letter. The defendant asserts that what was done was done at the suggestion of the plaintiff and that the Plaintiff said he wanted the *Hundi* and letter to keep his account in form, and that he had no intention of instituting any suit against him. There is not much to choose between the versions given by the two witnesses and the letter makes it clear what was intended. The plaintiffs now sue to recover the amount of the *Hundi*, and in order to succeed they rely for consideration on that stated in the letter and not on the original debt. The suit was filed under O. XXXVII of the Civil Procedure Code and the plaint states that the defendant promised to pay the sum in question "for value received." The defendant in his written statement says that the *Hundi* was excuted for a debt due on betting transactions. It is not till the suit comes to a hearing that the real question of fact is raised, and that is done in reply to the defendant's contention that there was no consideration. For this the parties cannot be held responsible, it is the result of a system of pleading which does not admit of a reply. This suggests that in cases where the real contest will follow from the nature of the defence, due to that being one which the defendant has to prove and the plaintiff did not anticipate, the plaintiff should be required to place on record his pleas in answer. In this particular instance no difficulty arises, but that is not always the case and it is at times embarrassing that pleas may legitimately be taken in reply which are not on record until they find their place in the issues.

The issues settled were :—

1. Is the plaintiff firm entitled to maintain this suit.

2. Was there consideration for the *Hundi* in suit and was such consideration legal?

3. Was the *Hundi* executed by the defendant by reason of undue influence exerted by the plaintiff firm?

4. To what relief, if any, is the plaintiff entitled?

The third issue does not strictly arise on the written statement but objection to it was not pressed. I will first state the provisions of law which in my opinion are applicable to the case.

The first is section 30 of the Indian Contract Act, the material portion of which is in the following terms :—

"Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

Section 23 which states that :—

"The consideration or object of an agreement is lawful unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law" has also been referred to.

Reference has also been made to the Bengal Public Gambling Act, 1913, which amended section 1 of the Bengal Public Gambling Act, 1867, by excluding from the definition of gaming, wagering or betting on a horse race when such wagering or betting takes place, (*a*) on the day on which the race is to be run and (*b*) in an enclosure which the stewards controlling the race have with the sanction of the local Government set apart for the purpose.

The Bengal Amusements Tax Act, 1922 which imposes taxes on certain forms

of betting including that of the kind carried on by "licensed book-makers," who are defined in the Act as persons who carry on the business or vocation of or act as book-makers, etc., was also referred to in the course of the argument. But that statute was only passed this year and its effect, if any, upon a case such as this is a matter for future consideration.

It has also been contended that certain statutes of Anne which deal with gaming apply to India, and in support of this proposition I have been asked to refer to the preface by Mr. Whitley Stokes to the collection of Statutes relating to India. That only shows the obscurity in which the whole question of the application to India of English Statutes passed prior to the year 1726 is shrouded, and the contention has not been supported by argument. This, I think, exhausts the statutory provisions of the law on the subject which obtain or obtained at the time with which I have to deal.

Before applying them to the case, I will briefly dispose of the only disputed question of fact, which is whether the defendant signed the *Hundi* and letter at the solicitation of the member of the plaintiff firm who has given evidence, or whether on receipt of the letter from the Secretary of the Royal Calcutta Turf Club, he went to see him in order to make arrangements which would prevent the consummation of the penalties with which he was threatened. On the evidence I am satisfied that it was the defendant who sought the meeting. The penalties to which he had rendered himself liable are severe, especially to an owner of race horses, and he had a powerful motive for seeking relief. I will ignore the stigma attaching to a person who does not pay bets and is consequently debarred from betting or entering the race enclosures. The defendant says that it was a matter of no concern to him to be posted as a defaulter, and it is not for me to provide him with a standard of honour higher than that which he sets up for himself. The plaintiff said that the defendant came of himself. That statement I accept. He had already reported the defendant and from that report the substantial penalty to the defendant would ensue: I know of no reason why he should have asked the defendant to meet him when he could do no more and the meeting might prove infructuous. The outcome of the meeting was the agreement contained in the letter of the 20th December and upon that letter being signed and with that letter the defendant gave the *Hundi* in suit.

I now turn to the issues of which the second is the most important and involves the substantial point to be decided.

The argument of the learned Counsel on behalf of the plaintiff is founded on the well-known case of *Hyams* v. *Stuart King* (1) in which the facts were that a cheque was given for lost bets. The loser paid part of the amount of the cheque which was held over for a time by the payee. Subsequently the parties came to a fresh verbal agreement by which in consideration of the plaintiff forbearing to sue and forbearing to declare the defendant a defaulter the defendant promised to pay the balance of the cheque. Such consideration was held by the Court to be a good consideration and the plaintiff was held to be entitled to recover. Fletcher Moulton, L. J., delivered a dissentient judgment and it has been strongly pressed by Sir Benode Mitter on behalf of the defendant that I should follow the judgment of Fletcher Moulton, L. J., as representing the law applicable to this case in preference to the judgment of the Court.

The learned late Lord Justice's judgment depends upon his interpretation of that portion of section 18 of the Gaming Act, 1845, which is in the following terms:—

"All contracts or agreements whether by parol or in writing, by way of gaming or wagering, shall be null and void: and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

This, it will be observed, is in language almost identical with section 30 of the Indian Contract Act. The learned late Lord Justice's views are expressed, among others, in the following passages:—

"In my opinion too little attention has been paid to the distinction between the

(1) (1908) 2 K B. 696; 77 L. J. K. B. 794; 99 L. T. 424; 24 T. L. R. 675.

two parts of this enactment, and the second part has been treated as being in effect merely a repetition of the first part. I cannot accept such an interpretation." . . . . The language of the later provision is in my opinion much wider. It provides with complete generality that no action shall be brought to recover anything alleged to be won upon any wager, without in any way limiting the application of the provision to the wagering contract itself. In other words, it provides that " wherever the obligation under a contract is or includes the payment of money won upon a wager, the Courts shall not be used to enforce the performance of that part of the obligation.

This case is not unlike *Bubb* v. *Yelverton* (2) referred to in the judgment of the learned L. J.'s in *Hyams* v. *Stuart King* (1) and that case Lord Justice Fletcher Moulton dealt with, apart from its special circumstances, as they appeared to him, by the observation that the bond constituted an agreement to pay money on wagers, and by section 18 of the Gaming Act an action could be brought upon it. In the cases of this kind in which the plaintiffs have succeeded, it has been alleged that the sum is not " won on any wager " but due in respect of another consideration. The sum may be, and it would be affectation to pretend that it is not, fixed with reference to the amount of a lost wager, but where at the desire of the promisor the promisee promises to do or to abstain from doing something [Contract Act, section 2 (*d*)], the sum of money which the promisor reciprocally promises to pay, whatever it may be and however it may be determined, is a good consideration for the promise of the promisee. To say that because that sum is fixed with reference to a lost bet the amount of the lost bet, therefore, is the consideration for the promise of the promisor, seems to me to involve a lacuna in the logical sequence of the argument. Farwell, L. J., puts with the utmost lucidity what I have endeavoured to express in terms of the Indian Contract Act :—

" Here the agreement sued on is an agreement to pay a sum of money in consideration of forbearance to post the defendant as a defaulter : the sum of money may be equal to or less than the lost bet, but it is not payment of the bet, because that was payable on settling day, and non-payment on that day made the loser a defaulter and liable to be posted. The day of payment is most material, for non-payment involves the winner in a similar default ; the contract not to post is a new contract quite distinct from the contract of wager and is sufficient to support a promise to pay money, which, though equal to the amount of the bet, is not in fact the bet, but is compensation for its non-payment and the action cannot be said to be brought for recovering any sum alleged to have been won on any wager within 8 and 9 Vict., c. 109."

Apart from the contentions based on the dissentient judgment in that case, it was contended that the effect of sections 30 and 23 of the Indian Contract Act is to make agreements by way of wager illegal. But this point is covered by authority, for so long ago as in 1883, in *Juggernath Sew Bux* v. *Ram Dayal* (3), it was decided in the briefest but clearest possible language by two very distinguished Judges of this Court that a contract by way of wagering and gaming is void and not illegal.

There is a very material distinction between the facts of *Hyams* v. *Stuart King* (1) and this case, a distinction which adds to the strength of the case before me. In that case the cheque sued upon had been admittedly given in payment of a bet, and it was held that the forbearance of the Plaintiff to sue coupled with his forbearance to declare the Defendant a defaulter constituted a good consideration for a fresh agreement and that the Plaintiff was entitled to recover on the cheque. Here the *Hundi* was not given till the agreement of the 20th December was made ; there is no question of a new agreement and a new consideration for a *Hundi* given in the first instance in circumstances which would prevent its being sued upon in the absence of a new agreement. This disposes of much of the argument that the real consideration was the bet itself. It is true that the Plaintiff himself said that the *Hundi* represented the amount of the Defendant's losses, a statement on which reliance has been

(2) (1870) 9 E. Q. 471; 39 L. J. Ch. 428; 22 L. T. 258; 18 W. R. 512.

(3) 9 C. 791 at p. 796; 8 Ind. Jur 42 ; 4 Ind. Dec. (N. S.) 1175.

placed. But the terms of the agreement are in writing and though the actual sum may represent the amount of the losses, it does not follow that the consideration for the *Hundi* was the amount of the lost bets.

Another contention based on the evidence, to which I must refer, is that as the matter had passed out of the hands of the Plaintiff and it was discretionary with the controlling authority, the Royal Calcutta Turf Club, whether or not the defendant should be relieved from the penalties stated in the Secretary's letter, there was no consideration, or that it failed. To this, I think, the answer is that the letter shows what the Plaintiff had to do. The Plaintiff says that he could have the name withdrawn by going and explaining the reasons to the Secretary. He does not say in so many words that he did so, but I infer that that was what he did, and nothing else has been suggested, for the Defendant said that since his name had been withdrawn he had been to the races and made bets. The plaintiff did all that it lay in his power to do, and the relief from the penalties which the Defendant has since enjoyed is in my judgment the result of what the Plaintiff did in that behalf.

I find that the consideration for the *Hundi* in suit was the Plaintiff's promise to withdraw the Defendant's name from the Royal Calcutta Turf Club in order to prevent the latter from being posted as a defaulter, which, in fact, I find that he did with that result. I also find that such consideration was legal consideration. I also find that the *Hundi* was not executed by the Defendant by reason of undue influence exerted by the Plaintiff firm.

The only other point that has been argued is that since the Plaintiff firm is a firm of book-makers, the Plaintiff cannot sue as a firm since the business of book-makers is not one which the law will recognise.

For this proposition the authorities cited are the judgment of Lord Justice Fletcher Moulton in *Hyams* v. *Stuart King* (1), and *O'Connor* v. *Ralston* (4). In the former the learned Lord Justice said : "In my opinion no such partnership is possible under English law. Without considering any other grounds of objection to its existence, the language of the Gaming Act, 1892, appears to me to be sufficient to establish this proposition." I need not go further, for considerations based upon the Gaming Act, 1892, can have no application in this country where the legislature has not only not passed any similar Statute, but there are decisions founded upon legal conditions to alter which in England that Act was passed.

In so far as the Gaming Act, 1892, was relied upon by Darling, J., in the second of the two cases cited in support of the proposition, the point is not thereby advanced. But the observation—"Persons associating in such a business as this cannot come into a Court of law and claim that money is due to the firm on a transaction of this kind. The inclination of the law is not to favour but to discourage betting. True it does so in a partial, confused and illogical fashion, but the law upon this point is correctly stated by Fletcher, L.J."—supports the contention that since the law discourages betting, persons whose partnership business is to bet cannot come into a Court of law as a firm. Lord Justice Farwell on this point observed that he was not prepared to overrule the decision of Chitty,J., in *Thwaites* v. *Coulthwaite* (5). That was an action the object of which was to obtain the usual partnership account of profits of a bookmaker's business, and the learned Judge holding that it had not been made out that the plaintiff intended that the business should be carried on illegally, by which he meant in contravention of the Betting Act, 1853, directed an account.

I have stated all the provisions of the law applicable to the case. Section 30 of the Contract Act makes agreements by way of wager void and not illegal. It was pointed out by the learned President in *Hyamns* v. *Stuart King* (1) that nothing prohibited was done by the parties and the cheque and the bets were merely unenforceable. It would, he said, probably have been different if the bets were illegal and the giving of the cheque was an illegal act. There is nothing illegal in the agreements which it is the business of the partnership to make, nor are such agreements prohibited by law. Under the Bengal Public Gambling Act, 1913, not only are bets on horse races no longer

(4) (1920) 3 K. B. 451; 36 T. L. R. 768.

(5) (1896) 1 Ch. 496 ; 65 L. J. Ch. 238 ; 74 L. T. 164 ; 44 W. R. 295 ; 60 J. P. 218.

penalised in the circumstances stated in the Act, but the local Government has been given power by the legislature to sanction an enclosure to be set apart for the purpose by the stewards of controlling races in which betting on races may take place on the days on which the races are to be run.

General propositions as to what the law discourages in England have to be taken with reserve when they are sought to be applied in this country, of which the law as to champerty is an instance. The law of England whereby betting is discouraged is the Statute law. As Fletcher Moulton, L. J., observed in his judgment in *Hyams* v. *Stuart King* (1), "By Common law wagers were not illegal, and the nature of a wager is such that from the point of view of jurisprudence there is ample consideration for a valid contract. The distinction which English law makes between wagering contracts and others is therefore entirely the creation of statute." This disposes of any argument based upon the provisions of the law of England.

I am not prepared to say that the Statutes in force in Calcutta to which I have referred, discourage betting. The Public Gambling Act at least recognises it. Nor am I prepared to hold that persons who enter into a partnership for the purpose of making agreements not forbidden but recognised by the law, though unenforceable at law, are persons who conduct a business, the very nature of which disentitles them to have recourse to Courts of law to recover claims otherwise sustainable. For these reasons I hold that the suit is miantainable.

There is no question as to the amount which the Plaintiff firm, if successful upon the issues other than the last, should recover, and I give judgment for Rs. 8,500 with costs, and reserved costs, if any, on Scale No. 2.

K. S. D. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 456 OF 1922.

April 23, 1923.

Present :—Mr. Justice Broadway.

KIRPA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULABA AND OTHERS—PLAINTIFFS, AND BHANA—DEFENDANT—RESPONDENTS.

Custom—Alienation—Grazing rights.

Where a tract of *shamilat* land in a village has been allotted to certain specified families for the purpose of grazing their cattle and cutting grass and wood, their right to do so amounts to an easement and no member can alienate his right, if by doing so he would be introducing a foreign element in the class of persons to whom the right was specifically restricted. [p. 504, cols. 1 and 2.]

Sundar v. *Wazera*, 144 P. R. 1907 ; 183 P. W. R. 1907 ; *Hans Raj* v *Narain Chand*, 13 Ind. Cas. 716; 86 P. R. 1911 ; 229 P. W. R. 1911 ; *Nihal Singh* v. *Khazan Singh*, 24 P. R. 1902, cited.

Appeal from the decree of the District Judge, Hoshiarpur, dated the 10th November 1922, reversing that of the Munsiff First Class, Hoshiarpur, dated the 3rd December 1921.

Lala *Fakir Chand*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—It appears that a tract of Shamilat land 1039 kanals in area belonging to village Barnoh has been reserved for the grazing of cattle and cutting grass and wood. The wajbulars of the village shows that this particular area has been allotted for the purposes aforesaid, to certain specified families of Labanas. One of these Labanas a man named Bhana sold his grazing and other rights to 4 of the proprietors in the village by a registered deed of sale, dated the 12th March 1920.

The remaining Labanas instituted a suit against the said vendees and Bhana asking for an injunction declaring that the vendees had acquired no rights under the sale and restraining them from in any way obstructing or

interfering with the plaintiffs in the exercise of their rights.

The trial Court dismissed the suit but the learned District Judge decreed it on the ground that the transfer of such grazing rights was void in law. He held that rights such as these were what are described in the Transfer of Property Act as profits *a prendre* and were appurtenant to the land and therefore inalienable apart from the land.

The vendees-defendants have come up to this Court in second appeal through Mr. Fakir Chand who had contended that the view taken by the lower Appellate Court was bad in law.

He urged that grazing rights belonged to all residents in a village quite apart from any tenancy [*Sundar* v. *Wazera* (1)]. Reliance was also placed on *Hans Raj* v. *Narain Chand* (2), but it seems to me that this is scarcely an authority for the proposition advanced. It was held by Rattigan, J., that grazing rights are confined to cattle used for agricultural or domestic purposes alone. It was also contended on the authority of *Nihal Singh* v. *Khazan Singh* (3) that the plaintiffs have no *locus standi* to challenge the alienation in question as they were not shown to be Bhana's reversioners.

It seems to me that this question must depend on what the right is and how it was created. According to the *Wazib-ul-arz* this area in question was specially set aside for the sole use of the Labanas. It being clearly laid down that they and they alone could exercise these rights. The proprietors even appear to have been excluded from using this land for grazing purposes. It amounts to an easement and speaking broadly, easements are generally inalienable apart from the property to which they are appurtenant. As the right to graze, etc. in these lands was specifically given to a definite set of persons I am of opinion that every member of that set has a right to defend his rights against any infringements of them. That the plaintiffs are vitally interested in maintaining the exclusive right of Labanas to exercise these rights seems to me clear and they have, therefore, a *locus standi*.

(1) 144 P. R. 1907 ; 188 P. W. R. 1907.
(2) 13 Ind. Cas. 716; 86 P. R. 1911; 229 P. W. R. 1911.
(3) 24 P. R. 1902.

While admitting that an easement is inalienable Mr. Fakir Chand contended that section 38 of the Easement Act allowed the surrender of easements to the owner of the dominant tenement.

The present right, however, is not attached to any particular land. It is a right given to the Labanas to take certain profits from the area in question and was, it seems to me, granted to them not merely as tenants or non-proprietors but as Labanas.

If my reading of the Wajib-ul-arz is correct then it seems to me that a sale of his right to use the land for grazing purposes cannot be alienated by one of the owners of the right, for by doing so he introduces (as in the present case) a foreign element in the class of persons to whom the right was specifically restricted.

I, therefore, agree with the learned District Judge in thinking that the sale by Bhana was void in law and dismiss this appeal with costs.

N. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 175 OF 1925.

March 6, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

BALDEO SINGH—DEFENDANT—APPELLANT
versus
JAI SINGH—PLAINTIFF—OPPOSITE PARTY.

Oudh Civil Digest, para. 272 *cls. VI, VII, applicability of—Confession of judgment—Compromise after issues—Pleaders' fees, scale of.*

Clause VII of para. 272 of the Oudh Civil Digest applies only to cases which are decided on confession of judgment made at once and not to cases in which some degree of contest has been made. If a case has gone so far as the framing of issues pleader's fees should be charged at the full scale under clause VI of para. 2 272. [p. 505, col. 2.]

Appeal against the order of the Subordinate Judge, Hardoi, dated the 13th October 1923.

BALDEO SINGH *v.* JAISINGH

Mr. *Niamat Ullah*, for the Appellant.

Messrs. *Harish Chander* and *Raj Narain Shukla*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Hardoi allowing an application for amendment of a decree.

The applicant who was defendant in the suit filed a written statement in which he contested the claim made in the plaint. Issues were framed after this and before any evidence was recorded a compromise was filed under which the applicant undertook to pay a certain sum of money to the plaintiffs within a certain period. It was further provided that this period might be extended. If the money were not paid within the extended time then a decree for the relief claimed in the plaint was to be passed against the applicant with costs.

In the decree as originally drafted one-quarter of the pleader's fee of Rs. 350 was allowed as costs. The plaintiffs filed an application for amendment praying that the full pleader's fee be allowed. This application was granted and it is against the order granting it that the present application is made.

The learned Advocate for the applicant refers to Para. 272 Clauses VI and VII of the Oudh Civil Digest. Clause VI provides that " when such suits or appeals are decided on the merits after contest " the full fee shall be taxed and Clause VII runs " when such suits or appeals are decided *ex parte*, or on confession of judgment.....one-quarter of the fees payable in the case of suits or appeals decided on the merits after contest." He contends that the compromise filed in the present suit was in effect a confession of judgment as it resulted in the plaintiff's getting a decree for the whole of the relief for which he sued without having actively to contest it.

The term " confession of judgment " is nowhere defined, but this, it is argued, is what it really means.

On the other hand it is pointed out that the applicant did not at once confess judgment when the suit was filed. On the contrary he put in a written statement denying the claim and made it necessary for the Court to frame issues. Even in the compromise the plaintiff's claim was not at once admitted, that is, if the defendant had chosen to avail himself of the advantages given him by the compromise he might have succeeded in only making the payment for which he had admitted himself to be liable in his written statement.

It appears that this suit would be registered as a contested suit but the learned Advocate for the applicant contends that it could not be said to have been decided on the merits even if this is so.

As is pointed out by the learned Subordinate Judge the applicant agreed in the compromise that if he failed to carry out the conditions contained in the earlier part of that document the suit should be decreed against him with costs. This presumably means the full legal costs. If it had been intended that only a part of the costs should be granted this would have been stipulated for.

On consideration of all the circumstances and the language of clauses VI and VII of Para 272, Oudh Civil Digest I am of opinion that this case must be held to come under Clause VI. Clause VII seems to apply only to cases which are decided on confession of judgment made at once and not to cases in which some degree of contest has been made. If a case has gone so far as the framing of issues the vakils of the parties must have been called upon to do a certain amount of work and their fees may fairly be charged on a scale more liberal than if the plaintiff is successful on his first appearance in Court. I agree with the decision of the learned Subordinate Judge and I dismiss this application with costs.

Z. K. *Application dismissed.*

MUHAMMAD SADDIQ *v.* KHUDA BAKHSH

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1924.

April 7, 1924.

Present:—Mr. Justice Campbell.

MUHAMMAD SADDIQ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHUDA BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—De facto *Guardian*—*Alienation of minor's property.*

Under Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. [p. 506, col. 2.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), followed.

Appeal from the decree of the District Judge, Ambala, dated the 3rd October 1923, reversing that of the Munsif, 1st Class, Jagadhri, District Ambala, dated the 3rd February 1922.

Mr. *Sagar Chand*, for the Appellants.

Messrs. *Shamair Chand* and Lala *Amar Nath Chona*, for the Respondents.

JUDGMENT.—In this suit the plaintiffs who are the sons of *Musammat* Rahiman sued for possession of certain land sold by *Musammat* Rahiman purporting to act as their guardian to one Khuda Bakhsh. The plaintiffs alleged that the sale was neither for consideration nor for necessity, and also alleged that *Musammat* Rahiman was not the legal guardian of the plaintiffs.

The defendants were *Musammat* Rahiman and Khuda Bakhsh. *Musammat* Rahiman admitted the correctness of the plaint. Khuda Bakhsh asserted that the sales were for consideration and necessity and denied the allegation that *Musammat* Rahiman was not the plaintiff's legal guardian.

The Trial Court framed no issues on the second point but deecided that one of the two sales was binding on the plaintiffs and the other was not. The Trial Court also recorded a finding the *Musammat* Rahiman was a proper guardian of the plaintiff during their minority, referring to paragraph 107 of Wilson's Anglo-Muhammadan Law which deals not with guardianship of property but with the question of the custody of boys up to the age of 7 and the girls up to the age of puberty.

Both parties appealed to the District Judge and in their memorandum of appeal the plaintiffs distinctly asserted in paragraph No. 3 that *Musammat* Rahiman was not their lawful guardian.

The learned District Judge accepted the appeal of Khuda Bakhsh and dismissed that of the plaintiffs holding that both sales had been directly for the benefit of the plaintiffs who were then minors. No specific reference is made in his judgment to the plaintiff's contention that *Musammat* Rahiman was not their lawful guardian but at the end of the judgment the following passage occurs:—"*Musammat* Rahiman being the *de facto* guardian of the appellants at the time of the sale was competent to alienate on their behalf for consideration and necessity, provided it was for their benefit."

In Imambandi v. *Mutsaddi* (1), their Lordships of the Privy Council set themselves to lay down a definite rule on the question of how far and under what circumstances according to the Muhammadan Law a mother's dealings with her minor son's property are binding on the infant, and the rule which they declared was that "under Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the trans-

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.)

feree can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser." If, therefore, the parties to the present suit are governed by Muhammadan Law the decision of the learned District Judge in the passage quoted above is clearly wrong.

It has been argued, however, by Mr. Shamair Chand for Khuda Bakhsh, respondent, that under section 5 of the Punjab Laws Act in questions regarding guardianship the rule of decision is firstly any custom applicable to the parties concerned, that the present parties being *Arains* they are presumably governed by agricultural custom that under the *riwaj-i-am* of the Ambala District, as embodied in the answer to question No. 24 on page 13 of Whitehead's Customary Law of the Ambala District, 1921, the mother is by custom the legal guardian of a minor next after the father and that this rule applies to all agricultural tribes of the district. This raises a question into which the lower Courts have not entered, but of which the determination is necessary for the proper disposal of the suit. There has been no decision by the learned District Judge of paragraph 3 of the plaintiff's memorandum of appeal, and I do not agree with Mr. Shamair Chand's contention that this ground must have been expressly given up, before the learned District Judge.

The lower Appellate Court must decide whether *Musammat* Rahiman was or was not the legal guardian, if it holds that she was not, a further question may arise whether the plaintiffs are obliged by law to restore the benefit obtained by them, if any, to the vendee. The decision that *Musammat* Rahiman was entitled as *de facto* guardian to alienate the property, I hold it to be erroneous on the present contents of the record and for that reason I accept the appeal, set aside the decree of the lower Appellate Court, and order both appeals filed before him to be decided again with reference to the above remarks. Costs in this Court will follow the event.

N. H. *Appeal accepted.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 4700 of 1923.

January 17, 1924.

Present :—Mr. Justice Fawcett.

MEGHJI VALLABHDAS—PLAINTIFF

versus

DAYALJI LALJI & COMPANY—DEFENDANT.

Transfer of Property Act (IV of 1882), s. 116—Landlord and tenant—Holding over what constitutes.

The option of giving an assent which will convert a holding over by a tenant into a tenancy is one that is conferred by section 116 of the Transfer of Property Act, on the lessor and not on the lessee. The effect of the section that, if there is continuance of possession and if that continuance of possession is assented to by the lessor, that, in law, operates as a renewal, of the lease from month to month or from year to year, in the absence of any agreement to the contrary. [p. 508, col. 2 ; p 509, col. 1.]

Vadapalli Narasimham v. *Dronamraju Seetharamamurthy*, 31 M. 163; 18 M. L. J. 26 ; 3 M. L. T 256, relied on.

Mr. *Mirza*, for the Plaintiff.

Mr. *Kamdar*, for the Defendant.

JUDGMENT.—The facts in this case are all admitted.

The defendants occupied a godown on a lease from the plaintiff which expired on October 20, 1923. On that day the defendants sent a letter to the plaintiff saying that, as the Colaba Cotton Green was being removed to Sewri on November 1, they would vacate the godown on October 30. On the same date the plaintiff's attorneys replied to the defendants saying that if they did not vacate the godown during the course of that day they would have to give a proper notice to quit to the plaintiff, otherwise he would hold them responsible for all damages and consequences, and further that the plaintiff did not accept their proposal to vacate the godown on October 30. A somewhat similar letter was sent by the plaintiff's solicitors on October 22, in which it was said that the plaintiff would insist upon a proper notice for giving quiet and peaceful possession, otherwise he would hold them responsible for all damages and consequences. On the same

day the defendants' solicitors wrote to the plaintiff's solicitors denying that the plaintiff was entitled to any notice to quit as alleged, or that he could hold the defendants responsible for any damages or consequences. It was further said that the defendants would vacate the godown by the end of that month. However, as a matter of fact, the defendants vacated the godown on October 26, and a letter was sent to the plaintiff's attorneys on that date informing them of that fact. Further correspondence ensued in November; on the 12th of that month, the plaintiff's solicitors wrote claiming the sum of Rs. 1,166-10-8 made up of two months' proportionate rent under the old lease; one month's rent being rent for the month commencing from October 21, 1923, during part of which the defendants continued to be in possession of the godown; and another month's rent being claimed as an extra month's rent in lieu of giving a proper legal notice. Defendants' attorneys replied on November 14, denying the plaintiff's right to this claim and offering to pay Rs. 117 as compensation for use and occupation for six days from October 21 to 26, 1923. The suit was filed on November 23, and the plaintiff claims the amount of Rs. 1,166-10-8 with interest.

The main point for determination is whether the plaintiff is entitled to take up the position that the defendants became tenants holding over under section 116 of the Transfer of Property Act, so that they were under an obligation to pay rent, at any rate, for the month in which there was occupation and to give a proper legal notice to quit, that is to say, notice of their intention to quit under section 106 of the Transfer of Property Act, modified as it is by the Bombay usage requiring one month's (instead of fifteen days') notice. Mr. Mirza's contention is that the defendants did in fact hold over, although it was only for a period of six days; that this gave the plaintiff the option of treating the defendants either as trespassers or as tenants in accordance with the terms of section 116; that the plaintiff exercised his right of treating them as tenants, and so is justified in demanding the two months' rent claimed in the plaint. On the other hand, Mr. Kamdar's main argument is that there must be not only the assent of the plaintiff to the holding over but the consent of the defendants to their continuing as monthly tenants in accordance with section 116.

If you take the words of section 116 in their ordinary meaning, then, certainly I find it difficult to say that the conditions specified in that section are not fulfilled in the present case. The defendants were lessees and they remained in possession of the property after the determination of the lease granted to them as lessees. The first sentence of section 116 is, therefore, fulfilled. The plaintiff is a lessor, and he, in the correspondence, did assent to the defendants' continuing in possession subject to the condition that has been referred to about their giving a proper notice to quit. Therefore, it seems to me that literally the second condition that "the lessor otherwise assents to his continuing in possession" is complied with. Then the final part of the section provides that "the lease is, in the absence of an agreement to the contrary, renewed", in the present case "from month to month", and the effect is that merely by the defendants remaining in possession with the assent of the plaintiff to their continuing in possession, by law, the lease which had been given to the defendants was renewed from month to month. If that is so, then clearly there is justification for the position taken up by the plaintiff, although it certainly savours of sharp practice and seems grasping and unfair. However, that may be, I am only concerned with what are the strict legal rights of the parties. I cannot accede to Mr. Kamdar's entire proposition that in order to bring the case under section 116 there must also be the assent of the lessee to the lease being renewed from month to month, or from year to year, as the case may be. That would put the person holding over obviously in an unfair position in regard to his relations with the lessor, and I quite accept what has been laid down in *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthy* (1), that the option of giving an assent which will convert the holding over into a tenancy is one that is conferred on the lessor and not on the lessee. I was at first inclined to think that a distinction might be made in a case where a person does not remain in possession for a sufficient time to justify his being treated as a tenant holding over from month to month or from year to year,

(1) 31 M. 163; 18 M. L. J. 26; 3 M. L. T. 256.

under section 116. The argument which suggested itself to me is this. What is the principle which underlies section 116? As far as I can see, it could only be assigned to two different grounds (1) of contract or (2) estoppel. One might say that what the section really recognises is that a tenant holding over makes a proposal that the lease shall be renewed from month to month, or from year to year, and that acceptance of rent or other acts of the lessor assenting to his continuing in possession have the effect of communicating the acceptance of that proposal in accordance with section 3 of the Indian Contract Act. Again one might say, looking at it from the stand-point of estoppel, that the lessor by accepting rent or doing any other act, which shows that he assents to the lessee remaining in possession, has intentionally caused or permitted the lessee to believe that the lease is renewed from month to month or from year to year, and to act upon that belief. That would be a case falling under section 115 of the Indian Evidence Act, and that of course would imply that the lessee was asserting that he was a tenant from month to month, or from year to year, and that the lessor was denying that, but was estopped by his act from setting up that defence. So that in either case there must be either a proposal from the lessee regarding it or an allegation by the lessee that he is a tenant from month to month; and here the short time the defendants contemplated remaining, and did in fact remain, in occupation of the godown precludes the idea of any such proposal or allegation. But on a further consideration I do not think, having regard to the very clear terms of the section, that I would be justified in taking that view. As I have already said the effect of that section is that, if there is continuance of possession and if that continuance of possession is assented to by the lessor, that, in law, operates as a renewal of the lease from month to month or from year to year, in the absence of any agreement to the contrary. Here no contract to the contrary is alleged. A further difficulty that arises is that, if one says that section 116 only operates in a case where the continuance of possession lasts for such a time as establishes a condition of things in which the lessee can properly be treated as a tenant from month to month, or from year to year, where is the exact line to be drawn? Is it to be said that the lessee can [illegible] possession for twenty-nine days and the landlord treating him as a tres[illegible] that if he stays one day longer then, if the lessor has assented to his continuing in possession, he becomes a monthly tenant? And in the case of a lease for agricultural or manufacturing purposes, over how many months can the occupation extend, before the lease becomes renewed from year to year? I think that there is no sufficient justification for my holding that any days (or months) of grace can be allowed in regard to the tenant's possession in a case under section 116. Finally, it is clear that the defendant's letter of October 20, 1923, contemplates a holding over with the assent of the lessor rather than a continuance of possession without such assent. For these reasons I am forced to the conclusion that, in law, the position taken up by the plaintiff is correct.

There must, therefore, be a decree for the plaintiff for the sum of Rs. 1,166-10-8 with interest at nine per cent. per annum from November 12, 1923, to judgment. Costs and interest on judgment at six per cent.

The plaintiff to withdraw the sum of Rs. 117 deposited by the defendants towards satisfaction of the decretal amount.

Z. K. *Suit decreed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL
NO. 2204 OF 1923.
February 28, 1924.

Present:—Mr. Justice Martineau.

RALLA RAM—CREDITOR—APPELLANT
versus
RAM LABHAYA MAL AND OTHERS—INSOLVENTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 51, application of—Insolvency petition—Execution sale, validity of.

There is no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by section 52 of the Act to direct the property, if in its possession, to be delivered to the Receiver. In the absence of such an application the Court is at liberty to sell the property and the sale, being legal, cannot be impeached by the Receiver or the creditors. [p 510, col. 1.].

Woolford's Trustee v. *Levy*, (1892) 1 Q. B. 772; 61 L. J. Q. B 546; 66 L. T. 812; 40 W. R. 483; 56 J. P. 691, followed.

BHOWANIDAS RAMGOBIND *v.* HARSUKHDAS BALKISHENDAS,

Appeal from the Order of the District Judge, Shahpur, Sargodha, in the exercise of insolvency jurisdiction, dated the 29th June 1923.

Kunwar *Dalip Singh*, for the Appellant.

Mr. *Mukand Lal*, for the Respondents.

JUDGMENT.—A money decree was obtained against Ram Labhaya, and execution was taken out. An insolvency petition by the judgment-debtor had been admitted by the Insolvency Court, and notice of this was given to the Court executing the decree ; but the latter Court proceeded to sell some of the judgment-debtor's property, and the sale was confirmed. After the confirmation of the sale Ram Labhaya was adjudged an insolvent, and a Receiver was appointed. The Receiver and one of the creditors Ralla Ram, then applied to the Insolvency Court to amend the sale. That Court has held that as there was no application by it or the Receiver to the executing Court to hand over the property to the Insolvency Court, the executing Court was authorized to sell the property. and the sale cannot now be questioned by the Insolvency Court. Ralla Ram has appealed from that order.

I think the lower Court is right. There is no provision in the Provincial Insolvency Act (V of 1920) which prohibits a Court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insovency petition by him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by section 52 to direct the property, if in its possession to be delivered to the Receiver. As no such application was made in the present case the Court was at liberty to sell the property, and the sale, being legal, cannot be impeached by the Receiver or the creditors. On this point there is the authority of *Woolford's Trustee* v. *Levy* (1), for the provisions of section 46 (1) of the Bankruptcy Act, 1883, to which that case related were similar to those of section 52 of the Provincial Insolvency Act of 1920. It is argued for the appellant that as a Receiver was not appointed till after the sale no application could have been made to the executing Court to deliver up the property, but this argument has no force as the application could have been made by the Insolvency Court, which, under section 58 of the Provincial Insolvency Act had all the rights of. and could exercise all the powers conferred on a Receiver until a Receiver was appointed.

I hold that the sale is valid, and that, therefore, the purchaser's title is good, the question whether he purchased in good faith not arising. The appeal is accordingly dismissed with costs.

N. H. *Appeal dismissed.*

(1) (1892) 1 Q B. 772; 61 L. J. Q. B. 546 ; 66 L. T. 812 ; 40 W. R. 485, 56 J. P. 691.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 106 OF 1922.

April 24, 1923.

Present :—Mr. Justice Mookerjee and Mr. Justice Ranikn.

BHOWANIDAS RAMGOBIND—PLAINTIFF—APPELLANT

versus

HARSUKHDAS BALKISHENDAS—DEFENDANT—RESPONDENT.

Arbitration—Proceedings ex parte—*Arbitrators, duty of—Special notice, absence of, when does not vitiate award—Interest after date of award—Arbitrators, powers of.*

Although arbitrators should give notice of their intention to proceed *ex-parte* if one of the parties should not appear, the true test in determining whether the absence of such notice would vitiate an award is, whether the party taking exception to the award has, in fact, been prejudiced by the omission of the arbitrators to serve the special notice on him. If it is established that, notwithstanding, such warning, he would not have appeared, he cannot in vite the Court to set aside the award on the ground of the alleged. defect in procedure. [p. 511, col, 2.].

Arbitrators have authority to allow interest after the date of the award. [p. 512, col. 1.]

Sewdatrai, Narsaria v. *Tata Sons, Ltd.*, 77 Ind Cas. 769 ; 27 C. W. N. 494, dissented from.

Uttamchand Saligram v. *Mahmood Jewa Mamooji*, 54 Ind. Cas. 285; 23 C. W. N. 704; 46 C 534: In re *Badger*, (1819) 2 B. & Ald 691; 21 R. R. 455; 106 E. R. 517; *Edwards* v. *G. W. Ry*, (1851) 11 C. B. 588; 21 L. J. C. P. 72; 138 E. R. 603; *Sherry* v. *Oke*, (1835) 3 D. P. C. 349; 1 H. L. W. 119; *Beham* v. *Wolfe*, (1832) 1 Al. and Na. 233, relied on.

In re. *Morphett*, (1845) 2 D. & L. 967; 69 R. R. 888; 14 L. J. Q. B 259; 10 Jur. 546, distinguished.

Appeal against the judgment of Mr. Justice Buckland, dated the 18th July 1922.

Mr. *B. L. Mitter* and Mr. *M. N. Basu*, for the Appellant.

Sir *Binod Mitter* and Mr. *H. C. Mazumdar*, for the Respondent.

BHOWANIDAS RAMGOBIND v. HARSUKHDAS BALKISHENDAS

JUDGMENT.—This is an appeal by the plaintiffs from the judgment of Mr. Justice Buckland in a suit to set aside an arbitration award made by the tribunal of the Bengal Chamber of Commerce.

The contract contained an arbitration clause in the following terms:—"Any disputes to be settled by arbitration under the rules of the Bengal Chamber of Commerce, or at the option of the sellers by the arbitration of two European Sugar Importers of Calcutta, one to be appointed by the sellers and one by the buyers, with power to appoint a European Merchant as Umpire. The decision of the Chamber, Arbitrators or Umpire shall be final and binding on both parties, either of whom may make the same a rule or order of Court. If the buyers shall fail to join in such arbitration or to appoint an arbitrator within three days after being required to do so, the arbitration may at the option of the sellers, proceed *ex parte*, and the award thereon shall be binding on the buyers, and the sellers may make the same a rule or order of the Court."

On the 1st September 1920, the buyers made a reference to the Chamber. Thereupon correspondence followed. On the 4th October 1920, the Registrar of the Chamber intimated to the sellers that the reference had been received and requested them to send their papers on or before the 12th October, failing which arbitration would be proceeded with in their absence. On the same date the sellers stated that they wanted time for a fortnight after which they would be able to send their statement and papers. On the 12th October, the Registrar sent an intimation that unless the statement and the papers were received, on or before the 30th October, the arbitration would be proceeded with *ex parte*. It was also intimated that no further extension would be granted under any circumstances whatever. On the 13th October, time was extended till the 11th November 1920. There was later a further extension till the 10th December 1920. It does not appear that the sellers took any steps whatever to join in the reference and to assist the arbitrators. On the other hand, on the 13th December 1920, they intimated that they would not submit to the jurisdiction of the tribunal of arbitrators, as the tribunal could not possibly have any jurisdiction over the matter. The result was thatthe arbitrators proceeded *ex parte*, and on the 23rd December 1920, an award was made. The sellers thereupon instituted the present suit to have the award set aside, on the ground amongst others, that it had been made without jurisdiction. Mr. Justice Buckland overruled this contention, investigated the other objections against the award, and dismissed the suit in view of the terms of cl. 17 of the contract. We agree with Mr. Justice Buckland that the sellers had the option to make a reference to the arbitration of two European Sugar Importers of Calcutta, but they never exercised that right. Consequently, the objection to arbitration by the Bengal Chamber of Commerce is futile and the award must be regarded as made with jurisdiction. In these circumstances, the contention of the appellant has been limited to two grounds, namely, first, that the award should be set aside as proper notices were not given, and, secondly, that the arbitrators had no authority to allow interest after the date of the award.

As regards the first point it need not be disputed that arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear; *Crompton & Co.*. v. *Mohan Lal* (1), *Sukhamal Bunsidhar* v. *Babulal Kedia & Co.* (2) and *Udaichand Panna Lal* v. *Debibux Jivaram* (3). But it is plain that the complainant has not been prejudiced in any manner by the failure of the arbitrators to give such notice; as was stated in *Udaichand Panna Lal* v. *Debibux Jivaram* (3) the true test is, has the complainant who has taken exception to the validity of the award, been, in fact, prejudiced by the omission of the arbitrators to serve the special notice on him? If it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure. In the present case, there can be no doubt that the appellants had no intention to appear before the arbitrators. Indeed, up to the 13th December, they had taken no steps whatever to appear before the arbitrators. They might, on that date, have formulated their objections to the jurisdiction of the arbi-

(1) 25 Ind. Cas. 391; 41 C 313.
(2) 59 Ind Cas. 75; 42 A. 525; 18 A. L. J. 652; 2 U. P. L. R. (A) 248.
(3) 60 Ind. Cas. 987; 47 C. 951.

trators, and under protest, filed their statements. This course they did not adopt, and we agree with Mr. Justice Buckland that the appellants have not been prejudiced by the course taken by the arbitrators.

As regards the second point, reference has been made to the decision of Mr. Justice Greaves in the case of *Sewdutrai Narsaria* v. *Tata Sons, Ltd.* (4) as an authority for the proposition that the arbitrators exceeded their authority when they allowed interest after the date of the award. If Mr. Justice Greaves intended to lay this down as an inflexible rule of law, we are not prepared to follow his ruling. On the other hand, we find that in *Uttamchand Saligram* v. *Mahmood Jewa Mamooji* (5), interest was allowed as has been done by the arbitrators in this case. The decision in *In re Morphett* (6) proceeded upon its special facts, and *In re Badger* (7), shows that the arbitrators have authority to make a decree for such damages as might have been assessed by the Court; see also *Edwards* v. *G. W. Ry. Co.* (8), *Sherry* v. *Oke* (9) and *Beaham* v. *Wolfe* (10). In the case before us, there is no controversy that if the matter in dispute went to trial, the Court would in ordinary course have allowed interest as has been awarded by the arbitrators. The second point fails equally with the first.

The result is that the judgment of Mr. Justice Buckland is affirmed and this appeal dismissed with costs.

Z. K. *Appeal dismissed.*

(4) 77 Ind. Cas. 769; 27 C. W. N. 494.
(5) 54 Ind. Cas 285: 23 C. W. N. 704; 46 C. 534.
(6) (1845) 2 D & L. 967; 69 R. R. 888; 14 L. J. Q. B. 259; 10 Jur. 546.
(7) (1819) 2 B. & Ald. 691; 21 R. R 455;, 106 E. R. 517.
(8) (1861) 11 C. B. 588; 21 L. J. C. P. 72; 138 E. R. 603.
(9) (1835) 3 D. P. C. 349; 1 H. & W. 119.
(10) (1832) 1 Al. & Na. 233.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 10 OF 1923.

January 22, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Shah.

BHIKU KRISHNA BADHADE —DEFENDANT—APPELLANT *versus* KESHAN RAMJI BADHADE—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Remarriage—Succession to daughter by former husband.

A Hindu widow, who re-marries, is entitled to succeed to the estate of her daughter by her former husband who dies after her re-marriage. [p 512, col. 1.]

Basappa v. *Rayava*, 29 B. 91; 6 Bom. L. R. 779; (F. B); *Akora Suth* v. *Bovani*, 2 B. L R. 199; 11 W. R. 82, *relied on.*

Appeal from the decision of the District Judge, Poona, in Appeal No. 52 of 1922, confirming the decree of the Second Class Subordinate Judge, Saswad, in Civil Suit No. 398 of 1920.

Mr. *A. G. Desai*, for the Appellant.

Mr. *V. D. Limaye*, for the Respondent.

JUDGMENT.

Macleod, C. J.—We think the learned District Judge was right in following the Full Bench decision in *Basappa* v. *Rayava* (1). In that case it was held that a widow re-marrying could succeed to the estate of her son by her former husband who died after her re-marriage. We do not think that case can be distinguished from the present case merely bacause the widow succeeded to the estate of her daughter, and not to the estate of her son. It was suggested that there might be some difference if the son had taken by survivorship, which could not be the case with the daughter, as the daughter must necessarily take by inheritance. The fact remains, whether the estate has vested in a son or a daughter, that the mother succeeds to both of them as heir, and consequently, if she could succeed to the estate of her son, after she had re-married, she could equally succeed to the estate of her daughter. Considering

(1) 29 B. 91; 6 Bom. L. R. 779 (F. B.)

that in *Basappa* v. *Rayava* (1) the learned Chief Justice was of opinion that they were not entitled to disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in *Akora Suth* v. *Boreani* (2) and considering that he declined to give expression to his own opinion on the point, it certainly would be impossible for us sitting as a Division Bench to consider that that decision was wrong. Nor would there be any ground for our referring the question to another Full Bench. The appeal, therefore, must be dismissed with costs.

Shah, J.—I concur in the order proposed on the ground that we are bound by the decision in *Basappa* v. *Rayava* (1).

Z. K. *Appeal dismissed.*

(2) 2 B. L. R. 199; 11 W. R. 82.

CALCUTTA HIGH COURT.

CIVIL RULE No. 328 OF 1923.

July 30, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

RADHA RAMAN KUNDU—PETITIONER

versus

GOPAL CHANDER SINHA—OPPOSITE PARTY.

Succession Certificate Act (*VII of* 1889), *Ss.* 10 (1), 19—*Order refusing to grant—Extension of certificate, whether appealable.*

An order under section 10 (1) of the Succession Certificate Act refusing to grant an extension of a certificate for the collection of debts, to debts other than those specified in the certificate, is appealable. [p. 513, col. 2.]

Venkateswarulu v. *Brahmaravutu Raja Kristnaji*, 25 M. 634 (1901), distinguished.

Rule against the order of the District Judge, Murshidabad, dated the 8th March 1923, confirming that of the Munsif, 1st Court, Kandi, dated the 18th December 1922.

Dr. *Jadu Nath Kanjilal* and Babu *Binode Lal Mukherjee*, for the Petitioner.

Babu *Mohesh Chunder Banerjee*, for the Opposite Party.

JUDGMENT.—The Petitioner in this case obtained a certificate of succession under Act VII of 1889 to collect certain debts of one Gour Sunder Kundu. Subsequently he applied for extension of the certificate under section 10 of the Act to collect other debts. That application was refused by the Munsif who was empowered to deal with applications under this Act. An appeal against his order was preferred to the District Judge and he on the authority of the Madras High Court, *Venkateswarulu* v. *Brahmaravutu Raja Kristnaji* (1) held that no appeal lay. We are unable to accept the view of the learned District Judge. He has overlooked the fact that there is a marked difference between the facts of the present case and those of the case on which he relied. In the Madras case the appeal was preferred against an order granting an application under section 10 for extension. Here the appeal is against an order refusing such an extension. Section 19 read with the proviso to cl. (2) of section 26 of the Act lays down what are appealable orders under this Act, and they are orders granting, refusing or revoking certificates. We think an order refusing certificate as to some of the debts alleged to be due to the deceased comes within the terms of section 19.

We, accordingly, make this rule absolute. We set aside the order of the lower Court and direct that he do re-hear the appeal according to law. Costs of this Rule will abide the result, and assess hearing fee at one gold mohur.

W. C. A. *Rule made absolute.*

(1) 25 M. 634 (1901).

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 38 OF 1923.

February 6, 1924.

Present:—Mr. Kendall, A. J. C.

GUR DIN—DEFENDANT—APPELLANT

versus

Must. SIRAJUNNISSA——PLAINTIFF—RESPONDENT.

Oudh Rent Act (*XXII of* 1886), *ss.* 47, 48—*Oudh Rent Amendment Act* (*XXII of* 1886), *s.* 4—'*Payable*' *in s.* 48 *meaning of—Enhancement of rent, illegal—Agreement to pay—Arrears, suit to recover, maintainability of.*

GUR DIN *v.* SIRAJUNNISSA

The word "payable" in section 48 of the Oudh Rent Act as amended by the Act of 1921, means payable under the Act which was in force at the time. [p. 514, col. 2.]

No agreement made between a landlord and tenant in contravention of the provisions of section 47 of the Oudh Rent Act, could be a valid agreement. Section 4 of the Oudh Rent Amendment Act of 1921 merely restricts a landlord from ejecting a tenant or enhancing his rent otherwise than in accordance with the provisions of the Act. It does not enable a landlord to claim arrears of rent under an agreement that was invalid, under section 4 of the Oudh Rent Act of 1886, and was therefore, no agreement at all. [p. 514, col. 2.]

Appeal against the judgment of the District Judge, Lucknow, dated 6th August 1923, upholding the judgment of the Assistant Collector, the 1st class, Lucknow, dated 12th February 1923.

Mr. *Piyare Lal*, for the Appellant.

Mr. *Mohammad Ayub*, for the Respondent.

JUDGMENT.—The appellant is a tenant of the plaintiff-respondent, who sued him for the recovery of Rs. 98 arrears of rent for 1329 F. in respect of certain plots. It appears that the appellant had a brother Bhupat, who held a separate holding for which he used to pay Rs. 82-12-0 rent. Bhupat was ejected from this holding in July 1917, and in June 1918, exactly the same holding was leased to him by the plaintiff on an annual rent of Rs. 200. This rent it is said that he continued to pay until he died in 1327 F. when his brother, the present appellant, succeeded him and thus cultivated the holding in addition to his own. Gur Din has all along paid Rs. 70 for his own holding, and it is now claimed by the plaintiff that the rent of both holdings is Rs. 270, of which he has been paid Rs. 172 so that Rs. 98 is still outstanding. The two lower Courts have decreed the claim in full.

The objection has been taken all through that the enhancement of rent from Rs. 82-12-0 to Rs. 200 was illegal under section 47 of the Oudh Rent Act of 1886. The lower Courts have held that although the agreement was illegal under the old Act, yet under section 48 of the Amended Act, which came into force on February 11th, 1922, the defendant was entitled to retain occupation of the holding at the rent payable by the deceased, while by section 4 of the same Act the enhancement of rent made in 1918 was validated.

The conclusions of the Courts below are in my opinion not justified. The appellant succeeded to Bhupat's tenancy in 1327 F. and became liable to pay the rent that had been payable by the deceased. By "payable" must mean the rent payable under the Act then in force. No agreement made between a landlord and tenant in contravention of the provisions of the Act could be a valid agreement. If the agreement of 1918 was not a valid agreement then it cannot be considered as an agreement in law at all. Section 4 of the Act of 1921 merely restricts a landlord from ejecting a tenant or enhancing his rent otherwise than in accordance with the provisions of the Act. It does not enable a landlord to claim arrears of rent under an agreement that was invalid and that was therefore no agreement at all. An attempt has been made in this Court to show that the appellant agreed to pay rent for the holding to which he succeeded at a rental of Rs. 200, but this is an entirely new plea. It was not claimed in the plaint, nor was it put forward in either of the Courts below: and it is denied by the appellant. Reference has been made to an unreported judgment of this Court (Rent Appeal No. 18 of 1923) in which the facts were to some extent similar. The learned Judicial Commissioner dismissed the appeal and the claim for arrears of rent on the ground that the period during which the rent accrued was one during which section 47 of the old Act was operative. He added however "If the rent had been due for a period subsequent to the repeal of section 47 the argument (*i.e.*, of the plaintiff-appellant) would have had considerable "weight." These words however are by way of an *obiter dictum*, and it is quite possible that the learned Judicial Commissioner would have dismissed a claim in regard to rent that had accrued during a period subsequent to the repeal of section 47, if that had been the point that he had been called on to decide. In any case the sentence quoted is not authority for allowing the present suit, and for the reasons I have given above, I allow the appeal with costs in all Courts, set aside the decree of the lower Appellate Court, and order that the plaintiff's suit be dismissed.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEALS NOS. 6 AND 7 OF 1924.

February 8, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

KAIKHUSHRU NUSSERWANJI CHANDABHOY— APPELLANT
versus
TATA INDUSTRIAL BANK, LIMITED —RESPONDENT.

Companies Act (VII of 1913) s. 207 (IX) Liquidation, voluntary—Removal of liquidators—Power of Court—"Cause shown" meaning of.

Under section 207 (IX) of the Companies Act, the Court has power in the voluntary winding up of a Company on cause shown to remove a liquidator. The jurisdiction of the Court is not confined to cases where there is personal unfitness in the liquidator. The cause shown is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidators are appointed. Fair play to the liquidators themselves is not to be left out of sight but the measure of due cause is the substantial and real interest of the liquidation. [p 515, col. 2].

In re *Adam Eyton*: *Exparte Charlesworth*, (1887) 36 Ch. D. 299 ; 57 L. J. Ch. 127 ; 57 L. T. 899 ; 36 W. R. 275, relied on.

Appeals against the Orders of Mr. Justice Kemp.

Mr. *G. N. Thakor*, for the Appellant.

Messrs. *B. J. Desai* and *Taraporevalla*, for the Respondent.

JUDGMENT.

Macleod; C. J.—These are two appeals from the orders passed by Kemp, J., on two petitions under the Indian Companies Act VII of 1913. The first petition was filed by the appellants, the second by the respondents in the circumstances mentioned by the learned Judge at pp. 336 to 340 of the Paper Book. There being no dispute as to the facts there is no necessity for me to set them out again in this judgment. The learned Judge on the second petition ordered that Messrs. Chandabhoy and Guzdar should be removed from their office as liquidators in the voluntary winding up of the Tata Industrial Bank. As a consequence of that order the first petition was dismissed with costs, the Judge remarking that in the circumstances of the case he thought the presentation of that petition was improper.

Under section 207, clause (ix), of the Indian Companies Act the Court has power in the voluntary winding up of a company on cause shown to remove a liquidator. What should be the measure of "due cause" was considered in *In re Adam Eyton* : *Ex parte Charlesworth* (1) where Bowen, L. J., said (p. 306) :

"A contention was raised by Mr. *Cozens-Hardy*...to the effect that unfitness in the liquidator ought to be shewn before he is removed...In many cases, no doubt, and very likely, for anything I know in most cases, unfitness of the liquidator will be the general form which the cause will take upon which the Court in this class of case acts, but that is not the definition of due cause shewn. In order to define 'due cause shewn' you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation. That should be thoroughly understood, I think, as of great importance."

It is unfortunate for the appellants that, as it would seem, they were not aware of that judgment before they embarked upon the course of action which led to the order in the Court below for their removal. It is necessary then to consider the facts leading up to the resolution for the voluntary winding up of the Tata Bank, and the purpose for which the liquidators were appointed. The conditional agreement of July 5, 1923, referred to

(1) (1887) 36 Ch. D. 299. 57 L. J. Ch. 127; 57 L. T. 899; 36 W. R. 275.

by the learned Judge, a copy of which by some strange omission does not appear to have been annexed to either petition, provided for the transfer of the whole business of the Tata Bank to the Central Bank, provided the Tata Bank Share-holders passed effective resolutions for the voluntary winding up of the Bank and the appointment of liquidators to carry out the transfer mentioned in the agreement. Thereafter the necessary resolution was passed by the share-holders of the Tata Bank for the voluntary winding up and, at the meeting confirming this resolution, the appellants with two other gentlemen were appointed liquidators by a separate resolution for the following purpose, to adopt the conditional agreement and carry it into effect with such modifications as they thought fit under the supervision of the Directors of the Central Bank and the Tata Bank, the power of the last named Directors to continue for the purpose of carrying the agreement into effect. Put shortly, under that agreement the whole of the assets of the Tata Bank were to be transferred to the Central Bank which undertook to satisfy all the liabilities of the Tata Bank and to keep the Tata Bank, its liquidators, and contributories, indemnified against all such liabilities. The share-holders of the Tata Bank who agreed to take one share of the Central Bank for two shares of the Tata Bank would get the shares in the Central Bank through their liquidators. Those who did not consent to the exchange were offered Rs. 15 for each share, which they would receive from the Central Bank through their liquidators, and if any such share-holder did not agree to the offer of Rs. 15, then he was to be paid such sum as by arbitration between the vendor company and himself should be determined the payment being made by the Central Bank to the liquidators.

The liquidation, therefore, was to be carried out under the provisions of section 213 of the Indian Companies Act and was of an entirely different nature to an ordinary liquidation in which the liquidators would have to realise the assets of the Company, inquire into the conduct of its affairs by its Directors, pay the debts of the company, make calls if necessary on the contributories, and generally so act until the surplus assets, if any, were distributed amongst the share-holders and a final dissolution could be declared.

In the present case it will clearly be seen that it was in the interest of the share-holders of the Tata Bank of whom we are told those holding 97 per cent. of the capital had consented to the liquidation and the transfer of the assets to the Central Bank, that the transfer should be complete with the least possible delay so that the Central Bank should continue its business after the transfer without undue dislocation which might affect its credit. It was also to the interests of the share-holders of the Tata Bank that their liquidator should oppose the claims of the dissentient share-holders who had refused the offer of Rs. 15 per share and demanded arbitration. It would also seem hardly necessary to mention that it was in the interest of the share-holders that their liquidators should work together in harmony.

Exhibit B to the affidavit of H. C. Captain of November 22, 1923, filed in the liquidators' petition, contains extracts from the minutes of the meeting of the liquidators. See pp. 83 to 101 of the Paper Book.

The affidavit of Mr. Gilchrist of November 21 summarises very fairly the relations existing betweeen the liquidators as disclosed by these extracts. Practically from the commencement there was friction between the appellants and their co-liquidators. The appellants desired that the liquidators should take complete inspection of all the books, documents, and papers,of the Tata Bank which had been handed over to the Central Bank. They relied on clause 19 of the agreement of July 5, 1923, which, on the face of it, would appear to support their demand. But that clause must be read in relation to the rest of the agreement. It could never have been intended that the liquidators were entitled to a roving inspection which might seriously impede the working of the Central Bank, and I construe that clause as meaning that the liquidators were entitled only to such inspection as was necessary to carry out the purposes for which they were appointed. Now it is clear from the minutes of the liquidator's meetings that the appellants desired to inspect the minutes of the Tata Bank Directors' meetings and also all the books of the Bank because, as Mr. Guzdar said on August 27, he wanted to see whether he could find out specific items on which it would be possible to

charge the Directors with fraud or misfeasance, as, if so, he intended to prosecute each and every Director who appeared to be concerned in such acts. He further said he wanted inspection in order to find out whether the offer of Rs. 15 per share should be accepted or whether if such inspection disclosed acts of fraud or misfeasance a higher value could not be obtained by arbitration. The appellants even instructed Counsel before us to support their attitude in these respects. It was not that they had formed a mistaken opinion regarding their duties as liquidators, they were acting in direct opposition to the interests of the share-holders who had appointed them. However much dissatisfied the share-holders may have been with the conduct of their affairs by their Directors, they had decided by an over-whelming majority that it was in their interest to accept the terms of the conditional agreement which excluded any idea of steps being taken against the Directors of the nature contemplated by the appellants. It was also the duty of the liquidators who would represent the Tata Bank in arbitration proceedings between those dissentients who refused to accept the offer of Rs. 15 from the Central Bank to support the offer. Clearly the appellants were seeking for evidence that the offer was not a fair one, and when it was suggested that the Central Bank which would have to provide the liquidators with the funds to meet the awards should present the case for the Tata Bank, the appellants directly opposed the suggestion. They were anxious to side with the shareholders seeking arbitration to obtain for them an award higher than Rs. 15. When they were asked to sign the necessary submission papers they obstructed the proceedings by refusing to do so on the ground that they had not the inspection they had asked for to enable them to produce evidence before the arbitrators. That they were anxious in one case to agree to Mr. Shamdasani being appointed arbitrator need only be mentioned and comment is unnecessary.

The appellant's petition was affirmed on November 10, 1923; the companies' petition on November 27. In the appellant's affidavit of December 6 filed in answer to the latter petition they alleged in para. 2 that the Banks realising that they had no answer to the petitions presented by the liquidators had as a counter-blast filed their petition for the removal of the petitioning liquidators from their office in the hope that they would thereby avoid the decision of the questions in the prayer of the first petition. The answer to that allegation lies in the fact that long before November 10 the Banks had a complete case for the removal of the appellants from their offices. Assuming that they had honest doubts as to their rights and powers as liquidators which could not be removed by the opinion of their solicitors, the directions of the Court on the question in dispute could easily have been obtained before the end of August but the appellants had been invited to join in an application to the Court for such directions and they had refused. See Messrs. Little & Co.'s letter of November 15. In their letter of September 8 to the Secretary of the Joint Boards they write:—

"Mr. Pochkhanavalla and two of our colleagues who are auditors of the Tata Bank, as also some of the Directors of both the Banks are desirous of *dragging* us into a Court of law to ascertain what they call our legal position. They do not seem to realise what effect such proceedings would have on the public mind and what a rude shock such proceedings would give to the credit of the Central Bank."

While the appellants had been considering how they could obtain materials for attacking the Directors on the ground of their fraud and misfeasance, they thought that a simple application to the Court for construction of some clauses in the agreement between the Banks would seriously affect the credit of the Central Bank. The Secretary to the Joint Boards in his letter to the appellants of September 20 correctly stated the functions of the liquidators, but the appellants would not agree with him as appears from their letter of September 24. It is possible that in spite of all that had occurred before the appellants' petition had been filed, the Banks would have been unwilling to take proceedings for their removal as liquidators had not the fact been discovered that a copy of a balance-sheet which had been given in confidence to the liquidators had been furnished, and it is not denied that it was furnished by Mr. Guzdar, to Mr. Shamdasani whose suit against the liquidators and the Banks was then pending before Pratt, J. It was this discovery which in all probability made the Bank realise the necessity for filing

their petition. Lastly, I may refer to the fact that the appellants declined to recognize the provision in the resolution appointing them that they should act under the supervision of the Directors of the two Banks.

It is extremely unfortunate that the appellants who were appointed liquidators at the meeting of share-holders of the Tata Bank on August 6, in conjunction with Mr. Gilchrist and Mr. Billimoria, should have entirely misconceived from the commencement their duties as liquidators according to the terms of the resolution. What Mr. Guzdar described their duties should be is clear from his speech on that occasion when he said :

" A liquidator's business is not only to liquidate but to bring to book those who have wittingly or unwittingly by their negligence ruined thousands of share-holders and the Tata Bank."

And again :

" We have lost heavily, but that is no reason why the delinquents should escape scot-free, they must be brought to book in the interest of the commercial morality of Bombay."

But the resolution passed at the meeting strictly defined the duties in a manner contrary to Mr. Guzdar's wishes. If the share-holders had wished to impeach the conduct of their Directors they could easily have resolved to do so, but clearly the resolutions to adopt the proposed amalgamation scheme excluded the idea of any such action being taken. The appellants received perfectly correct advice from the solicitors for the liquidators but they chose to disregard it and have persisted in maintaining before the lower Court and this Court that Messrs. Little & Co.'s advice was wrong. In my opinion the conclusions of Kemp, J. are right and the appeal against the order removing the appellants from their office as liquidators must be dismissed with costs. But the order as to costs in the lower Court will be amended by directing the parties to pay their own costs.

I should not, however, be inclined to say that the first petition as framed was improper. If the appellants had filed it as soon as they came into disagreement with their co-liquidators, nothing could have been said against it. But by November the situation had become exceedingly strained with the result that in their affidavit in reply to the petition Messrs. Gilchrist and Billimoria disclosed the motives which prompted the petitioners in adopting the view they took of their rights as liquidators, so that the affidavits, with their exhibits on the petition, cover nearly 200 pages of the Paper Book. It would have been sufficient if the Court had been asked to answer to questions in the petition on a construction of the documents in the case. The greater part of these 200 pages contains matter which would only be relevant to the second petition. I think, therefore, that the proper order to make on the petition was that the parties should bear their own costs except the costs of filing the petition which should be paid by the respondents out of the assets. On the appeal there will be no order as to costs.

Shah, J.—I agree that the order appealed from as to the removal of the liquidators, who are the appellants before us, is right. I shall state briefly the reasons for my conclusion, without recapitulating the facts.

Under section 207 (ix) of the Indian Companies Act the Court has the power to remove a liquidator " on cause shown. " The expression " on cause shown," as used in the corresponding section of the English Statute, has been judicially construed ; and it has been held in *In re Adam Eyton, Limited : Ex parte Charlesworth* (1) that the jurisdiction of the Court to remove a liquidator is not confined to cases where there is personal unfitness in the liquidator. I accept the observations in the judgment in that case as laying down the scope of the expression used, and I particularly rely upon the observations of Bowen, L. J., at p. 306 of the report as being applicable to the circumstances of the present case. According to the language used in that case, we have to consider that cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidators are appointed. Of course fair play to the liquidators themselves is not to be left out of sight but the measure of due cause is the substantial and real interest of the liquidation.

In the present case, according to the terms of the resolution passed by the share-holders, the four liquidators were appointed for adopting the agreement of July 5, 1923, and carry-

ing the same into effect with such, if any, modifications as the liquidators might think expedient under the supervision of the Directors of the Central Bank of India, Limited, and the Tata Industrial Bank, Limited, the powers of the last mentioned of whom were to continue for the purpose of carrying the said agreement into effect. Apart from the personal allegations against the two appellants, it is clear that they have failed to comply with these two conditions. First, instead of strictly confining their attention to the carrying out of the amalgamation of the two Banks and of the agreement of July 5, 1923, they have been influenced by other considerations, which, even though they may be proper in themselves, cannot be treated as advancing the liquidation, and as giving effect to the agreement of July 5. Secondly, the supervision of the Joint Board of Directors has not been accepted by them in effect. Lastly, owing to the divergence of views between the appellants and the other two liquidators a situation has arisen under which it is difficult to hold that the substantial and real interest of the liquidation can be served by retaining the appellants as liquidators. While I am prepared to give due weight to the consideration that the liquidators appointed by the general body of shareholders should not be removed without adequate reasons, in the present case I am satisfied that sufficient cause for their removal is shown.

The principal thing, so far as the present proceedings are concerned, that remains to be determined in liquidation is the carrying out of the provisions as to arbitration in the agreement as regards the amount to be paid to the dissenting share-holders. On this point the conflicting interest will be represented by such share-holders on the one hand and the Central Bank on the other, which has to pay the amount to be determined by the arbitrators. The two remaining liquidators will be in a position to represent the same interest as that of the Central Bank. The position of the appellants, does not appear to be consistent with the interests of the liquidation of the vendor company or of the Central Bank, and having regard to the divergence in the views of the two sets of liquidators, it is difficult to understand what useful position they can take up, in the arbitration proceedings, if they are not to side with the dissenting share-holders. Without implying any reflection against the liquidators personally and without expressing any opinion as to the merits of the conflicting interests in the liquidation it is clear that the appellants have misconceived their position and that in the interests of liquidation their removal is desirable.

In this view of the matter it is not necessary to consider the points in the appeal arising out of the first petition filed by the appellants for directions of the Court on certain points.

I, therefore, agree that both the appeals be dismissed. I concur in the order as to costs.

Z. K. *Appeals dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 786 OF 1923.

October 13, 1923.

Present :—Mr. Justice Martineau.

Mussammat JAMNA BAI—PLAINTIFF—APPELLANT

versus

GONDA RAM, *alias* GHULAM MOHAMMAD—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Conversion of co-parcener to alien faith, effect of—Adverse possession—Partition, suit for—Property in possession of mortgagee or female whether must be included:

The conversion of a Hindu co-parcener to an alien faith has the effect of separating the co-parcener *ipso facto* from the co-parcenery. [p. 520, col.1.]

Abraham v. *Abraham*, 9 M. I. A. 195 at p. 199 ; 1 W. R. P. C. 10; 1 Suth P. C. J. 501 ; 2 Sar. P.C.J. 10; 19 E R. 716, *Ganga Singh* v. *Begam*, 57 P. R. 1916, followed.

The possession of the separated co-parcener, however, of family property, becomes that of a tenant-in-Common from the moment of his conversion, and is not adverse to the other co-parceners. [p. 520, col. 2.]

In a suit for partition property in possession of a mortgagee or of a female who has a right of residence need not be included. [p. 520, col. 2.]

Appeal from the decree of the District Judge, Dera Ghazi Ghan, dated the 6th January 1923, reversing that of the Munsif

1st, Class, Dera Ghazi Khan, dated the 14th August 1922.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Zafar Ullah Khan*, for the Respondent.

JUDGMENT.—The plaintiff is the widow of one Sidhu Ram, who underwent a sentence of imprisonment and died without returning home. The defendant was Sidhu Ram's brother, and they formerly constituted a joint Hindu family but the defendant became a Muhammadan and the plaintiff, in consequence brought the present suit to have her half share in the house partitioned off. The first Court passed a preliminary decree for partition, but the District Judge on appeal dismissed the suit, holding that the defendant's conversion to *Islam* did not effect a partition of the co-parcenary property and that the defendant became the sole owner on his brother's death. The plaintiff has preferred a second appeal.

The learned District Judge has taken a wrong view of the law. In *Abraham* v. *Abraham* (1), their Lordships of the Privy Council held that a member of a Hindu family who had become a convert to Christianity became at once severed from the family. In Gour's Hindu Code, 2nd edition, pargraph 145 (4) it is similarly laid down that the conversion of a co-parcener to an alien faith has the effect of separating the convert *ipso facto* from the co-parcenary. This principle is also stated in Mulla's Hindu Law, 2nd edition, at page 280 and there is a ruling of the Chief Court, namely *Ganga Singh* v. *Begam* (2), to the same effect.

The defendant's conversion, therefore, effected a severance of the joint family, and his learned Counsel has not been able to support the view taken by the lower Appellate Court. He contends that his client's conversion took place more than 12 years ago and that he has been in adverse possession of the property since that time. This contention is clearly unsustainable, for after the defendant's conversion, when he and his brother ceased to be co-parceners, they held the property as tenants-in-common and the defendant's possession cannot be regarded as adverse.

The plaintiff is entitled to a decree. As pointed out by the first Court the house in suit is the only one available for partition for of the other two houses owned by the parties one is in the possession of a mortgagee and the other is in the possession of the plaintiff's mother-in-law, who has a right of residence.

I accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the first Court. The respondent will pay the appellant's costs throughout.

Z. K. *Appeal accepted.*

(1) 9 M.I.A. 195 at p. 199; 1 W. R. P. C. 10; 1 Suth. P. C. J. 501 ; 2 Sar P. C. J. 10 ; 19 E. R. 716.

(2) 85 Ind. Cas. 549 ; 57 P. R. 1916 ; 159 P. W. R. 1916 ; 4 P. L. R. 1917.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 718 OF 1922.

January 15, 1924.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BAI KAMALA—PLAINTIFF—APPELLANT
versus
REVASHANKAR RANCHHOD—
DEFENDANT—RESPONDENT.

Hindu Law—Will, construction of—Devise in favour of daughters—Daughter having son to take absolutely.

A Hindu testator directed in his will that his three daughters should be the owners of his property after his death. The eldest daughter being a childless widow was declared to have an interest only for her life-time. With regard to the other two daughters who were married, the will stated that "she who has male issues is the owner of my property, that is to say, if they both have male issue then both are owners, and if one of those two has male issue then one is the owner. What I mean to say, is only this that finally who has male issue is the owner of my property since after my death." A son was born to one of the two married daughters, but he died in his infancy ;

Held, that the intention of the testator was that if either of the married daughters had male issue, her life-interest would mature into an absolute interest, so that the daughter to whom a son had been born took an absolute interest in the property as soon as her son was born, subject to the life interests of her two sisters. [p. 521, col. 2.]

BAI KAMALA *v.* REVSHANKAR RANCHHOD

Appeal from the decision of the Extra Assistant Judge, Ahmedabad, in Appeal No. 311 of 1919, reversing the decree of the Subordinate Judge, in Civil Suit No. 153 of 1917.

Mr. *G. N. Thakor*, with Mr. *R. J. Thakor*, for the Appellant.

Mr. *H. C. Coyajee*, with Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.—One Vidyaram died on July 30, 1897, leaving three daughters, Ruxmani, Ichha and Mahalaxmi. He left a Will, dated June 22, 1897, whereby he disposed of his property, and with regard to certain property, which is the subject-matter of this suit, he made dispositions in favour of the daughters. At the date of the Will Ruxmani was a childless widow, while Ichha and Mahalaxmi were married. Thereafter Mahalaxmi had a son who predeceased her. She died in 1903, while Ichha died in 1904, leaving a daughter. The property in suit was claimed by the first and second defendants as reversioners to Vidyaram, while the plaintiffs are the husband of Mahalaxmi, her two daughters and the daughter of Ichha.

The question in the suit, therefore, is what interests did the daughters take under the Will of Vidyaram. The Trial Court passed a decree in favour of the plaintiffs. The learned Assistant Judge in appeal dismissed the suit.

There are considerable difficulties in construing the Will according to the ordinary rules of construction, but after hearing the arguments on both sides, we have no doubt as to what is the proper construction to be placed upon it. The testator commences by declaring that of all the other properties, except those specifically mentioned and dealt with, his three daughters should be the owners after his death, and they should manage the properties accordingly. If the Will had stopped there, the three daughters would have been absolute owners as tenants-in-common of the suit properties. But thereafter limitations are imposed upon the interests of the daughters. The eldest being a widow, is declared to have an interest only for her life-time. With regard to the other two daughters the Will states that "she who has male issues is the owner of my property, that is to say, if they both have male issue then both are owners, and if one of those two has male issue then one is the owner. What I mean to say is only this that finally who has male issue is the owner of my property since after my death."

We think, therefore, that the testator directed that if either Iccha or Mahalaxmi had male issue, then their life-interests would mature into an absolute interest, so that in the events that have happened Mahalaxmi had an absolute interest in the suit property as soon as her son was born, subject of course to the life-interests of Ruxmani and Ichha. If Ichha had had a son, then Ichha and Mahalaxmi would both be absolute owners subject to the life-interest of Ruxmani. Accordingly the first and second plaintiffs as heiresses of Mahalaxmi would succeed to her absolute interest in the property, and when Ruxmani died in 1915, they would become absolute owners of the whole property without any further limitations. The fourth plaintiff clearly had no interest in the property as Iccha died without having a son, nor has the third plaintiff, the husband of Mahalaxmi, any interest in her estate.

The other construction which found favour with the Assistant Judge was that Ruxmani had a life-interest in the whole property, and that the interests of Ichha and Mahalaxmi were contingent on their surviving Ruxmani, That would have been a perfectly sound construction if the Will had not in the first instance directed that the three daughters were to be *Maliks* of the property devised to them, with powers of management.

We think, therefore, that the appeal must succeed. We reverse the decree of the lower Appellate Court and restore that of the Trial Court, with this amendment that it should only be in favour of plaintiffs Nos. 1 and 2. In the circumstances of the case the parties should bear their own costs throughout.

Z. K. *Appeal allowed.*

ARJAN *v.* HARI RAM

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2455 OF 1920.

January 29, 1924.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

ARJAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow, alienation by—Consent of daughter and daughter's son, effect of—Reversioners remote, whether can challenge alienation.

The separated brothers of a deceased Hindu have no *locus standi* to question an exchange of land belonging to the deceased effected by his widow, to which the daughter and daughter's son of the deceased have given their consent. The latter are the immediate reversioners of the deceased, and in their presence the brothers of the deceased have only a bare possibility of succession. [p. 523, col. 1.]

Appeal from the decree of the Senior Sub-Judge, 1st Class, Sargodha, dated the 30th August 1920.

Dr. *Nand Lal* and Mr. *A. R. Kapur*, for the Appellants.

Messrs. *Mukand Lal Puri, Nanak Chand, Jagan Nath* and *Amar Nath Chona*, for the Respondents.

JUDGMENT.—This was a suit for possession of land measuring 185½ *kanals* situate in *Mauza* Chaowal and 83 *kanals* situate in *Mauzu* Hujjan under the following circumstances.

The land belonged to one Barkat, husband of *Musammat* Bhagan, defendant No. 1, father of *Musammat* Ram Piari, defendant No. 2, maternal grand-father of Shiv Charan Lal, minor defendant No. 3, brother of defendants Nos. 4, 5 and 6, and paternal uncle of Dewan Singh, defendant No. 7. The said Barkat having died *Musammat* Bhagan, his widow, a reversionary heir, came into possession of his estate and mutation was effected in her favour. On the 8th of February 1915, Arjan Das, defendant No. 4, filed a suit for the establishment of his right to succeed to the estate of the deceased Barkat on the allegation that the latter was a member of a joint Hindu family with his brothers and nephew and that the property had descended according to the rule of the survivorship. The suit was dismissed on the 28th of July 1915 on the ground that Barkat deceased was separate from his brothers and that *Musammat* Bhagan was his lawful heir and that after her death her daughter, defendant No. 2, would have a right to succeed to the property. Defendants Nos. 5, 6 and 7 were parties to the said suit. A similar suit was brought subsequently by defendants Nos. 5, 6 and 7 for a similar relief on the allegation that the deceased Barkat was a member of a joint Hindu family and that defendant No. 1 had re-married. That suit was also dismissed on the same ground on which the first suit had been dismissed. Before the birth of defendant No. 3 (deceased's daughter's son) defendants Nos. 1 and 2 exchanged the land in question with an equal area of land from the plaintiff by a registered deed of exchange, dated the 30th of August 1918. The mutation in respect of the land given by the plaintiff to defendants Nos. 1 and 2 in exchange was sanctioned in favour of the defendant No. 1 on the 23rd of the August 1919 and she is shown to be in possession thereof. The land sued for was not mutated in favour of the plaintiff owing to objections raised by defendants Nos. 4 to 7. This led to the institution of the suit for the recovery of possession of the land in dispute on the allegations above set forth. Defendant No. 2 and defendant No. 3 through his father and guardian admitted the claim; but the suit was resisted by defendants Nos. 4 to 7 mainly on the grounds on which they had preferred their claims on the death of Barkat. The plaintiff's suit was decreed. Hence this appeal by the defendants.

As many as 28 grounds have been taken in the memorandum of appeal. The main questions for decision on which alone Dr. Nand Lal has addressed arguments to us may be summarised as below :—

(1) That Barkat was a member of a joint Hindu family and the property came into the possession of the defendants by right of survivorship ;

(2) that in any case the defendants have a right to question the exchange as reversioners of the deceased Barkat ;

(3) that defendant No. 1 never obtained possession after the death of her husband and the defendants have been in possession of the property all along.

A feeble attempt was also made to contend that the parties were governed by custom and not by Hindu Law; but the learned Counsel could not maintain this position in the face of the pleadings in this case and the allegations of the defendants themselves in their plaints in the previous suit. It is idle to contend that the parties are not governed by Hindu Law. Under the Hindu Law defendant No. 2 would be the next heir after defendant No. 1 and defendant No. 3 would come in as the next heir after his mother and would inherit the property as a full owner.

The evidence on the record on the question of separation is overwhelming. The defendant's suits were dismissed and it was found by the Court that they were separate from Barkat, *vide* Exs. P-5. and P-6. It is true that the land of the brothers was joint, but they were in separate enjoyment of their respective shares. In fact when Barkat's widow defendent No. 1, succeeded to the property she had to bring suits against defendant No. 4 for recovery of her share of the produce. Those suits were decreed, *vide* Exs. P-9, P-11 and P-12. The *Patwari's* report, dated the 24th of May 1919 (Ex. : P-10) shows that all the co-sharers were in joint possession of the land and that they paid the land revenue of their own shares. Exhibit P-16 is the copy of a statement of defendant No. 4, dated the 1st of May 1920 to the effect that he was separate from Barkat and other brothers. Exs. P.-17 and P.-18 to 21 (extracts from the revenue papers) also establish *Mussammat* Bhagan's separate possession. In the face of such overwhelming evidence no room is left for contention that Barkat was joint with his brothers and that his widow did not succeed.

As to the right of the appellants to contest the exchange it is enough to remark that they are not the next reversioners, as under the Hindu Law the daughter and her son are admittedly the next reversioners. These having given consent to the alienation the appellants as remote reversioners have no right to question it. If they had brought a suit for a declaration it would have been dismissed on the ground of remoteness, for they have very little chance of succeeding to the property.

The question No. 3 has already been discussed and the plea of adverse possession set up by the appellants is without any force.

There is no force in this appeal and we dismiss it with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 80 OF 1923.

January 31, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

HAJI ABDULLA HAJI CASSUM—PLAINTIFF—APPELLANT

versus

GEORGE REGINALD STAMP—DEFENDANT—RESPONDENT.

Arbitration Act (*IX of* 1899), *s.* 4—*Clause providing disputes shall be decided by particular Court, whether submission—Contract Act* (*IX of* 1872), *s.* 28, *applicability of.*

A policy of marine insurance contained the following clause :—

All disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England where the underwriters are alone domiciled and carry on business:

Held, that the clause amounted to a submission of any dispute arising under the contract to the English Courts, within the meaning of section 4 of the Arbitration Act. [p. 524, col. 2.]

Austrian Lloyd Steamship Company v. *Cresham Life Assurance Society*, (1903), 1 K. B. 249; 72 L. J. K. B. 211; 88 L. T. 6; 51 W. R. 402, relied on.

An agreement which merely contracts that one of two Courts which would have jurisdiction to try any dispute arising under the agreement, should try such dispute, does not come within the meaning of section 28 of the Contract Act. [p. 524, col. 2.]

Appeal against the order of Mr. Justice Kemp, dated the 18th September 1923.

Mr. *Kanga*, for the Appellant.

Mr. *B. J. Desai*, with Mr. *Vatcha*, for the Respondent,

HAJI ABDULLA HAJI CASSUM *v.* GEORGE REGINALD STAMP

JUDGMENT.

Macleod, C. J.—The plaintiffs filed this suit against the defendant, the Senior Member of Lloyd's Underwriters, London, on a policy of March 24,1920. The Policy contained the following clause :—

"It is mutually agreed that in accordance with the aforesaid regulations the benefit of this Policy and the right to receive or endorse over claims thereon may be passed, whether before or after claim by endorsement, and that such endorsees or the bearer of the Policy, if endorsed in blank, on production of this Policy shall have power to receive and give receipts for or to endorse or assign over, as provided by the said Regulations, any claim thereon. " All disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England, where the underwriters are alone domiciled and carry on business. "

The defendant took out a summons on December 8, 1922, for an order under the Indian Arbitration Act, IX of 1899 that all proceedings should be stayed. The summons was heard before Mr. Justice Kemp on September 18, 1923. The question argued before him was whether this clause in the Policy amounted to a submission to arbitration within the meaning of those words in section 4 of the Indian Arbitration Act. The learned Judge relying upon the decision in *Austrian Lloyd Steamship Company* v. *Gresham Life Assurance Society* (1) held that there was a submission to arbitration, and in consequence made the Summons absolute with costs.

The plaintiffs have now appealed. They rely mainly on the contention that the wording in clause 9 of the Policy differs from the clause in the agreement in *Austrian Lloyd Steamship Company's case.* But though the wording may be different, it is clear that in both the agreements the intention of the parties was that in the event of a claim under the agreement not being settled, it should be decided by the Courts of a particular country. In *Austrian Lloyd Steamship Company's case* it was held that the parties mutually agreed that, if any dispute arose under the contract, it should be determined by the Courts in Budapest, and that having regard to the nature and language of the contract, the Court was of opinion that that was a submission of any dispute arising under the contract to the Courts of Budapest, and came within the meaning of a submission to arbitration in section 4 of the Arbitration Act, 1889 (52 & 53 vic., c. 49). It is also clear, under the previous decisions, which were referred to in the course of the argument in that case, that since the passing of the Common Law Procedure Act of 1854, such an agreement has always been considered as a submission to arbitration. The question may arise whether the agreement in suit was an agreement whereby any party thereto was restricted absolutely from enforcing his right under or in respect of the agreement by the usual legal proceedings in the ordinary tribunals. But I doubt very much whether an agreement of this nature which merely contracts that one of the two Courts, which would have jurisdiction to try any dispute arising under the agreement, should try such dispute, would come within the meaning of section 28 of the Indian Contract Act. It does not make very much material difference in this case, because clearly if there has been no ouster, section 28 does not apply, and if the agreement can be construed as amounting to an ouster, still under the decisions to which I have referred, the first exception to section 28 would become applicable, and in consequence the suit would be stayed. If clause 9 in the agreement did not amount either to a reference to arbitration, or to an absolute ouster, then the defendant would be entitled to have the suit set down for dismissal. But it is in the interest of the plaintiff to have the suit stayed, so that after the proceedings in the English Courts are finished, they may take such action in this case as they may be advised. The appeal, therefore, must be dismissed with costs.

Shah, J.—I agree.

G. K. *Appeal dismissed.*

(1) (1903) I K. B. 249 ; 72 L. J. K. B. 211 ; 88 L. T. 6; 51 W.R. 402.

NIHAL SINGH *v.* NARAIN SINGH

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 21 OF 1923.

December 17, 1923.

Present :—Mr. Justice Le Rossignol and Sir Shadi Lal, Kt., Chief Justice.

NIHAL SINGH, MAHANT OF GURDWARA OF JAGRAON, LUDHIANA DISTRICT —DEFENDANT—APPELLANT

versus

NARAIN SINGH, *alias* BABU—PLAINTIFF AND *Musst.* GUJRI —DEFENDANT—RESPONDENTS.

Res judicata—*Estoppel—Admission by widow in compromise*—Locus standi *not admitted—Representatives whether bound.*

An estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel. [p. 525, col 2.]

Plaintiff alleged in a suit that he was the reversioner of G's husband The suit was compromised and G gave the plaintiff a portion of the land held by her and agreed that he should succeed her In a subsequent suit by the plaintiff to contest the validity of a gift made by G,

Held, (1) that the admission made by G in the previous suit created an estoppel binding on her. [p. 525, col. 2.]

(2) That G's representatives were not estopped from denying that plaintiff was a reversioner of G's husband and the point was not *res judicata* against them. [p. 525, col. 2.]

Appeal under clause 10 of the Letters Patent against the order of Mr. Justice Broadway, dated the 6th December 1922, in Second Appeal No. 805 of 1922.

Dr. *Nand Lal* and *M. Sagar Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The plaintiff-respondent's suit is for a declaration that a gift of land by *Musst.* Gujri in favour of Nihal Singh, shall not affect his reversionary rights.

The plaintiff failed to prove his *locus standi* by evidence in this suit, but it has been held that the matter is *res judicata*, because in litigation in 1914 between plaintiff and *Musst* Jujri, wherein plaintiff alleged that he was the brother of *Musst.* Gujri's husband, the parties had compromised and plaintiff had been granted a decree for some land.

The date of the gift to Nihal Singh is in dispute, but assuming that it was made after the compromise of 1914, we have to determine whether the relation-ship alleged by the plaintiff is *res judicata*.

Now the proceedings of 1914 contain no clear admission by *Musst.* Gujri that plaintiff was her husband's relative, all that she admitted was that plaintiff should have at once a fraction of the property in suit and should succeed her.

This admission so far as it goes creates an estoppel binding on *Musst.* Gujri, but we doubt that it closes the mouth of her representative to deny that plaintiff is the brother-in-law of *Musst.* Gujri.

The estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel.

Musst. Gujri and her representatives cannot deny that plaintiff is entitled to the area surrendered to him in 1914, nor can they deny that he is entitled to take her succession when it opens out, but there was no adjudication on her express admission of the alleged relationship.

It cannot be asserted that there was of necessity an implied admission, for *Musst.* Gujri may have yielded out of weariness or fear.

For these reasons we think the point is not *res judicata*, and accepting the appeal dismiss the suit with costs throughout.

Z. K. *Appeal accepted.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 66 of 1923.

December 7, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

KESHAVA VITHAL OLTIKAR—
PLAINTIFF—APPLICANT
versus
HARI RAMKRISHNA OLTIKAR—
DEFENDANT—RESPONDENT.
OPPONENT.

Contribution—Partition suit—Costs by one defendant—Other defendants, liability of.

Where in a partition suit all the defendants equally contest the suit and are directed to pay the plaintiff's costs and the costs are paid by one defendant he is entitled to contribution from his other Co defendants unless facts can be proved which would be considered sufficient to defeat the equity. The fact that a common defence was raised by all the defendants in the partition suit would not be sufficient to defeat the right of contribution. [p. 527, col. 1.]

Application against the decision of the Subordinate Judge at Roha, in Small Cause Suit No. 410 of 1922.

Mr. *V. B. Virkar*, for the Applicant.

JUDGMENT.—The question which arises in these applications under section. 25 of the Provincial Small Cause Courts Act, is whether, in the circumstances of the case, the plaintiff was entitled to contribution against the defendants with regard to the amount of costs which he had paid in a suit filed by one Krishnaji Mahadeo Ghate for possession by partition of his one-sixth share in certain property against the petitioner and his brothers, all of whom had to pay plaintiff's costs in those proceedings. The present plaintiff now seeks to recover by contribution from his co-defendants their shares in the costs in that suit, which he had paid to the successful plaintiff.

The learned Judge relying on the decision in *Mulla Singh* v. *Jagannath Singh* (1) dismissed the plaintiff's suit. He thought all the defendants were equally guilty in defending the proceeding brought by Krishnaji Mahadeo, and therefore, according to the principle laid down in that case, the plaintiff had no equity against the present defendants.

No case has been decided in this Presidency where the point has been raised, and for that reason I granted the rules on these applications. We have been referred to the decision in *Mahabir Prasad* v. *Darbhangi Thakur* (2) in which case the facts were somewhat similar, the plaintiff having brought a suit for a declaration that by reason of a previous partition, which still subsisted, the property in suit was not liable to be again partitioned. The defendants contested the claim, pleading that there had been no previous partition. That defence failed, and the suit was decreed with costs against all the contesting defendants jointly and severally. The decree was executed and costs were recovered against one of the defendants. He then instituted a suit to recover from his co-defendants their proportionate share of the costs recovered from him under the decree. The real issue seems to have been obscured by the defendants being allowed to raise an issue in the Trial Court whether the plaintiff and defendants in the previous suit had been joint wrong-doers in so far as the defence in that suit was concerned. It appears to have been suggested that when several co-defendants joined in a defence which failed, that thereupon they became joint tort-feasors, in which case according to English authorities one tort-feasor would not be entitled to contribution against the others. But as pointed out by the learned Chief Justice, such a suggestion was not applicable to that case. His Lordship said (p. 493) :—

"To hold that it is a tort for the defendant by his pleadings to deny a fact which he knows to be true, even if he has no evidence to the contrary, is a proposition which cannot be supported on any known principle of law. It follows, therefore, that on the facts found by the lower Court the parties were not wrong-doers in the sense which would debar contribution between them."

His Lordship then went on to consider the cases which had been cited on one side or the other on the question of contribution, and it was pointed out that the English case of

(1) 6 Ind. Cas. 684 ; 32 A. 585 ; 7 A. L. J. 720.

(2) 51 Ind. Cas. 697; 4 P.L. J. 486; (1919) Pat. 289.

Dearsly v. *Middleweek*. (3) which was relied upon in *Mulla Singh* v. *Jagannath Singh* (1), could not be considered as an authority, as Mr. Justice Fry in that case followed what was wrongly asserted by counsel before him to have been the dictum of the Court of Appeal in *Real and Personal Advance Co.* v. *Mc Carthy*, (1) which had been decided the day before. When reference is made to the report of the case which appears in the same volume at p. 362, it will be found that their Lordships of the Appeal Court never said what was alleged to have been said by them, namely that "no apportionment of or contribution for costs could be obtained by one co-defendant against another in an independent proceeding." It seems difficult to imagine how those remarks could have been attributed to the Court of Appeal, as there was no question in that case of contribution between co-defendants. One defendant in the case had elected to give up the case and was directed to pay plaintiff's costs of the action so far as they were occasioned by his defence down to a certain date, and the only question was what costs the defendant who retired from the case was liable to pay under that order.

There is also the case of *Shakul Kameed Alim Saheb* v. *Syed Ebrahim Saheb*, (5) which seem to be a decision directly in point in which it was held that where A, B and C being defendants who had taken part in defending a suit, were ordered to pay the costs of the plaintiff therein, and A one of those defendants, paid the whole amount due in respect of costs, he was entitled to sue the other defendants for contribution.

It seems to us on general principles of equity that when in a partition suit all the defendants equally contest the suit, and are directed to pay the plaintiff's costs, if one defendant pays the costs, he should be entitled to contribution from his other co-defendants, unless facts could be proved which would be considered sufficient to defeat the equity. The common defence raised by the defendants in the partition suit would not be such a fact.

(3) (1880) 18 Ch. D. 236 ; 50 L. J. Ch. 777 : 45 L. T. 404 ; 30 W. R. 45.
(4) (1880) 18 Ch. D. 362 ; 45 L. J. 116 ; 30 W. R. 481.
(5) 26 M. 373.

We think, therefore, that the decrees of the lower Courts in these cases must be set aside and the plaintiff's claim decreed with costs throughout.

Z. K. *Decree set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 767 OF 1920.

June 5, 1923.

Present :—Mr. Justice Campbell and Mr. Justice Zafar Ali.

UTTAM SINGH—APPELLANT
versus
MUNSHI—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 41 (1) (a) (b) (c), (3)—Custom, question of—Second appeal—Certificate, whether essential.

A decision about the existence of a custom cannot be attacked in second appeal on any of the grounds set forth in section 41 (1) (a) (b) (c) of the Punjab Courts Act without the lower Appellate Courts' certificate in terms laid down in section 41 (3) of the Act. [p. 528, col. 2]

Mr. *Jaggan Nath*, for the Appellant.

Mr. *Sheo Narain*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit by four plaintiffs Munshi, Gurditta, Jiva and Indar for possession of the landed estate of one Kanhaya, who appears in the following short pedigree-table.

Kahna—*Must.* Tabi

Must. Bhagwani-Kanhaya, D. S. P.	*Must.* Khemi-Sham Singh
	Uttam Singh.

On Kanhaya's death his estate passed to *Mussammat* Bhagwani his widow, and after her death to *Mussammat* Tabi his mother. When *Mussammat* Tabi died mutation was

effected in favour ofUttam Singh the sister's son of Kanhaya.

The four plaintiffs asserted themselves to be collateral agnates of Kanhaya. Uttam Singh was the principal defendant and is the present appellant. Other defendants were Nathu, Sher Singh and Sunder Singh of whom the two former were alleged also to be collaterals of Kanhaya. It does not appear who or what Sunder Singh is. His name is said by the learned District Judge to have been struck out of the suit by the Trial Court. But he is a respondent to this appeal and has not appeared.

Both Courts below held that Munshi plaintiff had acquired by purchase the rights of Nathu in the estate in suit, and that Gurditta plaintiff had failed to prove that he had in likewise brought out Sher Singh. Both Courts moreover, concurred in finding that the plaintiffs, being collaterals, no matter how far distance of Kanhaya, were by custom preferential heirs to his sister's son. The shares of the plaintiffs in the estate were further held to amount to $\frac{3}{4}$th of the whole and they were given a decree for possession of this fraction by the Trial Court, which decree the District Judge affirmed in appeal.

During the pendency of the appeal a compromise was presented in the District Judge's Court by Munshi, plaintiff, Uttam Singh appellant, and Sher Singh defendant, with a prayer that it should be recorded and a decree in accordance with it so far as the suit of Munshi was concerned and that the appeal should proceed against the other plaintiff-respondents alone *viz.*, Gurditta, Jiva and Indar. The learned District Judge, Lieut. Col. Roe, recorded the statements of the three executants attesting the compromise and ordered it to be put up on the date of hearing of the appeal. His successor, Lieut. Col. Frizelle, however, decided the appeal in the manner already described without reference to the compromise beyond a brief remark that it had been entered into and that it was unnecessary for purposes of the appeal to say anything about it.

Uttam Singh has preferred a second appeal. He applied unsuccessfully to the District Judge for a certificate under section 41 (3) Punjab Courts Act.

The first point argued by his learned Counsel has no force, *i. e.*, that the District Judge has not considered the question of custom properly in deciding it without coming to finding as to the exact relationship of the plaintiff with Kanhaya. Whether rightly or wrongly, the learned District Judge has held that a custom exists, applicable to the parties, by which collaterals, no matter how remote, succeed in preference to a sister's son and that the plaintiffs are collaterals of the late Kanhaya. This decision about the existence of a custom cannot under the law be attacked on any of the grounds set forth in section 41 (1) (*a*) (*b*) (*c*) of Punjab Courts Act without the lower Appellate Court's certificate in terms laid down in section 41 (3).

The second contention is that the District Judge should not have ignored the compromise but should have recorded it and should have passed a decree in accordance with it so far as it related to the suit. On this point there is no contest and obviously the appellant has right on his side here for the suit undoubtedly was adjusted in part in the Court of Appeal by what apparently was a perfectly lawful compromise. The only respondents represented are the plaintiffs Gurditta, Jiva, and Indar and they do not oppose the modification of the decree which we propose to make.

The purport of the compromise briefly was to divide up $\frac{3}{4}$ ths of Kanhaya's estate in certain shares between Munshi, Sher Singh and Uttam Singh. This $\frac{3}{4}$ ths, it is conceded before us, consisted of $\frac{1}{2}$ out of the $\frac{3}{4}$ths decreed to the plaintiffs by the Trial Court plus the remaining $\frac{1}{4}$th which was not decreed. The $\frac{1}{4}$th included in the decree but excluded from the compromise, is admitted before us by the appellant's learned Counsel to constitute the shares of Gurditta, Jiva and Indar plaintiff-respondents and Mr. Sheo Narain on behalf of them states that they claim no more and that they have had no objection to the other $\frac{3}{4}$ths of the estate being decreed to the executants of the compromise in the shares arranged by them on the understanding that they, the plaintiff-respondents, are not by this consent surrendering any of their rights as reversionary heirs of the executants all three of whom are stated to be sonless.

BALABAI TUKARAM BABAR v. MAHADU KRISHNA BABAR

Accordingly as against Gurditta, Jiva and Indar plaintiff-respondents, and in respect of ¼th of the estate of Kanhaya we dismiss the appeal so far the learned District judge's decision is final and cannot be interfered with on second appeal. In respect of the remaining ⅜th of the estate of which ½ was included in the Trial Court's decree in favour of the plaintiffs and the suit was dismissed in regard to the other ¼th the orders of the Courts below are set aside the compromise presented to the lower Appellate Court is ordered to be recorded and a decree will be drawn up in accordance with that compromise of which decree *Lala* Jagan Nath the learned *Vakil* of the Appellant will present a draft for approval. Parties will bear their own costs throughout.

N. H. *Appeal partly accepted.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 195 OF 1922.

January 7, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BALABAI TUKARAM BABAR—
DEFENDANT—APPELLANT

versus

MAHADU KRISHNA BABAR—
PLAINTIFF—RESPONDENT.

Hindu law—Adoption—Adopted son older than adoptive father, effect of.

The adoption of a boy who is older than the adoptive father is contrary to the recognised notions of Hindus as to adoptions, and to the fundamental idea of an adopted son. [p. 530, col. 1.]

But the consideration that the adopted boy should not be older than his adoptive father, cannot be treated as having the force of a prohibitive rule of Hindu law. Such an adoption, therefore, is not invaild under the Hindu Law.

Appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 223 of 1920, reversing the decree of the Subordinate Judge, Athni, in Civil Suit No. 175 of 1914.

Mr. *H. C. Coyajee*, with Mr. *A. G. Desai*, for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.—The only question of law that arises in this second appeal is whether the adoption of plaintiff No. 1 by Putlabai, the widow of Krishna, is valid. Its validity is questioned by defendant No. 1, the mother of Krishna, on the ground that the age of the adopted boy is greater than the age of the adoptive father Krishna, the adoption was effected by Putlabai the widow of Krishna. But that circumstance does not affect the question of the validity of the adoption. She could not validly adopt, if Krishna could not have made the adoption on account of the plaintiff No. 1 being older than himself.

The Trial Court in this case has taken the view that such an adoption is invalid, while the lower Appellate Court has accepted the view that the adoption is not invalid, though it is opposed to the Hindu sentiment, and to a rule which, though it has not the force of law, is recommendatory as to the propriety of the adoption. There is no express text directly bearing on this point, at any rate none has been cited to us. But it is urged on behalf of the appellant that it is a necessary inference from the provision that the adopted boy should be the reflection of a natural son. That no doubt is true and the inference which is suggested also is undoubtedly a fair inference. But the question is whether it has the force of law in the sense that if that condition is not fulfilled, the adoption becomes invalid.

No decision is cited in support of this contention ; and according to the observations in different cases, of which *Mallappa Parappa* v. *Gangava* (1) is only an example, these various rules which are deducible from the expression that the adopted son should be the reflection of a natural son, including the rule as to the age of the adopted boy, have been treated as recommendatory and not mandatory. The observations of Ranade J. in *Gopal Balakrishna* v. *Vishnu Raghunath* (2), which have been referred to in the judgments of the lower

(1) 49 Ind. Cas 517 ; 43 Bom. 209, s , c. 21 Bom. L. R. 17.
(2) 23 B. 250 ; 12 Ind. Dec. (N. S.) 166.

Courts do not directly bear on this point, though the inference which is suggested on behalf of the appellant is referred to. It would appear, however, from the observations taken as a whole that the consideration as to the age limit would be a matter of recommendation, and not a positive rule of law.

It is quite true that the adoption of a boy who is older than the adoptive father is contrary to the recognised notions of Hindus as to adoptions, and to the fundamental idea of an adopted son. That is the reason why such adoptions are very rare. But having regard to the lines on which these rules relating to adoption have been interpreted by the Courts it is difficult to hold that the consideration that the adopted boy should not be older than his adoptive father, can be treated as having the force of a prohibitive rule. We think that the learned Assistant Judge has taken a correct view as to the validity of this adoption, and that the contention of defendant No. 1 on this point must be disallowed. The decree for partition must, therefore, be accepted as correct.

It is, however, necessary to make provision for the maintenance of defendant No. 1, the widow of Tukaram, before she is dispossessed of any property. We, therefore, amend the decree by directing that adequate provision for the maintenance of defendant No. 1 should be made before the properties in suit are partitioned and possession given to the respective parties in pursuance of the partition decree. If the parties do not agree within a fortnight as to the amount of maintenance to be awarded to defendant No. 1 that question should be determined in execution. The amount of maintenance to be a charge on the properties to be partitioned. The appellant to pay the costs of respondent No. 1.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 635 OF 1921.

April 7, 1924.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

RAMZAN—DEFENDANT —APPELLANT

versus

NABI BUX AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 —Additional evidence—Failure to record reasons—Rebutting evidence.

The failure of an appellate Court to record reasons for admitting additional evidence vitiates the procedure. [p. 531, col. 1.]

If additional evidence is admitted in appeal, an opportunity to produce rebutting evidence should also be given to the other side. [p. 531, col. 2.]

Appeal from the decree of the District Judge, Sialkot, dated the 14th December 1920, reversing that of the Sub-Judge, 2nd Class, Sialkot, dated the 12th June 1922.

Dr. *Nand Lal*, for the Appellant.

Mr. *Cooper*, for the Respondents.

JUDGMENT.—This was a suit for a declaration to the effect that the mutation entry D.—the 13th of May 1919, given Ramzan, defendant, one half share instead of 2/5ths of 1044 *kanalas* 10 *marlas* of land specified in the plaint, was wrong, and should not affect the previous entry of ownership of the parties. The relationship between the parties will appear from the pedigree-table given in the judgment of the lower Appellate Court at page 13 of the paper book.

It appears that originally Ramzan was shown as owning only 2/5ths. He applied to the revenue authorities for the correction of the entry. His application was allowed, and he was entered as the owner of one-half share. It is in respect of this last entry that the present suit was instituted. The plaintiffs altogether failed to make out the case set out in the plaint and this was probably due to the

fact that the revenue records had been destroyed by fire. The Trial Court dismissed the suit. The matter came up in appeal before the lower Appellate Court. The learned Judge was informed somehow that the records of 1892-1893 were still in existence He, thereupon, sent for them and found an entry in the pedigree-table denoting that 1|5th share had been sold by Ramzan to Kamun and the sons of Zulfikar. This left only 2|5ths share to be recorded in his name. That is why the original entry in the revenue papers showed him the owner of 2|5ths and the other parties the owner of 3|5ths. The records of 1892-1893 were sent for by the learned District Judge without any application being made on behalf of any of the parties for the production of additional evidence. Order XLI, r. 27, Civil Procedure Code gives ample power to the Appellate Court to admit additional evidence in appeal if it requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The District Judge, after a perusal of the revenue records reversed the decision of the Trial Court and granted a decree in favour of the plaintiffs.

The defendant Ramzan has come up in second appeal and the following contentions have been put forward in his behalf :—

(1) That the lower Appellate Court had no authority to admit any additional evidence in this case ;

(2) That in any case while doing so it ought to have recorded the reason for its admission;

(3) That an opportunity ought to have been given to the appellant to rebut the additional evidence admitted in appeal.

In our opinion, the procedure adopted by the lower Appellate Court is vitiated by the circumstance that no reason was recorded by it for the admission of the additional evidence. The record does not show whether the appellant was ever informed that the learned Judge of the Court below was going to send for additional evidence. Further, it does not appear that any opportunity was given to the appellant to meet the new case made out upon the receipt of the additional evidence. We are of opinion that the lower Appellate court had ample authority to admit additional evidence if it considered it necessary for the ends of justice, but we are also clearly of opinion that an opportunity should be given to the appellant to produce rebutting evidence, if there is any.

We accordingly accept this appeal and setting aside the decree of the lower Appellate Court remand this case under O. XLI, r. 23, Civil Procedure Code with the direction that it be placed on its original number in the register of pending appeals and be disposed of according to law. Costs will abide the result.

N. H. *Appeal accepted.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
No. 4375 OF 1922.

October 18, 1923.

Present :—Mr. Justice Fawcett.

SUKHANAND SHAMLAL—PLAINTIFF
versus
OUDH AND ROHILKHAND RAILWAY—
DEFENDANT.

Civil Procedure Code (Act V of 1908) s. 79 (1)—Government of India Act (5 & 6 Geo. V c. 61) s. 32 (2)—Railways Act. (IX of 1890) s. 316—Suit against State Railway—Manager whether can be sued—Defendant, proper—"Railway administration", definition of, scope of—Interpretation of Statutes—Interpretation clause, scope of.

Where an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that if that word is used more than once in the Act it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration. [p. 533, col. 1.]

The extended meaning given to the expression "railway administration" by the words "and includes the Government" in section 3 (6) of the Railways Act, does not apply appropriately in all cases where that expression occurs in the Act, but it can be availed of when the subject or context shews this is legitimate, as in the case of suits failing under chapter VII of the Act. [p. 533, col. 2.]

The Railways Act contains no clear indication that a suit against a state Railway can be brought against the Manager, and on the contrary, the definition of

SUKHANAND SHAMLAL *v.* OUDH AND ROHILKHAND RAILWAY

"railway administration," in the case of a railway administered by the Government, as including the Government, suggests that a suit like this should be brought against the Government. [p. 532, col. 2.]

By virtue of the provisions contained in section 79 (1) of the Civil Procedure Code and section 32 (2) of the Government of India Act, the Secretary of State for India is the real and proper defendant in a suit against a state Railway. [p. 534, col. 1.]

Case-law discussed.

Mr. *Munshi*, with Mr. *Coltman*, for the Plaintiff.

Mr. *Campbell*, for the Defendant.

JUDGMENT.—The preliminary issue I have to decide is whether the present suit is maintainable against the first defendant as framed.

This is based on the plea raised by defendant No. 1, the Oud band Rohilkhand Railway, that that is owned and worked by Government, and the Secretary of State for India in Council should have been the person against whom the suit should have been instituted. Since this objection was taken, the plaintiffs have amended the title of the suit by substituting for " the Oudh and Rohilkhand Railway " the words " The Oudh and Rohilkhand Railway Administration by its Manager and Agent " Mr. Munshi for plaintiffs contends that the suit is maintainable against the Railway Administration in that form, and that the Secretary of State for India in Council need not be sued.

The fact that the Railway is a state Railway was eventually admitted by Mr. Munshi, after his attention had been called to the official statement about it in the Imperial Gazetteer of India, Vol. III, p. 399.

The suit is one in which plaintiffs seek to recover from the defendants (*viz.*, the Oudh and Rohilkhand Railway and the Great Indian Peninsula Railway Company) damages for non-delivery at the proper time of 400 bales of cotton, which were handed over to the defendant No. 1 for carriage to Colaba and were to be carried over the track of defendant No. 2 from Jubbulpore to Colaba.

Mr. Munshi's main contention is that the Indian Railways Act IX of 1890 clearly contemplates a State Railway Administration being sued by its Manager, and that this special enactment is not affected by the subsequent general enactment contained in Section 79 of the Civil Procedure Code 1908 that suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

In my opinion the Indian Railways Act of 1890 contains no clear indication that a suit against a State Railway can be brought against the Manager, and on the contrary, the definition of " railway administration," in the case of a railway administered by the Government, as including the Government, suggests that a suit like this should be brought against the Goverment. On this point I entirely agree with the view taken in the Oudh case relating to this same railway: *Traffic Superintendents, E. B. and E. I & O. R. Railways* v. *Hafiz Abdul Rahman* (1). I adopt the arguments given in the report of the Court's judgment at pp. 814, 815.

I may add that the statement of objects and reasons appended to the Bill which became Act IX of 1890 clearly shows that the inclusion of the Government or State in the definition of "railway administration" was proposed for the purposes of Chapter VII of the Act relating to the responsibility of Railway Administrations as carriers. But, apart from that, the Act itself shows that that must have been the object. It is difficult to see what other intention could have led to this alteration of the previous definition contained in section 3 of the Indian Railways Act of 1879.

Mr. Munshi drew my attention to sections 72-77, 97, 140 and 145 of the Act of 1890; but there is nothing in these which indicates that the Manager and not Government should be sued in the case of a State Railway, sections 72-77 use the general words "railway administration", which under the definition in the Act includes Government. Section 97 applies only to a railway company and not to a State railway so there is nothing incongruous in the provision that the plaintiff in the suit contemplated shall be the Secretary of State for India in Council; and it cannot be said that this in any way suggests that the Manager and not Government is to be sued in the case of a State railway. Section 140 relates to notices like those provided for in section 77 and not to suits: it is also purely

(1) (1901) Ind. Rly. Cas. (2nd Edn.) 812.

permissive in its terms. Section 145, so far as it relates to Civil Courts, merely coutains provisions corresponding to those in O. XXVII, r. 2, so as to avoid the necessity of personal attendance by the Manager, as chief representative of the railway (cf. O. XXIX, r. 3, Civil Procedure Code). It certainly cannot be read as implying that the Manager can be sued as sufficiently representing a State railway.

Again, it is most improbable that the legislature would intend to enact that a railway administration could be sued not in its corporate name but in the name of any particular officer or agent engaged in the administration. As long ago as 1868, it was held that the East Indian Railway Company could not be sued in the form of a Deputy Agent and a District Engineer, but must be sued in its corporate name: *Ramdas Sen* v. *The Collector of Moorshedabad* (2). It is very unlikely that Government or the legislature would intend to make a departure from this principle of ordinary English law, and there is certainly nothing in the Act that I can see which rebuts this presumption. A Manager of a State railway can very well represent the railway administration in its ordinary business concerns and its general management: "and accordingly the definition in section 3 (6) says " railway administration in such a case" means the Manger unless there is something repugnant in the subject or context. When we come to Chapter VII of the Act, however, which deals with responsibility of railway administrations as carriers, then there is (so far as suits are concerned) "something repugnant in the subject"—having regard to the general principles already mentioned—(which goes against the Manager being treated as a proper defendant, duly representing the State railway) and the Courts should therefore fall back on the subsidiary part of the definition in section 3 (6), which expressly says the Government are included in the words " railway administration." This follows the rule that where an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration: see Hardcastle on Statutory Law, 3rd Edn., p. 223. The extended meaning given to the expression "railway administration " by the words "and includes the Government " does not apply appropriately in all cases where that expression occurs in the Act, *e. g.*, sections 53-61 of the Act: but it can be availed of when the subject or context shows this is legitimate, as in the case of suits falling under Chapter VII of the Act and this case of notices under section 77 (*Radha Shyam Basak* v. *Secretary of State for India*(3). Mr. Munshi virtually contended that the definition makes the Manager the equivalent of Government: but the definition does not say that the 'Manager' includes Government and obviously such a definition would be open to criticism.

The Secretary of State for India in Council being the proprietor working the railway is, therefore, in my opinion, clearly the proper defendant. The revenues of the Government of India are liable to pay any damages awarded to plaintiffs, and the suit lies against the Secretary of State under section 32 (2) of the Government of India Act, 1915, corresponding to section 65 of the Government of India Act, 1858. That such a suit would have lain against the East India Company is sufficiently shown by the judgment in the leading case of *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India* (4). The remarks at pp. 12 and 13 refer to the particular case of the East India Company engaging in undertakings for the conveyance of goods and passengers by hire, and being liable for the negligent acts of their servants in the carrying on of such business. The authority of *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India* (4) is recognised by this Court in *Shivabhajan Durga Prasad* v. *Secretary of State for India* (5) and by the Privy Council in *Secretary of State for India* v. *Moment* (6). In

(2) 2 B. L. R. (6) vi. S. N.

(3) 34 Ind. Cas 130 ; 44 C. 16 ; 23 C. L. J. 547.
(4) 5 B H. C. R. App A. 1 at pp. 12, 13.
(5) 28 B. 814 ; 6 Bom. L. R 65.
(6) 18 Ind. Cas. 22 ; 40 C. 391 at p 399 ; 15 Bom. L R. 27 ; 13 M. L. T. 53 ; 17 C. W N. 169 ; (1913) M. W. N. 45 ; 11 A. L J. 49 ; 17 C. L J. 194 ; 6 Bur. L. T. 1 ; 24 M. L. J. 459 ; 7 L B. R. 10 ; 40 I. A. 48 (P. C.).

the circumstances, section 79 of the Civil Procedure Code clearly applies.

It is unnecessary, therefore, to consider the application of the maxim *generalia specialibus non derogant*, relied upon by Mr. Munshi. But it may be pointed out that the enactment contained in section 79 (1) of the Code of 1908 is not really a *subsequent* enactment to the Indian Railways Act of 1890, for it merely reproduces the similar provision contained in section 416 of Act X of 1877 and Act XIV of 1882.

I may add that it has long been held by other High Courts concerned that Government is the real and proper defendant in a suit against a State Railway, and the Court should be slow to take a different view (cf. *Kathama Natchiar* v. *Dorasinga Tever* (7) and Halsbury, Vol. XXVII, Article 2 6, at p. 143). Thus, in the case of this same Oudh and Rohilkhand Railway the Secretary of State was sued in the case of *Banna Mal* v. *Secretary of State for India in Council* (8). The same applies to a suit against the Dacca & Mymensingh State Railway, which appears to have been brought in about 1885: see *Secretary of State for Indian in Council* v. *Budau Nath Poddar* (9). And there are many reported cases where Government have been sued for the North Western State Railway in Sind and in the Punjab (*e.g.*, *Mathradas* v. *Secretary of State* (10); *Hill*; *Sawyers and Co* v. *The Secretary af State* (11), *The Secretary of State for India in Council* v. *Lovida Ram* (12), *Mohamed Abdul Ghaffur* v. *Secretary of State for India in Council* (13) and *Llahi Buksh* v. *Secretary of State for India* (14), and for the Eastern Bengal State Railway (*e.g.*, *Secretary of State for India* v. *Dip Chand* (15) *Sarat Chandra Bose* v. *Secretary of State for India* (16) *Radha Shyam Basak* v. *Secretary of State for India* (3); *Kala Chand Shaha* v. *Secretary of State for India* (17) and *Surendra Lal Choudhury* v. *Secretary of State for India* (18).

I, accordingly, answer the issue in the negative, and hold that the suit is not maintainable against the present defendant No. 1.

Z. K. *Order accordingly.*

(7) 2 I. A. 169 at pp. 187, 188 ; 15 B. L. R. 83 ; 23 W R. 314 ; 3 Sar P. C. J. 456.
(8) 23 A. 367 ; A. W. N (1901) 107.
(9) 19 C. 598 ; 9 Ind. Dec. (N. S.) 802.
(10) 11 Ind. Cas 58 ; 5 S. L. R. 82 on appeal 13 Ind. Cas. 237 ; 5 S. L. R 140.
(11) 61 Ind. Cas. 926 ; 2 L. 139 ; 3 L. L. J. 297.
(12) (1894) Ind. Rly. Cas 124 ;
(13) (1897) Ind. Rly. Cas. 131.
(14) (1895) Ind. Rly. Cas. 497.
(15) 24 C 306 : 12 Ind. Dec. (N S.) 871.
(16) 14 Ind. Cas. 726 ; 39 C. 1029.
(17) 38 Ind. Cas. 844 ; 21 C. W. N. 761.
(18) 43 Ind. Cas. 263 ; 21 C. W. N. 1125.

LAHORE HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 2361 OF 1920.

April 7, 1924.

Present :—Sir Shadi Lal, Kt, Chief Justice, Mr. Justice Scott-Smith, Mr. Justice Le Ressignol, Mr. Justice Broadway, and Mr. Justice Abdul Raoof.

Mst. ATTAR KAUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NIKKOO *alias* HARWANT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom (Punjab)—Inheritance—Property inherited from maternal grandfather—Ancestral property.

Land inherited by a person from his maternal grandfather is, by the custom of the Punjab, regarded as ancestral property *qua* the former's son [p. 535, col. 1.]

Lehna v. *Thakri*, 32 P. R. 1895, followed.

The doctrine of *stare decisis* is a statutary principle to be applied to the law relating to property and the Courts would be reluctant to overrule a decision, upon which many persons have acted, unless they are convinced that it is clearly wrong. [p. 535, col. 2.]

Appeal from the decree of the District Judge, Amritsar, dated the 30th July 1920, reversing that of the Munsif, 1st Class, Amritsar, dated the 17th December 1919.

Bakhshi *Tek Chand*, and Lala *Mehr Chand*, for the Appellants.

Dr. *G. C Narang*, for the Respondents.

ATTAR KAUR *v.* NIKKOO

JUDGMENT.

Shadi Lal, C. J.—This reference to the Full Bench raises the question whether land inherited by a person from his maternal grandfather is, by the custom of the Puujab, regarded as ancestral property *qua* the former son. The question was answered in the affirmative by two of the three Judges in *Lehna* v. *Thakri* (1), and the present order of reference seeks to impeach the correctness of the rule laid down by the majority of the Full Bench. and to support the view taken by Chatterji, J., who dissented from his colleagues.

Now, I do not propose to examine the arguments which may be urged in support of the respective contentions, and I concede that there is a good deal to be said in favour of the proposition that unless the land came to a person by descent from a lineal male ancestor in the male line it should not be treated as ancestral. The decision of the question does not depend upon any evidence relating to custom on the subject, nor did the learned Judges who dealt with the case of *Lehna* v. *Thakri* (1), base their conclusions on any evidence. There can be no doubt that the majority as well as the minority invoked, what they considered to be, the general principles of the customary law in support of their respective views, and that the majority also relied upon the argument *ab inconvenienti*.

It does not appear that there was any definite pronouncement on the subject prior to 1895, but the rule laid down by the majority of the Judges has since been accepted as the correct proposition of the law and has been followed in a long course of decisions. I do not think that it is desirable to upset the law which has been followed for nearly 30 years, especially when I find that, even under the Hindu Law, which was relied upon by Chatterji, J., there is a conflict of opinion as to whether the property inherited by a daughter's son from his maternal grand-father is to be deemed ancestral property; Allahabad and Patna High Courts holding it to be non-ancestral, *Jamma Prasad* v. *Ram Partap* (2), *Bishwanath Prasad Sahu* v. *Gajadhar Prasad Sahu* (3) while the Madras High Court takes the contrary view in *Karri Rammayya* v. *Villori Jagannadhan* (4).

The doctrine of *stare decisis* is a statutary principle to be applied to the law relating to property; and I would be reluctant to overrule a decision, upon which many persons may have acted, unless I am convinced that it is clearly wrong. I am not prepared to say that the rule laid down in *Lehna* v. *Thakri* (1) has been shown to be manifestly erroneous and I would accordingly decline to disturb the law which has been followed by the Courts during the last thirty years.

Scott-Smith, J.—I concur. I am further of opinion that the decision of the majority of the Full Bench contained in the judgment of Roe, S. J., in *Lehna* v. *Thakri* (1) is sound and correctly interprets the term 'ancestral' as understood in the customary law of the Punjab.

Rossignol, J.—The question referred to the Bench is whether land inherited through a daughter is regarded by custom as ancestral property in the hands of the daughter's son so that his sons may control his disposition of that property, and the reference has been made because the correctness of the decision in *Lehna* v. *Thakri* (1), has been doubted.

The principle underlying the Punjab custom of agnatic succession is the retention of the land first in the family and then in the tribe. In the case of endogamous tribes, the postulates are satisfied whether the succession is through a male or a female, for in either case the land remains if not in the family at any rate, within the tribe, and it is especially among such tribes that a daughter is allowed to succeed as an heir even in the presence of agnates. In such cases a daughter and her heirs cannot be conceded wider powers of disposal than lineal heirs in the male line.

When, however, we are dealing with exogamous tribes succession of a daughter and her heirs introduces strangers into the village proprietary body and this circumstance throws doubt upon the correctness of the decision above noted. Presumably such a succession takes place only in the absence of near collaterals.

(1) 32 P. R. 1895.
(2) 29 A. 667 : 4 A. L. J 582 ; A. W. N. (1907) 211.
(3) 43 Ind. Cas. 370 ; 3 P. L. J. 168 ; (1917) Pat. 6283; P. L. W. 286.
(4) 30 Ind. Cas. 889 ; 39 M. 930 ; 2 L. W. 874 ; 18 M. L. T. 360 ; (1915) M. W. N. 838.

That decision, it may be noted, was arrived at not after an enquiry whether in such case the land was, in fact, customarily regarded as ancestral, but on pure ratiocination.

With all respect I regard that method as unsound ; the matter was one for enquiry not for argument, but it must be remembered that even if that decision does not truly represent the custom prevailing at the date of its issue it has created custom since that date, and for that reason I think we should not disturb it, but follow the rule of *stare decisis*.

Broadway, J.—I concur.

Abdul Raoof, J.—I agree.

N. H. *Reference answered in the affirmative.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 432 OF 1922.

October 9, 1923.

Present :—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

ANANDILAL BHAGCHAND MARWADI---DEFENDANT—APPELLANT

versus

CHANDRABAI TATYA PATIL—PLAINTIFF—RESPONDENT.

Hindu Law—Maintenance—Avaruddha stree, *married woman whether can be*

The connection between a married woman and a man other than her husband would be adulterous according to Hindu Law Such a woman cannot be an *avarudda stree*, and does not acquire the right to be maintained out of the estate of her paramour after his death. [p. 537, cols. 1 and 2.]

Case-law discussed.

Appeal from the decision of the District Judge, Nasik, in Appeal No. 121 of 1921, varying the decree of the Assistant Judge, Nasik, in Civil Suit No. 353 of 1920.

Mr. *Joshi*, with Mr. *D. C. Virkar*, for the Appellant.

Mr. *T. N. Walavalkar*, for the Respondent.

JUDGMENT.

Shah, A. C. J.—The plaintiff in this case claimed maintenance as the kept mistress of the deceased Chauthmal from his heirs. She alleged that for nearly four years prior to his death she had been living with Chauthmal practically as his wife, and on his death she was entitled to be maintained out of his estate. In defence it was pleaded that the plaintiff's husband Tatya was alive, that the connection between the plaintiff and the deceased Chauthmal was adulterous and that she was not entitled to maintenance from the estate of Chauthmal. Both the lower Courts have disallowed this defence and decreed the plaintiff's claim.

The defendants have appealed and it is urged in support of the appeal that though she might be an *avaruddha stree* so far as the mode of her living with Chauthmal was concerned, her husband was throughout alive, that the connection was adulterous, and that a person in the position of the plaintiff is not entitled to maintenance, as she cannot be properly speaking an *avaruddha stree*, who would be entitled to be maintained out of the estate of her keeper. On the other hand it is urged that the decision in *Khemkor* v. *Umiashankar* (1) is a clear authority on this point, and that if she has lived as an *avaruddha stree* would live, the nature of her connection cannot affect her right to be maintained.

A woman, who has lived an adulterous life while her husband is alive, has a limited right of maintenance against her husband according to Hindu law. Verse 70 of the *Yajnavalkya Smriti* (*Achara Adhyaya*) and Vijnanesvara's commentary thereon show that she is entitled to bare maintenance from her husband. The translation of this portion as given in the Translation of *Achara Adhyaya* by Srischandra Vidyamana (published by the Bhuvaneshwar Press, p. 136) is as follows :—

"The author now describes how unchaste woman are to be treated.

" Yajnavalkya.

"LXX.—The unchaste wife should be deprived of authority, should be unadorned, allowed food barely sufficient to sustain her body, rebuked, and let sleep on low bed, and thus allowed to dwell—70.

"Mitakshara.

"She who commits adultery, 'should be deprived of authority' *i.e* the control over servants and the management of the household &c., should be taken away. She should

(1) 10 B. H. C. R. 381.

be kept 'unadorned' i.e., without collyrium, ointments, white cloth or ornaments; 'with food enough to maintain her body, and sustain her life merely, and 'rebuked' with censure, &c., and 'sleeping on low bed,' on the ground, and 'allowed to dwell,' only in his house. This should be done in order to produce repentance, and not for purification.

It is needless to quote the other texts bearing on this point. They have been referred to and the result stated by Mr. Justice Chandavarkar in *Parami Ramayya* v. *Mahadevi Sham Karoppa* (2) as to the right of an adulterous wife to have maintenance from her husband. In the present case we are not concerned with the exact limits of that right nor are we concerned with the right of a widow who has led an unchaste life to such maintenance. There is conflict of decision as to the right of such a widow as pointed out by the learned Judge in *Parami's case*. But as regards the right of the wife there does not appear to be any such conflict in this Presidency, and I refer to the judgment of Chandavarkar, J., to save unnecessary elaboration of a point which according to the Hindu Law is clear. It is also settled that the connection between a married woman and a man other than her husband would be adulterous according to law. The observations in *Rahi* v. *Govinda* (3) are clear on that point. Such a woman cannot be an *avaruddha stree* such as could acquire the right to be maintained out of the estate of her paramour. All along her rightful residence would be with her husband and the residence with her paramour wholly wrongful. The idea of *avaruddha stree* is inconsistent with the position which such a woman occupies. Further the obligation to lead a chaste life after the death of the man with whom she lived an adulterous life is not possible of fulfilment according to law when the husband is alive at the time of her paramour's death. The view taken in *Yeshvantrav* v. *Kashibai* (4) as regards the obligation of a woman kept in concubinage to lead a chaste life can have no application to a woman kept in that manner when her husband is alive.

The meaning of an *avaruddha stree* (a woman kept in concubinage), who is entitled to maintenance, is discussed in *Bai Monghibai* v. *Bai Nagubai* (5). The point that now arises for consideration did not arise in that case. It is clear to my mind that a woman in the position of the plaintiff cannot claim to be maintained out of the deceased paramour's estate when her husband has been alive during the whole period of her adulterous connection.

But it is urged that this view is contrary to the decision in *Khemkor* v. *Umiashankar* (1) and the observations of Mr. Justice Crowe in *Ningareddi* v. *Lakshmawa* (6). We have examined the facts in *Khemkor's case*. It is not clear that the husband of Khemkor was alive when Ranchhor, the person with whom she lived as mistress, died. The principal point considered in that case was whether the marriage betwen Khemkor and Ranchhor was valid in view of the fact that the husband of Khemkor was alive at the time. The connection continued after that invalid marriage for a long time, namely, twenty years and there is nothing to show that the husband was alive at the time of Ranchhor's death or that he was alive during the best part of that period of twenty years. The effect of Khemkor's husband being alive during the period of her connection with Ranchhor, upon her claim to maintenance has not been adverted to either in the letter of reference or in the judgment. There was apparently no argument in the case: and this aspect of the point does not appear to have been adverted to by the learned Judges. It is true that the case has been referred to in the recognised books on Hindu Law as if the existence of the husband would make no difference in the result; but I do not think that the decision could be read as going so far. I find it difficult to reconcile that reading of the judgment in *Khemkor's case* (1) with the observations of Westropp, C. J., in *Rahi* v. *Govinda* (3) to which I have already referred. On the contrary the reference to *Khemkor's case* (1) in those observations seems to suggest that the decision was treated by the learned Chief Justice as applying to a case where the husband was not alive at the time of her paramour's death. I find it

(2) 5 Ind. Cas. 960; 34 B. 278 at pp. 282, 283; 12 Bom. L. R. 196.
(3) 1 B. 97 at pp. 116, 117; 1 Ind. Dec. (N. S.) 65.
(4) 12 B. 26; 6 Ind. Dec. (N. S.) 502.
(5) 69 Ind. Cas. 291; 47 B. 401; 24 Bom. L. R. 1009; (1923) A. I. R. (B.) 180.
(6) 26 B. 168; 3 Bom. L. R. 647.

equally difficult to reconcile the broader interpretation put upon *Khemkor's case* (1) with the view taken by Nanabhai Haridas, J., in *Yeshvantrav* v. *Kashibai* (4) as to the obligation of a woman, who has lived as an *avaruddha stree*, to lead a chaste life. Though the decision in *Khemkor* v. *Umia shankar* (1) has stood for a long time and though it has been understood as applying to a case where the husband may be alive, I think it is clearly distinguishable on the ground that the fact does not appear from the original record of the case on the file of this Court; and further that that aspect of the point does not appear to have been expressly considered. The observations of Crowe, J., which were not necessary for the decision of *Ningareddi's case*, (6) are referable to this reading of *Khemkor's case* (1) which, for the reasons I have just stated, is not justified by the facts in that case.

I should have referred this point for decision to a Full Bench if I were satisfied that the point which we have to decide was covered by the decision in *Khemkor's case*. (1) As on the facts the case is distinguishable and as I am clear that a kept mistress whose husband is alive cannot be treated as an *avaruddha stree* who is entitled to maintenance on the death of her paramour out of his estate, I see no objection to give effect to that view.

I would, therefore, allow the appeal, reverse the decree and dismiss the suit. Under the circumstances each party should bear his or her costs throughout.

Crump, J. I agree.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION
APPEAL NO. 11 OF 1923.

May 8, 1923.

Present :—Mr. Justice Mookerjee and Mr. Justice Rankin.

LAKSHAN CHUNDER DEY—PURCHASER—APPELLANT

versus

SM. NIKUNJAMONI DASSI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXII, r. 10—Party, addition of—Court, discretion of—Suit, when to be deemed as pending.

An applicant who invokes the aid of r. 10 of O. XXII of the Civil Procedure Code to be added as a party to the suit is not entitled, as a matter of right, to an order in his favour, regardless of delay or laches. The matter is within the discretion of the Court, and such discretion should be exercised in a judicial manner. [p. 540, col. 1.]

A suit must be deemed to be pending so long as it is possible to make an order therein relating to the subject-matter of the litigation; that is, so long as the final decree has not been drawn up and signed. [p. 540, col 1.]

Appeal against the following judgment of Mr. Justice Greaves, dated the 4th January, 1923:

Greaves, J.—This is an application by one Lakshan Chunder Dey, under circumstances which I shall state, to be substituted as plaintiff in this suit No. 1309 of 1914. The suit was commenced by Srimati Nikunjamoni Dassi and others to establish a right in respect of a room which had been built over the porch of a certain house. While that suit was still pending, another suit No. 1305 of 1914, which was a suit for partition of the property to which the porch room was said to belong, was decreed and the Commissioner of partition finding that the property could not adequately be partitioned, the property was sold and was purchased by Lakshan Chunder Dey on the 28th November 1919. There is no doubt that on that date the interest, whatever it was in the cause of action in suit No. 1309 of 1914, would pass to Lakshan Chunder Dey. Some few days after the sale, namely, on the 2nd of December 1919, terms were arrived at by the

parties in suit No. 1309 of 1914. By those terms a sum of money was paid to the plaintiffs and certain terms were drawn up which are Ex. B to the petition herein. They provided for the withdrawal of the suit and for the recording of the terms in Court, and that the plaintiff's right of use and occupation of the porch room should cease and that the defendants should be entitled to close up the opening by a wall on their land if they chose to do so. I am told that this wall has in fact been built.

Although the terms were filed in December 1919 the order was not in fact drawn up but on the 10th February 1922 the present applicant provided the necessary stamp for having the order drawn up. It is under these circumstances that the application is made to me under the provision of O. XXII, r. 10, to have the applicant added as a party in what is said is still a pending suit.

The application is opposed by the defendants in suit No. 1309 of 1914 who say that the suit is no longer a pending suit, the terms having been carried out and they further say, which of course is the fact, that if the defendant is right in his contention he is not affected by these terms but that he can get the consent terms set aside in appropriate proceedings and pursue what remedy he is entitled to in respect of the relief claimed in suit No. 1309 of 1914. I think myself, notwithstanding the argument addressed to me, that the suit is no longer a pending suit. The terms were arrived at and filed and the actual order drawn and I think that the mere fact that the order was not in respect of the relief claimed in suit still a pending suit. Even if I am wrong in this view, I do not think that in the exercise of my discretion at this time I ought to make the order that I am asked to make.

A letter has been read to me dated the 17th December 1919 from which it is clear that on that date the present applicant had notice of what had been done, and if he had any remedy at that time it was surely his duty to have pursued that remedy diligently and not to have waited for 3 years as he has done before asking to be made a party to the suit. Under these circumstances I do not think that I ought to exercise my discretion under O. XXII, r. 10 in his favour. Consequently the application fails and must be dismissed with costs.

Sir B. C. Mitter and Mr. *J. C. Hazra*, for the Appellant.

Messrs. *S. K. Chakraburtty* and *R. N. Mitter*, for the Respondents.

JUDGMENT.—This is an appeal from an order of dismissal made by Mr. Justice Greaves on an application under O. XXII, r. 10, Civil Procedure Code.

The plaintiffs sued the defendants for a declaration of their right to a room which had been built over the porch of another house. The right, title and interest of the plaintiffs were sold on the 22nd November 1919. On the 4th december 1919 terms of settlement between the plaintiffs and the Defendants were intimated to the Court and the following order was thereupon made:—"Mr. Mitter states that this has been settled. He puts in terms of settlement. Let decree be made in terms of settlement signed and put in by Counsel." The sale in favour of the appellant was duly confirmed and the sale certificate was granted to him on the 14th June 1920. On the 1st December 1922, he made the present application for leave to be added as a party plaintiff. Mr. Justice Greaves dismissed the application on the 4th January, 1923.

Two reasons have been assigned in support of the order, namely, first, that at the time the application was made there was no suit pending and, secondly, that there was such delay on the part of the petitioner as would justify a dismissal of the application under O. XXII, r. 10, Civil Procedure Code.

As regards the first point, it has been urged that as the decree had not been drawn up, the suit was not yet dead ; *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatab* (1), and *Madaneswar Singh* v. *Mohamaya Prosad Singh* (2). In the first case, it was ruled that a suit for partition must be regarded as a pending suit till the final decree had been drawn up and signed. In the second case, it was ruled that a suit must be deemed to be pending so long as it is possible to make an

(1) 32 C. 488.
(2) 9 Ind. Cas. 1027 ; 13 C. L. J. 487 ; 15 C. W. N. 672.

order therein relating to the subject-matter of the litigation. We are of opinion that the suit could not be deemed to be dead at the time when the application was made.

As regards the second point, it has been argued very forcibly that there was such delay on the part of the petitioner that the Court could justly refuse the application. An applicant who invokes the aid of r. 10 of O. XXII is not entitled as a matter of right to an order in his favour, regardless of delay or laches. The Court undoubtedly has a discretion in the matter, which must be judicially exercised ; *Veeraraghava Reddi* v. *Subba Reddi* (3), and *Afzal Begam* v. *Akbari Khanum* (4). At the same time, we cannot overlook the fact that though there has been delay on the part of the petitioner, there has been equal delay on the part of his opponent which has rendered possible the application under r. 10 of O. XXII ; for some unexplained reason, the plaintiff has not taken steps to have the decree drawn up yet, though the order was made on the 4th December 1919. We are not pressed by the decision in *Script Phonography Co.* v. *Gregg* (5), which was cited on behalf of the respondent. That was a case where a suit would automatically stand dismissed on the failure of the parties to comply with the directions given by the Court. It was ruled that no application could be made as there was no pending suit. Similar observations apply to *King* v. *Davenport* (6) and *Metcalfe* v. *British Tea Association* (7). Here, as we have stated, the suit must be deemed pending as the final decree had not been drawn up and signed.

We have anxiously considered whether by reason of the delay on the part of the Petitioner we should decline to interfere with the order made by Mr. Justice Greaves. We have come to the conclusion that in view of the circumstances about to be mentioned that order should be vacated. Sir B. C. Mitter who has appeared on behalf of the appellant has urged that the only result of the dismissal of the application will be that there will be another suit and probably a protracted litigation. On the other hand, if the petitioner is allowed to intervene under O. XXII, r. 10, he may be able to prove that the settlement reported to the Court on the 4th December 1919 was not *bona fide* and that this will be the basis of his attack on the consent order. We are of opinion that this is a matter which may conveniently be investigated in the present proceeding, so as to avoid multiplicity of litigation.

The result is that this appeal is allowed and the order made by Mr. Justice Greaves set aside. We grant the application under O. XXII, r. 10 of the Code. But in view of the delay on the part of the petitioner in making the application under O. XXII, r. 10, we direct that each party do pay his own costs both of this appeal and of the hearing before Mr. Justice Greaves.

N. H. *Appeal allowed.*

(3) 53 Ind. Cas. 428 ; 43 M. 37 ; 10 L. W. 281 ; 37 M. L. J. 449 ; (1919) M. W. N. 699 ; 26 M. L. T. 339.
(4) 28 Ind. Cas. 857 ; 37 A. 326 ; 13 A. L. J. 444.
(5) (1890) 59 L. J Ch. 406.
(6) (1879) 4 Q. B. D. 402 ; 48 L. J. Q. B. 606 ; 27 W. R. 798.
(7) (1882) 46 L. T. 31.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 116 OF 1923.

Present :— Mr. Wazir Hasan, J. C.

May 19, 1924.

BHAGWANDIN TIWARI—DEFENDANT —APPELLANT
versus
RAMADHAR TIWARI—PLAINTIFF —RESPONDENT.

Pre-emption decree, compliance with—Money deposited in Court less than the decretal amount, effect of.

Plaintiff obtained a decree for pre-emption on payment of a certain sum of money, and he was also awarded his costs. He paid the decretal amount into Court within the time fixed by the Court, and then attached out of it a sum representing the amount of the costs awarded to him. The vendee appealed and the decretal amount was enhanced, and the vendee was also awarded proportionate costs, after the decision of the appeal the plaintiff withdrew from Court the amount attached by him, but shortly after, and within the time allowed by the Appellate Court, he paid back into Court a larger sum of money which, however, together with the sum already in deposit in Court fell short of the amount fixed by the Appellate Court as payable by him ;

Held, that plaintiff had failed to comply with the decree of the Appellate Court and his suit was, therefore, liable to be dismissed. [p. 541, col. 2.]

KIDAMBI RITUMALACHARYULU *v.* AMISETTI VENKIAH

Appeal against the decree of the Additional Subordinate Judge, Fyzabad, dated the 7th February 1923, up holding the order of the Munsif, Fyzabad, dated the 14th October 1922.

Mr. *Rudra Dutt Sinha*, for the Appellant.

Mr. *Naim Ullah*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption by the plaintiff-respondent against the defendant-appellant, who was the vendee in the sale with respect to which the pre-emption was claimed. The Court of first instance gave a decree to the plaintiff on the condition that he would pay Rs. 660 within two months from the date of the decree. He was also awarded Rs. 55 as costs. Within the time prescribed, the respondent deposited Rs. 660 but attached Rs. 55 out of the same as the amount of costs awarded to him. The matter was then taken in appeal and the Court of Appeal modified the decree of the first Court on the 7th July 1922 to the effect, that the vendee was allowed Rs. 860 with proportionate costs in the Court of first instance amounting to Rs. 31-7-5 and also costs of appeal amounting to Rs. 29-10-0, in all, Rs. 61-1-5 and no costs were awarded to the plaintiff pre-emptor. After the decree of the Court of Appeal the plaintiff-respondent withdrew the sum of Rs. 55 which he had already attached as the costs awarded and he also withdrew Rs. 2-6-0 as costs of the attachment. All this was done on the 21st July 1922. Again afterwards, the plaintiff-respondent deposited Rs. 221-10-0 as deficit of the purchase-money and the costs of the appeal within the time allowed by the Court of Appeal.

The question for determination is whether the respondent has complied with the conditions of the pre-emption decree as finally passed by the Court of Appeal. The Courts below have answered it in the affirmative. My opinion is to the contrary. The respondent withdrew the sum of Rs. 57-6-0, the amount of costs awarded to him by the first Court, out of Rs. 660 which he had originally deposited in proper time. This he did in spite of the modification made by the Court of Appeal. His act of withdrawing the money was, therefore, wrongful and its result was that only Rs. 660 minus Rs. 57-6-0, that is, Rs. 602-10-0 were left in deposit for the benefit of the vendee and the subsequent payment of Rs. 229-10-0 brought the total to Rs. 832-4-0 only. This was less by Rs. 27-12-0 than the amount fixed by the Court of Appeal, that is, Rs. 860. The plaintiff pre-emptor has, therefore, failed to comply with the condition of the pre-emption decree and in terms of the same decree his suit stands dismissed.

I, therefore, allow this appeal with costs throughout, set aside the orders of the Courts below and hold that the plaintiff-respondent's suit for pre-emption stands dismissed.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 843 OF 1921.

February 6, 1924.

Present :—Mr. Justice Wallace.

KIDAMBI RITUMALACHARYULU *alias* RAMANUJACHARYULU AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMISETTI VENKIAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3, 5—Minor defendant—Guardian ad litem, appointment of—Notice to person in charge of minors, absence of, effect of—Prejudice to minor, proof of.

No irregularity by way of an omission to send a notice as required by O. XXXII, r.3 of the Civil Procedure Code, can operate to render void the presumed representation of minor defendants in a suit, unless such omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof. [p. 542, col. 2.]

Suresh Chunder v. *Jagut Chander Deb*, 14 C. 204 ; 7 Ind. Dec. (N. S.) 135 ; *Bhagwan Dayal* v. *Param Sukh Dass*, 27 Ind. Cas. 623 ; 37 A. 179 ; 13 A. L. J. 179 ; *Nachiappa Chetty* v. *Chinniah Ambalan*, 86 Ind. Cas. 794 ; 4 L. W. 362 ; *Ramaswami Chetti* v. *Doraiswami*, 73 Ind. Cas. 409 : 44 M. L. J. 299 ; 17 L. W. 638 ; (1923) A. I. R. (N. S.) 465 ; *Maruthamalai Goundan* v. *Palani Goundan*, 16 Ind. Cas. 182; 37 M. 535, followed. [p. 542, col. 2.]

The question as to whether the omission has in fact prejudiced the defence will depend on the further question whether the minors had a good defence and whether the omission to obey the rules and the appointment of a Court guardian, had the effect of shutting out that defence.

KIDAMBI RITUMALACHARYULU *v.* AMISETTI VENKIAH

Appeal against the decree of the District Court of Guntur, in A. S. No. 307 of 1920 preferred against the decree of the Court of the Principal District Munsif of Guntur in O. S. No 173 of 1919.

Mr. *B. Satyanarayana*, for the Appellants.

Mr. *N. Rama Rao*, for the Respondents.

JUDGMENT.—The plaintiffs sued in this case to set aside the decree in O. S. No. 274 of 1917 on the file of the Principal District Munsif's Court, Guntur, obtained against them when they were minors. They sued on the ground that they were not properly represented by the guardian in the suit and that the said guardian was guilty of gross negligence.

There is no doubt that they were minors at the time of the suit, and both their father and mother were dead. It is also clear that they had no certificated guardian and no natural guardian. It appears that the plaintiff in O. S. No. 274 of 1917 first applied to the Court to have one K. Ramiah appointed as guardian *ad litem* and notice was sent to him but he refused to act. The plaintiff then applied for a Court guardian and the Head Clerk of the Court was appointed. The plaintiffs here in this case urged that the appointment of the Court guardian was illegal because no notice of the application to appoint a Court guardian was sent, as it should have been sent, under O. XXXII, r. 3 (5) to the person in whose care the minors were. The defence urged that, since plaintiffs were in the care of K. Ramiah who already had notice of the application to appoint himself as the guardian, it was not necessary to send a fresh notice to him. Plaintiffs rejoined that K. Ramiah was not the person in whose care then they were ; that they were in the care of R. Seetharamasami, that, even if they were in Ramiah's care, it was necessary to serve him with a notice again in order to comply with the rules, so that he might have had an opportunity of objecting to the appointment of the Court guardian or of proposing some other person as guardian ; and that at least under the Rules the Court should and could not have been satisfied, without sending a fresh notice to him, that there was no person fit and willing to act as guardian, which is the only condition on which the appointment of a Court guardian can stand. See O. XXXII, r. 4 (4).

The first Court found that the plaintiffs were not in the care of R. Seetharamaswami but it has not clearly found that they were in the care of K. Ramiah to whom notice under the rules did not go. Both the lower Courts have held that the mere omission to send such a notice is a sufficient ground in law for holding that the minors were not properly represented in the suit. I do not think that the law is so. The correct view, I think, is that no irregularity by way of an omission to send a notice as required by O. XXXII, r. 3 shall operate to render void the presumed representation of the minors in a suit, unless such an omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof. See *Suresh Chunder* v. *Jagut Chunder Deb* (1), *Bhagwan Dayal* v. *Pram Sukh Dass* (2) and in this Court the cases reported in *Nachiappa Chetty* v. *Chinniah Ambalan* (3) and particularly in *Ramasami Chetty* v. *Doraiswamy* (4). The *ratio decidendi* in *Maruthamalai Goundan* v. *Palani Goundan* (5) is to the same effect. It is clear then that the lower Courts were not justified in setting aside the decree in O. S. No. 274 of 1917 without first considering the question whether in fact the minors had been prejudiced in their defence.

The answer to this question again will depend very much on the answer to the question whether the minors had a good defence which, by the negligence of the Court guardian, whose appointment followed on the breach of the Rule, had not been put forward. In the present case it is clear that the Court guardian put forward no defence, did not file a written statement and did not supply the Vakil for the minors with any material on which to cross-examine the plaintiff's witnesses in that suit. So, the points to be settled are whether the minors had a good defence and whether the omission to obey the Rules had the effect of shutting out that defence. These points are embodied, not as clearly as they might have been perhaps in issues II, III and IV framed by the first Court. The appellants argued that the plaintiffs put forward no evidence on

(1) 14 C. 204 ; 7 Ind. Dec. (N. S.) 135.
(2) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.
(3) 36 Ind. Cas. 794 ; 4 L. W. 362.
(4) 73 Ind. Cas. 409 ; 44 M. L. J. 299 ; 17 L. W. 638 ; (1923) A. I. R. (N. S.) 465.
(5) 16 Ind. Cas. 182; 37 M. 535.

these issues, and therefore they must be found against them, the onus lying on them ; but, on my reading of the first Court's judgment, I am forced to the conclusion that the first Court refused to go into these issues, holding that its finding on the first issue was enough to dispose of the suit, and the lower Appellate Court never touched on these points at all. I must hold therefore that these issues are still to be tried. I therefore reverse the decision of the lower Appellate Court and direct the suit to go back to the first Court and be reheard there on the other issues in the light of this judgment. Fresh evidence is of course admissible. Costs up to date will abide by the result.

V. N. V. *Case reversed and remanded.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 28 OF 1923.

January 18, 1924.

Present :—Mr. Neave, A. J. C.

JAGJIWAN SINGH—PLAINTIFF —APPELLANT
versus
GAJRAJ SINGH AND OTHERS—DEFENDANTS —RESPONDENTS.

Mortgage—Redemption, suit for—Burden of proof—Admission of defendant, effect of.

Where a plaintiff in a suit for redemption of a mortgage fails to prove the mortgage on which he relies and which he alleges in his plaint, he cannot succeed upon the mere fact that the defendant admits that he is the mortgagee of the land. [p 544, col. 1.]

Salik Ram v. *Ramanand*, 8 O. C. 173 ; *Niamat Khan* v. *Deputy Commissioner, Kheri*, 25 Ind. Cas. 816; 1 O. L. J. 442, followed.

Bala v. *Shina*, 27 B. 271 ; 5 Bom. L. R. 85; *Bisheshar Singh* v. *Brij Bhookhan Singh*, 43 Ind. Cas. 300 20 O. C. 336 ; 5 O. L. J. 18, distinguished.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 30th October 1922 in C. A. No. 138 of 1922 preferred against the decree, dated the 8th August 1922.

Mr. *Raj Bahadur*, for the Appellant.

Mr. *Hyder Husain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage said to have been made 32 years ago by Chhedi Singh and Maheshar Singh, ancestors of the appellants, in favour of Pahar Singh, a predecessor in interest to the respondents Nos. 1. to 6. Respondent No. 7 is a transferee.

The defendants 1, 3 and 4, who alone contested the suit, admitted that they were mortgagees but denied that the appellants were their mortgagors. They also pleaded that their mortgage had become irredeemable.

No deed of mortgage was produced by the appellants nor did they give any notice to the opposite party to produce the deed on which they relied. They, however, called secondary evidence in the shape of two witnesses who were alleged to have attested the mortgage. This evidence has been disbelieved by both the Courts below who have found against the appellants on the first issue framed by the first Court. " Whether Chhedi Singh and Mahesar Singh mortgaged the property in suit to Pahar Singh for Rs. 25 about 32 years ago as alleged".

In appeal it is argued that the case has been approached from a wrong point of view by both the lower Courts and that the defendants' admission that they were mortgagees should have been considered sufficient to shift the onus from the plaintiffs on to them, and they should have been called upon to produce and prove the mortgages under which they allege they are holding the land, and to prove that these are irredeemable. Reference is made to *Bala* v. *Shina* (1) and also to *Bisheshar Singh* v. *Bhookhan Singh* (2). In the latter case, however, the title *prima facie* was with the plaintiff and what the Court held was that in such a case the defendant pleading that he was in possession under a mortgage executed " in the time of native rule" must adduce definite proof. In the present case, there seems to be no evidence on the record to prove that the plaintiffs—appellants have any title. The most recent document is *khasra* of the recent settlement (1321 F.) nearly 30 years ago. Even in the Bombay

(1) 27 B. 271; 5 Bom. L. R. 85.
(2) 43 Ind. Cas. 300; 20 O. C. 336; 5 O. L. J 18.

case referred to, it was laid down that there must be some slight evidence on the part of the person alleging the mortgage. In the present case there is none. Further it has been held more than once in this Court, *e.g.*, *Salik Ram* v. *Ramanand* (3), that where a plaintiff in a suit on a mortgage fails to prove the mortgage on which he relies and which he alleges in his plaint, he cannot succeed upon the merefact that the defendant admits that he is the mortgagee of the land. This has been followed in *Niamat Khan* v. *Deputy Commissioner, Kheri* (4).

The appellants have failed to prove even the existence of the mortgage on which they relied. The Courts below were, therefore, justified in refusing the decree for redemption. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 3 O. C. 178.
(4) 25 Ind. Cas. 816: 1 O. L. J. 442.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 156 OF 1920.

May 8, 1924.

Present :—Mr. Justice Das
and Mr. Justice Ross.

TIKAIT THAKUR NARAYAN SINGH—PLAINTIFF—APPELLANT
versus
NAWAB SAIYID DILDAR ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Ghatwalli tenure, incidents of—Service of personal nature, absence of, effect of—Inalienability, incident of—Custom—Kharagdiha Ghatwalli tenures, whether alienable—Court-fee, amount of, how determined—Declaration and consequential relief—Duty of Court—Possession, constructive—Tittle, absence of—Presumption.

Where the only duty cast upon the grantee of a tenure is to appoint police patrols and to pay for them, and there is no duty or service of a personal nature imposed, the tenure cannot be described as a service tenure and ghatwali in its nature. [p. 546, col. 2.]

Where no other service is imposed than the payment of rent or revenue, the tenure cannot be called a service tenure. [p. 549, col. 1.]

A ghatwalli tenure may be alienable by custom.

The incident of inalienability ceases to attach to a ghatwalli tenure if the Government releases or abolishes the services in some effective and lawful manner. [p. 546 col. 2.]

Kumar Satya Narayan Singh v. *Raja Satya Niranjan Chakravarti*, 79 Ind. Cas. 825; 28 C. W. N. 35; (1924) A. I. R. (P. C.) 5; 5 P. L. T. 171; 3 Pat. 183, referred to.

Ghatwalli tenures in Kharagdhi are alienable by custom. [p. 548, col. 1.]

The question of Court-fee must be decided on the plaint; and though it is open to the Court in the case of a suit for a declaration to say that the plaintiff has really asked for a consequential relief, though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper Court-fee as in such a suit. The plaintiff is entitled to have the case made by him in the plaint tried by the Court, although he takes the risk that if it is subsequently found that he could have asked for a consequential relief, his suit is liable to be dismissed. [p. 549, col. 2.]

In the absence of title the law will raise from definite physical control of part of land a presumption of possession of that which the possessor has shown a clear and unambiguous intention to possess. [p. 550, col. 2.]

Appeal from decision of the Subordinate Judge, Hazaribagh, dated the 6th April, 1920.

Messrs. *N. C. Sinha*, *N. C. Ghosh* and *Bindheshwari Prasad*, for the Appellant.

Messrs. *Saiyid Abdul Aziz*, *Niamat Ullah*, *Nuruddin* and *Ragho Prasad*, for the Respondents.

JUDGMENT.

Das, J.—I entirely agree with the decision of the learned Subordinate Judge. The arguments of the learned Vakil for the appellant are mainly, if not entirely, based on the recent decision of the Judicial Committee in the case of *Satya Narain Singh* v. *Raja Satya Niranjan Chakravarty* (1). Now, in that case, the question turned upon the construction of a grant of a permanent *ghatwalli* tenure made to the predecessor in title of the appellant by Capt. Brown in 1776, and the only point of law established in that case is that the nature of the estate which was the subject matter of the grant rested upon the

(1) 79 Ind. Cas. 825; 28 C. W. N. 351; (1924) A. I. R. (P. C.) 5; 5 P. L. T. 171; 2 Pat. 188.

true construction of the grant and "not upon the notions entertained about them in later generations". Their Lordships of the Judicial Committee construed the grant and referred to "the most significant clause in the grant." "When called by the *Huzur* you should be escorted by a body of archers and *Berkandazes* 307 in number, of whom the *Sirdars* will be 7 and archers and *Barkandazee* will be 300, and should appear before the *Huzur*." Referring to this clause, their Lordships said as follows :—"Their Lordships are further unable to refer the obligation to furnish a force of 307 men to any ordinary police administration of a Bengal *Zemindari*. The force is precise and it is large; it is military rather than civil; it does not vary according to the needs of the moment but is fixed at a standing number at all times, and attendance on the *Huzur* with the whole force on demand is clearly beyond the scope of mere constabulary duties. Effect must be given to these very special and express words, and although no forfeiture is stated in case of non-compliance with them, it is only possible to do so regarding them as descriptive of an obligatory service tenure, whether of the ordinary *ghatwalli* type or not, and as the condition on which the *ghatwal* holds the lands". In another place in their judgment, their Lordships made the following observations :—"The tenure-holder has to raise and maintain the force not merely to pay for it. Whatever may be the other incidents, it is clear that these grants impose on him the duty of providing a specific armed force and of attending with it upon the competent Government officers whenever this service is required of him. What can this be but a service tenure ?" And in summing up their conclusions with regard to the construction and effect of the *patta* of 1776 and the confirmatory *sanad* of 1794, they said as follows :—

"(3). The express obligation imposed on the grantees, as an integral part of the grant, to support a specified number of *Barkandazes*, and with them to attend the *Huzur* when required, shows that the tenure is a service tenure and is *ghatwalli* in its nature.

"(4). A tenure so granted is inalienable and indivisible."

I will now examine the grant in favour of the predecessor in title of the plaintiff to see whether the tenure at its inception was a service tenure and, therefore, inalienable. The grant was made by Mr. Chapman, the Agent of the East India Company to Tokait Paran Singh, described as "the *malik* and *mustojir* of *Gadi Ghoranji*" on the 8th November, 1780. The document which has been produced by the plaintiff is addressed to "*Mutsaddis* of affairs of the present and future, *Chaudhuris* and *Kanangoes* of the District Kharagdiha", but in the margin occur these words in English, in the handwriting of Mr. Chapman, "*Patta* granted to Tikait Paran Singh *ghatwal* of *Ghoranji* for the year 1183 *Fasli*, *Jama Sika*, Rs. 435-15-0."

We may then accept Exhibit 2, which is the document produced by the plaintiff, as the *patta* granted to Tekait Paran Singh, though it was not expressly addressed to him. The opening words of the document are as follows :—"Under orders of the Bengal Council, this *Sanad* is granted (letting out) *Gadi Ghoranji* appertaining to the said district, in *Istimarari Mokarari* to Tikait Paran Singh, *Malik* and *Mustajir*, of the said *Gadi* (with effect from) 1188 *Fasli* fixing Rs. 435-15-0 *Samwat* (coins of) the present currency as the annual consolidated *juma*." Though the grant is of *Gadi Ghoranji*, there is express exception of "*Chakran Jagirs*". Most of the clauses (and they are not many) impose duties which are ordinarily discharged by the *zemindars*; but then occurs this clause upon which reliance is placed by the plaintiff – appellant. "Also, besides paying Government Revenue, he shall appoint *Barkandazes* and *Digwars* with one *Sirdar* as *Chakars* of *Chakran* lands, in order to guard the roads of the villages appertaining to the said *Gadi*, and see that the same are well-guarded. Also if any murder, riot, theft, or highway robbery, etc., take place in their jurisdiction, they shall be treated as offenders against Government and be dismissed from their posts. Whenever the said *Chakars* shall be called for by the authorities, the *Sirdar* with his subordinates shall attend in person. If any one himself takes any ill-advised step or gives evil advice to others, in consequence of which the work of Government suffers, he shall be removed from his situation after enquiry and judgment, and he shall not be allowed to enter the said *Gadi* again".

In my opinion, there is all the difference in the world between the duties imposed on Paran Singh and those imposed on the grantee

in the case to which I have referred. Here his sole duty consists in appointing *Berkandazes* and *digwars*, and, it may be, paying for them though I am not sure that the exclusion of the *Chakran* lands from the grant did not imply that these *Berkandazes* and *Digwars* were remunerated by grant of *Chakran* lands expressly made to them by the Government and not by any wages paid by Paran Singh to them. These *Chakran* lands, as the document shows, were situate within the ambit of *Gadi Ghoranji*, and it may well be that they were settled by the former *maliks* and *mustajirs* of the *Gadi* with *Berkandazes* and *digwars* on conditions of service. Now the earlier history of the Gadi shows that it was one of the 84 divisions called Gadis of Kharagdiha which originally formed part of the *zamindari* of Siwar Muhammadabad, the property of Maharajah Mode Narain Deo. The *Ghatwals* recognized the Maharajah as the chief through whom they paid their small tribute to the ruler of the country, and they considered themselves as independent of his authority. It was recognized by the East India Company that the *Ghatwals* were a turbulent set of men worth winning by methods of conciliation, because of their influence in their country and their solidarity among themselves, and it was in pursuance of this policy that, ignoring Maharajah Mode Narayan, the East India Company entered into direct settlement with the *Ghatwals* of Kharagdiha. Now, I am not unmindful of what was said by the Judicial Committee in the case to which I have referred, namely, that where the instrument contains words of grant and purports to make a grant on behalf of and in the name of the East India Company, it must be so interpreted, and that this construction cannot be defeated merely because there may be ground for thinking that the grantee was already the holder of the lands under earlier grants. The tenure, in the present case, is undoubtedly a Government tenure, but the question remains, is it a service tenure? I was referring to the earlier history of the gadi to show that, prior to the date of the grant, the *Tekait*, referred to in the document as "the *malik* and *mustajir* of *Gadi Ghoranji*", was undoubtedly in the position of a *Zemindar*, and it is not unreasonable to assume that he, or his predecessors in title made grants of lands to various persons on condition of guarding the roads of the villages and rendering other services usually rendered by village police. In entering into the settlement with the *Tekait* of *Ghoranji* the Government was careful to exclude the *Chakran* lands from the grant, and it would appear as if the Government took it out of the power of the *Tekait* to resume these *Chakran* lands and to put an end to the services rendered by the *Digwars*. If I am right in this view, then the estates known as *Gadi Ghoronji*, were not even subjected to a pecuniary charge, and the only duty which was cast on the *Tekait* under the *patta* was to appoint these police officers. 'I will assume, however, that the *Tekait* was required to pay for the services of these police officers, and that the *Gadi Ghoranji* was subjected to a pecuniary charge for the wages payable to these police officers. Even then, there were no services to be rendered by the *Tekait* so that the personality or the appointments of the holder of the *Gadi* would be of no importance. In the case before the Judicial Committee, the grantee was required to go round the villages escorted by archers and *Berkandazes* and protect the villages. In the case before us, the duty is cast, not on the grantee, but on the Berkandazes and the *digwars* to guard the roads of the villages. In the case before the Judicial Committee, the grantee was required whenever called upon to appear before the *Huzur* with a force of 307 men. In the case before us, no duty is cast upon the grantee to appear before the Ruling Authority, but a duty is cast upon the *Chakors* to attend the authorities whenever required by them to do so. In short, there are no services of a personal nature to be rendered by Tekait Paran Singh under the *Sanad* of the 8th November, 1780. How can it then be suggested that the tenure was a service tenure and was *Ghatwalli* in its nature?

I will, however, assume that, though there were no services to be rendered by the *Tezkait* the fact that the grant imposed on him the duty of providing the village police was sufficient to impress the tenure with a *Ghatwalli* character. It is conceded in the judgment of the Judicial Committee that such a tenure may be alienable by custom. It is also conceded that the incident of inalienability ceases to attach to the tenure if the Government releases or abolishes the services

in some effective and lawful manner. I will first deal with the question of custom. My difficulty in dealing with this point is that the question was not discussed in the judgment of the Subordinate Judge. But the issue was clearly raised in the third paragraph of the written statement, and, as evidence of an unimpeachable character is in the record, I am clearly of opinion that I should express my views on this point. In the case of *Kali Pershad* v. *Anund Ray* (2), the Judicial Committee pointed out that Ghatwalli tenures are generally inalienable, but that evidence may be given to shew that in a certain district they are by local custom subject to special incidents in this regard. Such evidence was forthcoming in that case and was to the effect that many transfers had taken place in Kharakpur without being questioned or questionable, provided that the *Zemindar* of Kharakpur expressly assented to and accepted the transferee as his ghatwal. In this case we are dealing, not with a Kharakpur ghatwalli, but with Kharagdiha Ghatwalli, and we have conclusive evidence that numerous transfers have taken place in Kharagdiha without being questioned either by the holders of the gadis or by the Government. Ex.DD is the letter addressed by Capt. Wilkinson to the Government on the 3rd October 1834 on the serious situation created in Kharagdiha by reason of the chronic state of indebtedness of the Kharagdiha ghatwals. Cap. Wilkinson pointed out that Kharagdiha formerly consisted of 84 divisions designated gadis of which there were 51 in the agency, the rest having been transferred to the other Zillas. Dealing with 28 of the gadis which were permanently settled with the ghatwals, he said as follows :—" One of the gadis Lataki was sold in auction, and the heirs of the old proprietor subsist on charity collected from relations. One Kagali, was sold privately, and the family of the proprietor are in the same condition as the Lataki family. Of eight gadis, namely, Chakmanjo, Khurchutta, Deopur, Doetan, Domchanch, Ghoranji, Jurria, Beria, portions have been sold in different times by auction in satisfaction of decrees and by private sale. The portions which remain in the names of the ghatwals or *Zemindars* are pledged to Mahajans, and the *Zemindars* or ghatwals are in the greatest distress. The produce of the portion pledged will not cover the interest accruing on the last bonds executed. Eighteen gadis " and the names are given,—" are still in the possession of the heirs of the original ghatwals. They are all much involved in debt for the payment of which nearly the whole of their lands have been pledged to Mahajans and their condition is little better than those mentioned above". After pointing out that, if the Mahajans were allowed to recover their debts under Reg. 15 of 1793, 1 of 1798 or 17 of 1806, they must become proprietors in the course of three or four years of the whole landed property of Kharagdiha, he asked for special permission to be allowed " to invesitgate the accounts between the parties without any attention to bonds which have been intermediately executed." He suggested that there should be no appeal from his decision to the Sudder Dewani Adalut. Mr. Sifton points out in his Final Report on the Survey and Settlement Operations in the district of Hazaribagh that the proposals of Capt. Wilkinson received the immediate approval of the Government, and an order was passed under section 5 of Reg. 13 of 1833, declaring that no appeal against the agent's order in these matters should lie to the Sudder Dewani Adalut. Finally the Chota Nagpur Encumbered Estates Act was passed in 1876, extending the protection of the States to all Encumbered estates in Chota Nagpur. Mr. Sifton points out that there are at present only 12 gadis which are still the property of the original ghatwalli families, and 12 others in which the original families still retain a portion of their property.

Two questions fall to be considered ; first, what is the effect of the numerous transactions which have taken place as a result of which the estates or portions of the estates belonging to the Kharagdiha ghatwals have passed into the hands of strangers ? Secondly, what is the effect of the legislation, and particularly of the Encumbered Estates Act by which the protection of the state has been given to the encumbered proprietors of Chota Nagpur, including the Kharagdiha ghatwals ? To take the first question, it is remarkable that there was no effective protest by the Government against the power of alienation exercised by the ghatwals. It is not that the Government did not appreciate the

(2) 15 I. A. 18; 15 C. 471; 12 Ind. Jur. 172 ; 5 Sar. P. C. J. 121; 7 Ind. Dec. (N. S.) 893 (P. C.).

fact that it was necessary to maintain the ghatwals in the possession of their estates. Capt. Wilkinson, in his letter to the Government, stated the position in these words:— "The consequence of the Tekait's being deprived of their lands would, I am convinced, be disturbances of a nature something similar to those in Nagpur and Birbhum; for the Tekaits, although ignorant, have great influence over the inhabitants of the country who are chiefly men of their own and other low castes impressed with an idea that they have been cheated out of their lands by the Mahajans assisted by their own Karpardazes who have not unfrequently been near relations of the Mahajans." The Government took effective means for the protection of the Tekaits, but it never struck any one to raise the question whether these tenures were at all alienable. In my opinion, the evidence establishes that there is a well recognised custom in Kharagdiha under which these tenures have become alienable.

The other question is equally important. If these gadis were originally inalienable, the ghatwals did not stand in need of any state protection. The Chota Nagpur Encumbered Estates Act of 1876 was passed, as the preamble shows," to provide for the relief of holders of land in Chota Nagpur who may be in debt, and whose immoveable property may be subject to mortgages, charges and liens." Now this Act is the final effort on the part of the Government in the process of giving relief to "the holders of land in Chota Nagpur" which began with the action taken on the letter of Capt. Wilkinson in 1834. It is not necessary to go through the provisions of the Act; it is sufficient to point out that powers of a very sweeping kind are given to the executive officers to protect the encumbered holders of land in Chota Nagpur against the claims of creditors. Now there is no doubt that the ghatwals of Karagdiha come within the scope of the statute, and that the Act has been applied in their favour again and again. Now, if these estates were originally inalienable, how is it that the Legislature proceeds to devise means for the protection of those estates against the claims of creditors? I regard the Statute of 1876 as a legislative interpretation of the *sanads* under which the ghatwals of Kharagdiha held lands.

The last question is whether the Government has released or abolished the services renderable by the ghatwals in some effective and lawful manner. As I have pointed out, the only obligation imposed on the Tekait of Ghoranji under the *sanad* of the 8th November 1780, was to appoint the Barkandazes and the Digwars, and, it may be, to pay for their services. It will be found from Mr. Sifton's Final Report on the Survey and Settlement Operations in the district of Hazaribagh that the policing of the district was kept up by the ghatwals until 1834. In 1834, Government began to establish police stations, and in 1862, Government took over the entire management of the police under Act 5 of 1861 and abolished the police powers of the *Zemindars*. The Government then took up the question of the proper reorganization of the rural police or Digwars, and in 1877, Mr. Davis, the Superintendent of police presented a scheme for reorganization of the Digwari system throughout the district by means of Digwars paid by cash wages. He found that 938 Digwars were actually being maintained by the *Zemindars*; his scheme reduced the number of digwars to 450 to be distributed over 109 roads posts for patrol duty, and he calculated the costs of the establishment to be Rs. 2,220 per month. As the *Zemindars* had alienated portions of their estate, to digwars who would now be relieved of their duties by the substitution of paid road patrols, it was decided that the *Zemindars* could not be made responsible for the whole of this cost, but that it should be realized between the *Zemindars* and the *digwar Jagirdars* who retained their service lands without being required to perform any services. In the following year Act 8 (B. C.) of 1878 was passed empowering the Deputy Commissioner to fix the number of patrols necessary to protect the different roads and passes, and to realize their costs from the *Zemindars* and under tenure holders. Subsequent Acts dealing with the rural Police of Chota Nagpur are Act 5 (B. C.) of 1887 and Act I of 1914 (Behar and Orissa). It is pointed out by Mr. Sifton that the *Tekaits* of Kharagdiha are required to contribute altogether Rs. 5,280 for this purpose.

Now what is the effect of these subsequent events on the character of the tenure in the hands of the *Tekait* of Ghoranji? Clearly the Government has released the services

in an effective and lawful manner, if the obligation to appoint *Berkandazes* and *digwars* and to pay their wages could be called a service, and, in lieu thereof, has subjected his estate to a pecuniary charge. It was insisted by the learned Vakil for the appellant that the assessment by the Government of the *ghatwals* under Act 8 of 1878 is a continuation of their services in another form. But the change in form, in my opinion, is vital to the enquiry for it is obvious that the personality or the appointment of the holder is no longer of any importance. Payment of rent or revenue is a form of service, but a tenure where no other service is imposed than the payment of rent or revenue cannot be called a service tenure. In my opinion, if the tenure in question was ever a service tenure, the Government released or abolished the services by Act 8 of 1878, and it can no longer be regarded as a service tenure. I hold that the plaintiff is not entitled to succeed in the action on the ground that the tenure was inalienable.

The plaintiff's suit must also fail on another ground, namely, that he omitted to ask for a consequential relief although he was able to seek that relief in this action. The plaintiff's suit is a suit for declaration of title. No objection can be taken to the scope of the suit if, as the plaintiff asserts, he is still in possession of the disputed properties. The object of the suit is in substance to obtain a declaration that the conveyance of the disputed properties by his father, Tekait Hemraj Singh to Nawab Ali Khan, represented in this case by the defendants, so far back as the 14th December 1856 did not operate to confer any title on Nawab Ali Khan. Hemraj Singh died in 1857 and was succeeded in the *Gadi* by his son, the present plaintiff who, however, has died during the pendency of the appeal in this Court. It appears that the Court of Wards took possession of *Gadi Ghoranji* on behalf of the plaintiff and refused to recognise Nawab Ali Khan as the purchaser of the villages. Nawab Ali Khan thereupon instituted a suit for the purpose of having the deed of sale executed by Hemraj Singh established as against his son. It was open to the Court of Wards, which was then acting as the guardian of the present plaintiff, to take the plea that the tenure being *ghatwalli*, was inalienable. But the only defence that was put forward was that no such *kebala* had been executed by Hemraj Singh. The Calcutta High Court found in favour of the *kebala* and pronounced judgment in favour of Nawab Ali Khan (See Ex. K. 9-Part 3, page 34). Nawab Ali Khan then applied to have his name registered in the Government books as the proprietor of the purchased villages. The application was rejected on the 18th April 1868 by the Deputy Commissioner on the ground that the *gadi* was a service tenure and was inalienable. The order was maintained on appeal by the Commissioner on the 30th March 1869. When the Land Registration Act came into operation, the plaintiff applied to have his name registered in the Land Registration Department in respect of all the villages comprised in the *Gadi*. Nawab Ali Khan objected. The objection was allowed, and the name of Nawab Ali Khan was recorded in respect of the villages which were the subject-matter of the conveyance. In dealing with this point, the Deputy Collector said as follows :—" The Government has now decided by their letter No. 3002 dated the 5th December 1878 that the names of *bona fide* occupants of *ghatwalli* tenures are to be registered, but it will not affect the right of Government. There is no doubt that the applicant is in possession for a long time by right of purchase. I would, therefore, on the authority of the Government order quoted above register the applicant's name as a joint sharer." In the Record of Rights, finally published on the 23rd February 1913, the names of the defendants were recorded as proprietors of the disputed villages. The Subordinate Judge, on a consideration of all the evidence, came to the conclusion that the plaintiff was not in possession of the disputed villages and that the suit was barred by the provisions of section 42 of the Specific Relief Act.

Before dealing with the point, it is as well to dispose of an objection taken by the Stamp Reporter. He took the view that the plaintiff could not avoid paying the proper Court-fee as in a suit for declaration of title and for possession by casting his reliefs in a declaratory form. With this view, I do not agree. The question of Court-fee must be decided on the plaint; and though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he

has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper fee as in such a suit. Here the plaintiff insists that it is not necessary for him to ask for a consequential relief. Although he takes a risk in so insisting in that he is liable to have his suit dismissed under section 42 of the Specific Relief Act if the Court ultimately comes to the conclusion that it was open to him to ask for a consequential relief, he is clearly entitled to have the case made by him in the plaint tried by the Courts. I hold that the plaintiff cannot be called upon to pay the fee as in a suit for a declaration of title and consequential relief.

Coming now to the merits, there is no doubt whatever that the plaintiff is not in possession of the disputed properties, and that the Court will not make a declaration in his favour, since the plaintiff, being able to seek further relief than a mere declaration of title, omitted to do so. The learned Vakil for the appellant accepts the finding of fact of the Court below so far as the finding can be confined to the tenanted portions of the villages ; but he insists that so far as jungle lands and minerals are concerned, they cannot be in the actual possession of the defendants, and must be deemed to be in his possession assuming—as this argument must assume—that he has a good and valid title to the villages. The argument is founded upon the well-known principle that a person who has got possession by wrong cannot have recourse to the doctrine of constructive possession in his favour. Now possession, in the sense in which that term is used in jurisprudence, must be accompanied by an intention to possess, an *animus possidendi*. Now it cannot be said of a wrong-doer that there is any intention to possess that of which he has not a definite physical control. But of that of which he has a definite physical control, he is clearly in possession, provided the *animus possidendi* is established. I think this is at the bottom of the rule which lays down that a wrong-doer cannot have recourse to the doctrine of constructive possession. But let us go a step further. Supposing a person without title acquires possession of a part of the land and then proceeds to mark out the area of the entire land which he intends to possess. Clearly he has shown an intention to possess the entire area, and he will be deemed to be in possession of the entire area, though he has a definite physical control only over a portion. I think that it is more correct to say that, in the absence of title, the law will raise from definite physical control of part of land a presumption of possession of that, neither more nor less, which the possessor has shown a clear and unambiguous intention to possess.

But here the defendants were in no sense wrong-doers. They were in by a document which purported to convey whatever title the vendor had in the villages conveyed. There was no dispute as to the boundaries of the villages, and the position is the same as if the defendants had marked out the entire area conveyed to them. It may be that the conveyance did not confer any title on them ; but they were not aware of any defect in their title, and there was clearly an intention to possess the entire area conveyed to them in the right of the vendor. In my opinion, the defendants were just as much in possession of the jungles and the minerals as of the tenanted portions of the villages. I agree with the Subordinate Judge that the suit is barred by the provisions of section 42 of the Specific Relief Act.

The appeal must be dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1507 OF 1921.

December 17, 1923.

Present :—Mr. Justice Piggott, Mr. Justice Lindsay and Mr. Justice Sulaiman.

ALKHU RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LACHHMAN UPADHIA—DEFENDANT—RESPONDENT.

Construction of document—Precedents, value of—Pre-emption—Wajib-ul-arz, *entry in, construction of.*

The *wajib-ul-arz* of a village contained the following clause ;—

ALKHU RAI v. LACHHMAN UPADHIA

" If one of the the co-sharers disires to make a mortgage, or a mortgage by conditional sale, or an out-and-out sale, he must do so on the same adequate price as may be offered by other parties, in the first instance to a near co-sharer in the same *patti*, next to other co-sharers in the *patti*, if they will not take, then to a near co-sharer in another *patti* : next to any co-sharer in the mahal, and finally to a stranger."

Held, that the clause conferred no right of pre-emption on the occasion of the foreclosure of a mortgage by conditional sale apart from the right conferred on the occasion of the creation of the mortgage itself.

Case-law discussed.

Any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language, and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied, an appellant, or a respondent, relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns, can do nothing more than ask the Court to take into consideration the general principles which have been applied by other Hon'ble Judges in similar cases and to derive from them whatever assistance it can towards arriving at a correct conclusion. [p. 551, col. 2].

Appeal from the decision of the District Judge, Ghazipur, dated the 25th May 1921.

Messrs. *M. L. Agarwala* and *Uma Shankar Bajpai*, for the Appellants.

Messrs. *Haribans Sahai* and *Iqbal Ahmad*, for the Respondent.

JUDGMENT.

Piggott, J.—The facts out of which this appeal arises are sufficiently stated in the referring order. The essential point for determination is whether, under a custom described in the *wajib-ul-arz*, the plaintiffs—appellants have or have not a right of pre-emption in respect of a foreclosure decree which was made absolute on the 12th April 1919. The said decree was passed on a mortgage by conditional sale executed in the year 1861. The record of the custom in the *wajib-ul-arz* is in the following terms :—

" If one of the co-sharers desires to make a mortgage, or a mortgage by conditional sale, or an out-and-out sale, he must do so on the same adequate price as may be offered by other parties, in the first instance to a near co-sharer in the same *patti*, next to other co-sharers in the *patti*, if they will not take, hen to a near co-sharer in another *patti* ; next to any co-sharer in the *mahal*, and finally to a stranger."

If we were called upon to interpret these words, apart altogether from any decisions which have been pronounced or reported in other cases, I cannot say that I should feel any serious difficulty as to their meaning. I understand them to mean that a right of pre-emption is violated, and a cause of action given to the persons possessing pre-emptive rights in the order specified above, in the event of an ordinary mortgage in favour of a stranger, or of a mortgage by conditional sale in favour of a stranger, or of an out-and-out sale to a stranger. In each of these cases the violation of the right would occur, and the cause of action would accrue, from the date of the ordinary mortgage, the mortgage by conditional sale and the out-and-out sale respectively. I cannot read anything into the provisions of the *waji-bul-arz*, as quoted above, which would warrant the conclusion that, in the case of a mortgage by conditional sale, a pre-emptor whose rights were violated by the mortgage contract is entitled, either to claim to be placed at once in the shoes of the mortgagee, or to wait until proceedings are taken for foreclosure and then to prefer his claim to be placed, as owner of the property, in the shoes of the mortgagee, after the latter has enforced his rights to foreclosure by process of law.

It has, however, been contended that there is a great deal of case-law which requires to be considered before a correct interpretation can be placed upon the provisions of this *waji-bul-arz*. With reference to this argument I would take this general point, that any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language, and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied, an appellant, or a respondent, relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns, can do nothing more than ask the Court to take into consideration the general principles which have been applied by other Hon'ble Judges in similar cases and to derive from them whatever assistance it

can towards arriving at a correct conclusion.

Looking at the matters from this point of view, I think that, of all the cases which have been cited to us, the one most immediately in point is that of *Sundar Kunwar* v. *Ram Gulam*(1). The learned Judges who decided that case were dealing with a *waji-bul-arz* the terms of which were so far analogous to those of the document we are seeking to interpret, in that a right of pre-emption was given in respect of transfers either by mortgage or by sale. Furthermore, in the decision of that case, reference is made to the previous Full Bench ruling of this Court which has been most strongly relied upon by the plaintiff in appeal before us. This is the case of *Alu Prasad* v. *Sukhan* (2). The point taken by Richards, C. J. in discussing this older ruling is, in substance, the one which I have myself ventured to make. He treats the question as being essentially one of the interpretation of a document, and he holds that he is not bound to put a particular interpretation upon a particular document because observations made by learned Judges of the Court, in a case in which the general circumstances were not the same, and the document to be interpeted was not in identical terms, serve to suggest that, if the said Judges had had to decide the case then before the Court they might have interpreted the document under consideration in a particular way. The decision actually arrived at in *Sundar Kunwar* v. *Ram Ghulam* (1) supports the view that I should myself be disposed to take of the *waji-bul-arz* now before us.

It has been admitted in argument that this view is in accordance, generally, with the principles of interpretation applied to evidence of custom in cases which have come before this Court on appeal since the constitution of the Pre-emption Bench. On behalf of the appellants reliance is placed on certain older cases of this Court, and in particular the argument is preferred that the Pre-emption Bench has in effect overruled older Full Bench decisions and has applied to the decision of cases before it principles inconsistent with those affirmed by their Lordships of the Privy Council in *Batul Begam* v. *Mansur Ali Khan* (3). The point of their Lordships' decision in that case is to be found in the remarks at the close of the judgment, wherein they approved of the decision of this Court in *Ali Abbas* v. *Kalka Prasad* (4). Now, with regard to this case, as also to the one which went before the Privy Council, it seems to me important to notice that these were cases in which a claim for pre-emption was dismissed, and was dismissed upon a finding of limitation. The actual decision, therefore, in each case amounted to no more than this, that a cause of action had accrued to the pre-emptor at least from the date on which something had happened amounting to the foreclosure of a mortgage by conditional sale. The question whether any cause of action had or had not accrued before that date was one which it was no concern of either party in the cases then before the Court to argue. The decisions in themselves are not authority for anything more than what was actually decided. The real difficulty, so far as there is any, arises out of the older case of *Alu Prasad* v. *Sukhan* (2). It is to be noted that this case was decided by a Full Bench of five Judges and that there was very considerable difference of opinion. The case was one in which there had been a transfer by way of mortgage by conditional sale, and this had been followed by foreclosure proceedings under the old Regulation in force before the passing of the Transfer of Property Act, No. IV of 1882. According to the head-note, the five judges who heard the appeal were divided into three distinct categories of opinion. Pearson, J., held that a cause of action for a pre-emption suit had arisen from the date of the mortgage by conditional sale, and that no subsequent cause of action arose out of the foreclosure proceedings. Stuart, C. J. held that no cause of action accrued to the plaintiff on the date of the mortgage, but that he had a cause of action from the date of the foreclosure proceedings. The remaining three Judges constituting the Bench were of opinion that causes of action accrued to the plaintiff pre-emptor on both dates, but that he had a right to bring a suit on the

(1) 46 Ind. Cas. 900 ; 16 A. L. J. 561 ; 40 A. 626.
(2) 3 A. 610 ; A. W. N. (1881) 31 ; 2 Ind. Dec. (N.S.) 329 (F. B.).
(3) 24 A. 17 ; 5 C. W. N. 888 ; 28 I. A. 248 ; 3 Bom. L. R. 707 ; 8 Sar. P. C. J. 138.
(4) 14 A. 405 ; A. W. N. (1892) 108 ; 7 Ind. Dec. (N.S.) 627 (F. B.).

strength of the later of the two causes of action, even though he had ignored the first. Personally, after examining the judgment delivered by Straight, J., in detail, I should feel disposed to question the correctness of the head-note. I very much doubt if Straight, J., did not intend to hold that, on the terms of the particular custom which the Court held to be proved in that case, the plaintiff pre-emptor could not have brought a claim to pre-empt on the mortgage, and if so, he was in agreement with the Chief Justice on this point. At any rate, the learned Judges were very much divided, as has above been shown. They were dealing with a Record of Rights the wording of which was certainly not identical with that of the *wajib-ul-arz* which we are considering. Moreover, they were dealing with foreclosure proceedings which had taken place under the old Regulation. In my opinion, therefore, the ruling in this case cannot be quoted as in itself determining any specific point of law in such a manner as to bind subsequent decisions. If we are asked to consider the opinions expressed by the learned Judges who then constituted the Full Bench of this Court, we are certainly bound to receive with all due respect the views upon questions of law expressed by those Judges ; but so far as I am personally concerned, I can only say the line of reasoning followed by Pearson, J., in his dissentient judgment appeals more strongly to my mind than anything else which I can find in the report of the case.

To conclude, therefore, I am of opinion that, if the question now before us is to be determined apart altogether from previous authorities of the Court, then this appeal ought to fail, because upon a plain and straightforward construction of the terms of the *wajib-ul-arz* the plaintiffs' cause of action accrued to them on the date of the mortgage, and the subsequent foreclosure of that mortgage was not a transfer by a co-sharer by way of sale within the meaning of the custom as recorded in the *wajib-ul-arz*. On the question of authority, it seems to me that the balance of authority is also on the whole in favour of the same view, and that the decision of the Full Bench in *Alu Prasad* v. *Sukhan* (2) may fairly be distinguished, and should not be regarded as binding us to put upon the *wajib-ul-arz* in this particular case the interpretation contended for by the appellants. I would, therefore, dismiss this appeal with costs, including fees on the higher scale.

Lindsay, J.—I agree.

Sulaiman, J.—I agree that every case of presumption must be judged on its own merits. In such a case it is not sufficient for the plaintiff pre-emptor merely to prove that there is a general custom of pre-emption prevailing in the village. It is incumbent on him to establish such particulars of that custom as would entitle him to a decree. In the present case the plaintiffs came into Court on the allegation that there was a custom in village under which, if a mortgage by conditional sale was foreclosed by a decree of the Civil Court the co-sharers had a right to intervene and take the property by pre-emption from the successful plaintiff. In order to establish such a custom the sole evidence produced consisted of an entry in an old *wajib-ul-arz* which has been recited in full by my learned brother. Independently of all authorities, I would agree that the only interpretation which can be put on the terms of that *wajib-ul-arz* would be to hold that that cannot apply to a case like the present. The plaintiffs claimed that they had a cause of action to bring the suit for pre-emption on the date when the foreclosure decree was passed. It cannot be said that on that date the defendant vendor was wishing to make a mortgage by conditional sale or an absolute sale in favour of the old mortgagee. I am of opinion that the terms of the *wajib-ul-arz* as they stand contemplate a voluntary sale and not a transfer which is effected by compulsion of law.

The learned Vakil for the plaintiffs has relied on a number of earlier cases of this Court including those of *Alu Prasad* v. *Sukhan* (2), *Ali Abbas* v. *Kalka Prasad* (4) and *Batul Begam* v. *Mansur Ali Khan*, (5) all of which were Full Bench cases, and also on the Privy Council case of *Batul Begam* v. *Mansur Ali Khan* (3). The argument before us has been that in view of the expression of opinion in these Full Bench cases the word "sale" in the *wajib-ul-arz* should be given a wide meaning so as to include the extinguishment of the right of the mortgagor by foreclosure. The learned Vakil does not say that the present *wajib-ul-arz* should be interpreted

(5) 20 A. 315 ; A. W. N. (1898) 61 ; 9 Ind. Dec. (N. S.) 562 (F. B.)

in the light of the interpretation put upon the *wajib-ul-arz* in the earlier cases. What he has really contended is that the word "sale" should be taken in its general and wider meaning and not in its narrow meaning as defined by the Transfer of Property Act.

If the present case had arisen under the old Regulations and had been governed by those Regulations, I am bound to say that on the authorities cited before us I would have felt compelled to hold that the word "sale" must be taken in its general meaning so as to include the extinguishment of the right of redemption on foreclosure. That, however, is not the case. It is well known that before the Regulations came into force a mortgage by conditional sale used to become absolute on the expiry of the period fixed. The object of the Regulations was somewhat to protect the right of redemption of a mortgagor, and to give him a further period of grace. It was, however, held by their Lordships of the Privy Council in *Alexander John Forbes* v. *Ameeroonnissa Begam* (6), that the proceedings following an application under section 7 of the old Regulations up to the order passed under section 8 of those Regulations were purely ministerial act and not a judicial act. It was on this ground that the majority of the learned Judges in *Ali Prasad* v. *Sukhan* (2) above referred to came to the conclusion that the foreclosure was the consequence of the mortgagor's failure to redeem mortgage, that it was really the result of his own act and not on account of any intervention by the Court. Under the present law, however, suits for foreclosure are governed by the Code of Civil Procedure. The proceedings taken with regard to the foreclosure of a mortgage are proceedings in Court and the equity of redemption is extinguished by a decree of the Court. It cannot, therefore, be said that the right of redemption is extinguished by any act of the mortgagor himself. I am, therefore, of opinion that even accepting the view which was laid down in the earliest Full Bench cases, the soundness of the opinion in one of which, namely, *Ali Abbas* v. *Kalka Prasad* (4) appealed to their Lordships of the Privy Council in the case reported in *Batul Begam* v. *Ali Khan* (3) those cases are distinguishable on the main ground that suits for foreclosure are now governed by Statute. I am fortified in this view by the opinion expressed by the Full Bench in the case of *Gaya Bharthi* v. *Lokhnath Rai* (7) that a claim for pre-emption could not be enforced after the order absolute for foreclosure under the Transfer of Property Act had been passed.

I also would, therefore, dismiss the appeal.

The order of the Court is that this appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(6) 10 M. I. A. 340 ; 5 W. R. P. C. 47 ; 1 Suth. P. C. J. 621 ; 2 Sar. P. C. J. 153 ; 1 Ind. Jur. (N.S.) 117 ; 19 E. R. 1002.

(7) 20 A. 103 ; A. W. N. (1897) 203 ; 9 Ind. Dec. (N. S.) 426 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 877 OF 1921.

February 1, 1924.

Present :—Mr. Charles Gordon Spencer, Offg. Chief Justice.

POOCHAMMAL *alias* KAMAKSHI AMMAL—PLAINTIFF—APPELLANT

versus

SOUNDRAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by widow—Decree, whether alienation—Suit to challenge collusive decree based on sham transaction—Limitation, commencement of—Limitation Act (IX of 1908) Sch. I, Art. 125.

In some cases decrees of Court to which a limited owner is a party may amount to alienations. The test to be applied in order to determine whether a widow's action in submitting to a decree amounted to an alienation is to see whether she materially contributed by her action to the transfer. [p. 555, col. 2 and 556, col. 1.]

Kunni Lal v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 ; 8 A. L. J. 552; 13 C. L J. 575; 13 Bom. L. R. 427 ; 10 M. L T. 25 ; (1911) 1 M. W. N. 432 ; 21 M. L. J. 645 ; 38 I. A. 87 (P. C.); *Kanhaiya Lal* v. *Kishori Lal*, 35 Ind Cas. 683; 38 A. 679; 14 A. L. J. 881 ; *Gadiraju Somaraju* v. *Dandu Venkiah*, 53 Ind. Cas. 171; 26 M. L. T. 180; *Ranga Row* v. *Ranganayaki Ammal*, 47 Ind. Cas. 578; (1918) M. W. N. 739; 35 M. L. J. 364 ; 8 L. W. 455, relied on.

A suit by the reversioner of a deceased Hindu for a declaration that a decree and sale in execution of it in a suit on a sham mortgage brought collusively against the widow of the deceased with her conni-

vance are not binding on the estate after the lifetime of the widow, is governed by Art. 125 of Schedule I to Limitation Act, and limitation commences to run from the date of the decree or of the sale and not from the date of the sham mortgage, which the reversioner is not bound to get set aside. [p. 555, col. 2.]

A sham transaction means a transaction which has no legal effect either upon the parties who enter into it or upon the estate which they represent. Such a transaction need not be set aside by a reversioner, but can be ignored. [p. 555, col. 2.]

Appeal against the decree of the District Court, Trichinopoly, in A. S. No. 203 of 1920 preferred against the decree of the Court of the Additional District Munsif, Kulitalai, in O. S. No. 343 of 1919 (O. S. No. 10 of 1919 of the District Munsif's Court Srirangam).

Mr. *M. S. Vaidyanatha Iyer*, for the Appellant.

Mr. *N. S. Rangasami Iyengar*, for the Respondents.

JUDGMENT.—This is a suit by a reversioner to obtain a declaration that the Court sale in favour of the 2nd defendant of certain properties which belonged to the reversioner's father and the subsequent sale by the 2nd defendant to the 3rd defendant are not for purposes binding on the estate and are not valid after the death of the 1st defendant her step-mother who is alleged in the plaint to have got a suit instituted by 2nd defendant, her maternal uncle, who is also husband of her sister. The District Munsif dismissed the suit on the issue as to limitation without trying the other issue and the District Judge confirmed his decree. The ground given by the District Judge for holding that the suit is barred by limitation under Art. 125 is that the decree and sale sought to be declared invalid were preceded in 1905 by a mortgage and that the sale in execution cannot be taken as the starting point for limitation when there is a previous mortgage upon which the decree was obtained. There are observations to this effect in Rustomjee's Commentary on the Law of Limitation in which reference is made to *Jaggi* v. *Pirthi Pal*, (1). The learned Judges in that suit held that reversioners could not maintain a suit under Art. 125 to declare that a Court sale was not valid against the reversion unless they were entitled to a declaration that the antecedent mortgage also was void except for the life of the mortgagor. There is no discussion in that decision of the questions whether the mortgage itself was binding or not on the reversion and whether the decree obtained on that mortgage was a fresh act of alienation or whether it bound the reversioners as being a decree obtained by the widow representing the estate of her late husband. The present case, however, is distinguishable. In the plaint it is alleged that the mortgage of 1905 was a sham hypothecation executed in order to defeat the reversionary rights of the plaintiff and without any justifying necessity. The Courts below have not investigated the nature of that transaction. No relief is asked for in respect of it. If the mortgage was binding upon the reversion it would be open to the reversioners on the widow's death to redeem it if they applied in time for redemption. If it was an act of the widow not binding upon the reversion, it would operate only for the lifetime of the widow. If it was a sham transaction, the reversioners could ignore it and were not bound to sue to set it aside. A sham transaction means a transaction which has no legal effect either upon the parties who enter into it or upon the estate which they represent.

As regards the subsequent decree and sale the allegation in the plaint is that the 1st defendant got her uncle to institute the suit O. S. No. 379 of 1909 and got up a decree in collusion with him and had the properties purchased for a price much below their value. Whether the action of the 1st defendant in colluding with her relative to defraud the estate by a collusive decree and sale amounted to an alienation has not been decided by the Courts below. It is indisputable that in some case decrees of Court to which a limited owner is a party may amount to alienations. This appears from the Privy Council decision in *Khunni Lal* v. *Gobind Krishna Narain* (2) and has been followed in *Kanhaiya Lal* v. *Kishori Lal* (3) and considered by this Court in *Gadiraju Somaraju* v. *Dandu Venkiah* (4) and

(1) (1894) A. W. N. 134 at p. 137.

(2) 10 Ind. Cas. 477 ; 83 A. 356 ; 15 C. W. N. 545; 8 A. L. J. 552 ; 13 C. L. J. 575 ; 13 Bom. L. R. 427 ; 10 M. L. T. 25 ; (1911) 1 M. W. N. 422 ; 21 M. L. J. 645 ; 38 I. A. 87 (P. C.).

(3) 35 Ind. Cas. 683 ; 38 A. 679 ; 14 A. L. J. 881.

(4) 53 Ind. Cas. 171 ; 26 M. L. T. 180.

Ranga Rao v. *Ranganayaki Ammal* (5). The test applied by the Privy Council to decide whether the widow's action amounted to an alienation was to see whether she materially contributed by her action to the transfer, and a similar principle has been observed in the other decisions which followed the Privy Council judgment. If the plaint allegation is true that the 1st defendant was a party to a collusive suit followed by a decree and a sale and if she materially contributed to the property belonging to the estate being alienated by that means, the plaintiffs are within time in this suit of 1919 in bringing an action under Art. 125 to have that alienation declared to be void and the suit should not have been dismissed on the issue as to limitation without deciding the other issues which arise out of the plaint allegations. I am not aware of any other authority for holding that a reversioner who complains of a greater invasion of his reversionary rights, such as an outright sale, should be compelled to first sue to have a lesser infringement of his rights, such as a redeemable mortgage declared invalid before he can obtain relief in respect of the greater injury.

In the result, the appeal is allowed, the lower Court's decrees are set aside and the suit is remanded for disposal upon its merits. Costs in the lower Courts will abide and be provided for in the final decree. 3rd respondent will pay the appellant's costs in this Court and bear his own. The appellant is entitled to have the Court-fee on the Second Appeal refunded.

V. N. V. *Appeal allowed.*

Z. K.

(5) 47 Ind. Cas. 578; (1918) M. W. N. 739; 35 M. L. J. 864; 8 L. W. 455.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 186 OF 1923.

January 22, 1924.

Present:—Mr. Daniels, J. C.

THE PRESIDENT ZARDOZI UNION, LUCKNOW—PLAINTIFF—APPLICANT

versus

BASHIR KHAN—DEFENDANT—OPPOSITE PARTY.

Societies Registration Act (*XXI of* 1860), *ss.* 9, 18—*Penalty imposed by Society, when can be recovered—Rules framed before registration lodged with Registrar, force of.*

Section 9 of the Societies Registration Act implies that in order to be recoverable in a Court of law, a penalty imposed by a society registered under the Act, must have been imposed in the manner prescribed by the Act and not otherwise, that is to say, for breach of a bye-law duly made in accordance with the rules and regulations of the Society, or, if the rules do not provide for the making of bye-laws, a bye-law made at a general meeting by the concurrent votes of three-fifths of the members present. [p. 557, col. 1.]

The mere fact that certain rules framed by a Society before registration are lodged, after registration, with the Registrar under section 18 the Societies Registration Act, does not invest them with any special legal force. [p. 557, col. 1.]

Revision against the judgment of the Judge, Small Cause Court, Lucknow, dated the 13th October, 1923.

Mr. *Bisheshwar Nath Srivastava*, for the Applicant.

Mr. *Rameshwar Dayal*, for the Opposite-Party.

JUDGMENT.—This is an application in revision on behalf of the Zardozi Union or Society of embroiders of Lucknow, which is a Society registered under the Societies Registration Act (XXI of 1860). The applicant society filed a suit in the Small Cause Court to recover from the defendant arrears of subscription and a penalty of Rs. 15 imposed on him by the managing committee of the Society. The claim for arrears of subscription was decreed but the claim to penalty dismissed and it is in respect of the latter amount that the present application has been filed. The rules of the Society authorise the managing committee to impose a penalty up to Rs. 25 on any

member who fails to pay his subscription promptly. These rules were made before the society was registered but a copy of them was lodged with the Registrar under section 18 of the Act. The fact that they were so filed does not, however, invest them with any special legal force. Section 9 of the Act provides for the recovery in a Court of law of any pecuniary penalty imposed for the breach of a bye-law duly made in accordance with the rules and regulations of the Society, or, if the rules do not provide for the making of bye-laws, any bye-law made at a general meeting by the concurrent votes of three-fifths of the members present. It is admitted that the penalty in the present case is not covered by this section; but it has been argued that it is recoverable under an implied contract because the rule under which it was imposed was passed unanimously at a meeting at which the defendant was present. I agree with the Court below that this contention cannot be accepted. To accept it would render sections 9 and 10 of the Act altogether superfluous. It is a case of *inclusio unius exclusio alterius*. Section 9 clearly implies that in order to be recoverable in a Court of law a penalty must have been imposed in the manner prescribed by the Act and not otherwise. I agree with the view taken by the Court below and accordingly dismiss this application with costs.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1752 OF 1922.

January 31, 1924.

Present :—Mr. Justice Wallace.

MAUTRIPRAGADA GOWRIKANTAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANTIPRAGADA RAMAMURTHY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Inam—*Karnam Service* Inam—*Enfranchisement, effect of—Resumption and re-grant—Distinction between service and personal* Inams—*Prescriptive title against grantee of service* Inam, *proof of—Madras Act IV of 1862, IV of* 1868 *and VIII of* 1869, *operation of.*

The enfranchisement of a service *inam* is a clear and unequivocal resumption by Government of the land and the issue of a title deed amounts to a re-grant which creates a new title in the grantee. [p. 559, col. 1.]

Musti Venkata Jagannadha Sarma v. *Musti Veerabhadrayya*, 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.); *Venkata* v. *Rama*, 8 M. 249; 9 Ind. Jur. 185; 3 Ind. Dec. (N. S.) 172, followed.

Gunnizan v. *Kamakshi Aiyar*, 26 M. 339; 17 M. L. J. 101; 2 M. L. T. 101. *Pingala Lakshmipathi* v. *Bommireddi Palli Chalamayya*, 30 M. 434; *Neelachalam* v. *Kamaraju*, 14 M. L. J. 438; and *Idarapalli Dhanush, Kotirayudu* v. *Venkataratnam*, 59 Ind. Cas. 65; 38 M. L. J. 320; 11 L. W. 453, *held overruled.*

The distinction between the enfranchisement of a service *inam* and that of a personal inam is that the latter is a mere release of the service obligation, that is a release by the Crown of its reversionary interests, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement. [p. 558, col. 2.]

No one claiming adversely to an *inam* title-deed can succeed on a prescriptive title unless he proves either that there was no *inam* at all or that Government had no right left in it at the time of the resumption, that is, that his prescription was for more than sixty years at the date of the grant. [p. 559, col. 1.]

Madras Acts IV of 1862 and IV of 1868 are mere legal statements of the evidentiary value of an *inam* title deed and Madras Act VIII of 1869 merely saves the existing rights of occupancy holders or *kudivaramdars* already on the land. [p. 558, col. 2 and 559, col. 1.]

Talikonda Lakshminarasimham v. *Talikonda Venkataratnayamma*, 70 Ind. Cas. 642; 80 M. L. T. 334, referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 154 of 1922 (A. S. No. 395 of 1921, on the file of the District Court, Vizagapatam) preferred against the decree of the Court of the Additional District Munsif, Vizianagaram, in O. S. No. 212 of 1921 (O. S. No. 28 of 1920, on the file of the Court of the Principal District Munsif, Vizianagaram).

Mr. *Y. Suryanarayana*, for the Appellants.

Mr. *K. N. Rajagopala Sastri*, for the Respondents.

MAUTRIPRAGADA GOWRIKANTAM *v.* MANTIPRAGADA RAMAMURTHY

JUDGMENT.—The plaintiff, the seventh defendant and another were the sons of one Bogyapparaju. The plaint property was a *Mirasi Karnam inam* enfranchised in the names of the seventh defendant, the plaintiff and Suryanarayana, who were the three sons of Bogyapparaju, and the first defendant who is the brother of Bogyapparaju, Suryanarayana died long ago. The plaintiff sued for one half share in the property on the footing that the 1st defendant had no right in it. The first defendant relied on a family arrangement in 1905 in which the plaintiff and the seventh defendant gave up their third shares to the first defendant. The District Munsif upheld that arrangement and dismissed the suit on the ground that the first defendant had been in adverse possession for more than 12 years since 1905. In the lower Appellate Court it was argued that, as the enfranchisement of the *inam* was in 1911, the property was until then the absolute property of Government, that the first defendant, if he was from 1905 to 1911 prescribing for a title for adverse possession, could so prescribe against Government only and had not completed such title, that no adverse possession was running from 1905 against the plaintiff since the plaintiff's title only began in 1911, and that the title of any of the grantees under the *inam* title deed began only on the date of the enfranchisement, namely, in 1911. The lower Appellate Court accepted that argument, and gave a decree for plaintiff. The first defendant appeals.

There are two main lines of argument for the appellant, first, that enfranchisement and grant of an *inam* title-deed means nothing more than a removal of the service obligation on the land and does not in any way affect the manner in which the land was previously held or affect the rights of those previously holding it, whether members of the service-holder's family or outsiders; and secondly that, even if it be held that the *inam* title deed implies total resumption of Government and re-grant, that re-grant will not avail to disturb the pre-existing rights in the land, of persons not claiming any title or *spes* in the office, and particularly, will not rid the land of any right in the land acquired by outsiders by adverse possession. These points were argued on the assumption that, if the enfranchisement does not avail to break the running of the adverse possession in favour of the first defendant, then the first defendant's title by adverse possession is perfected.

On the first point I am quite clear that it cannot now be considered good law in the face of the Privy Council pronouncement of *Venkata Jagannadha Sarma* v. *Musti Veerabhadrayya* (1). That decision interpreted an *inam* title deed of exactly the same terms as the present one and of almost the same date. It lays down clearly that the lands comprising the emoluments of the *Karnam* office are attached to the office as such, so that, even if a stranger to the family is appointed, the land goes with the appointment, that eligibility to the office is a personal matter though the land goes with the office and is impartible, and that Government, in the act of enfranchisement, severs the land from the office and allows the office-holder for the time being to enfranchise it. The Full Bench ruling in *Venkata* v. *Rama* (2) and other rulings which have followed it are approved in that decision and other rulings of this Court which do not follow *Venkata* v. *Rama* (2) for example, *Gunnaiyan* v. *Kamakshi Aiyar* (3) and *Pingala Lakshmipathi* v. *Bommireddi Palli Chalamayya* (4) are disapproved of. The whole trend of that decision was set out and relied on in S. A. No. 287 of 1921 in this Court, with which I respectfully agree. It was there clearly pointed out that the distinction between the enfranchisement of a service *inam* and that of a personal *inam* is that the latter is a mere release of the service obligation, release by the Crown of its reversionary interests, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although no doubt ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement. The appellant relies on the wording of Act IV of 1862, Act IV of 1868 and Act VIII of 1869 and the ruling in *Talikonda Lakshminarasimham* v. *Talikonda Venkataratnayamma* (5). The first two Acts are mere legal statements of the

(1) 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1, 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. P. C. 96; 48 I. A. 244. (P. C.)

(2) 8 M. 249; 9 Ind. Jur. 185; 3 Ind. Dec. (N. S.) 172.

(3) 26 M. 339.

(4) 30 M. 434; 17 M. L. J. 101; 2 M. L. T. 101.

(5) 70 Ind. Cas. 642; 30 M. L. T. 334.

MAUTRIPRAGADA GOWRIKANTAM MANTIPRAGADA RAMAMURTHY

evidentiary value of the inam title-deed, while Act VIII of 1869 seem to me merely to save the existing rights of occupancy holders or *kudivaramdars* already on the land. It has been pointed out to me that Act VIII of 1869 in terms only applies to inam title-deeds "heretofore issued" and this point seems to have been overlooked, if I may say so with respect, by Spencer, J. in *Talikonda Lakshminarasimham* v. *Talikonda Venkataratnayamma*(5). It does not follow from the Act that inam title deed issued after it did not create a title where no title existed before. The other learned Judge, Ramesam, J. proceeded on the footing that the case does not prevent an aggrieved party whose name was already in the title-deed, from showing that another name was included in it by mistake. I may also note that the pronouncement on this point in that case was not necessary for the decision of the case, since the decision proceeded on a finding of estoppel *aliunde*. I, therefore, follow what I conceive to be the *ratio decidendi* of the case and hold that the enfranchisement of a service inam and the issue of a title-deed thereupon creates a new title in the grantee. I do not in any case understand the first defendant to contend here that the name of the plaintiff was included in the inam title-deed by mistake other than failure to give effect at the time of the issue of the title-deed to his own title by adverse possession. There is no plea before me, for example, that the grantees were not at the time holders of the service.

This brings me to the second point namely, whether assuming that the first defendant has been in exclusive possession of the land for more than 12 years before suit, that prescriptive title can avail against the rights of the grantees under the title-deed. Such an argument has been considered in S. A. No. 287 of 1921 above, and it was there decided that no one claiming adversely to the inam title-deed can succeed on prescriptive title unless he proves either that there was no inam at all or that Government had no right left in it at the time of the resumption, that is, that his prescription was for more than sixty years at the date of the grant. The first alternative does not arise here since it is not contended that the land was not service inam. As to the second alternative the appellant argues that it is not necessary for him to prescribe against Government and that it is sufficient if he had prescribed against the plaintiff, who claims under the title-deed. Since, however, I hold it is clear on the authority of *Venkata Jagannadhaswami* v. *Musti Veerabhadrayya* (1) that enfranchisement is a clear and unequivocal resumption by the Government of the land and a re-grant to whomsoever it pleases, it follows that, unless Government had at the time of the resumption no right to resume, the 1st defendant has no case. If the rulings relied on by him *Neelachalam* v. *Kamaraju* (6), and *Idarapalli Dhanush Kotirayudu* v. *Vankayala Venkataratnam* (7), imply the contrary, they must be taken to have been overruled by the case, which was pronounced in 1921. The case of *Majanath Alli* v. *Khaji Mis Mujafar Alli* (8), is a case of a khaji inam, to which the case has no application and is not in point here. Different considerations as pointed out in that case, apply to the cases of personal inams.

Another point might have been taken, namely, that, as the first defendant is one of the grantees presumably he was an office-holder prior to the grant and, therefore, was holding not adversely to the office-holder but on his or their behalf. But as there is no evidence as to who actually was the holder at the time of the grant and as the case can be disposed of on the lines indicated above without going into the question, I need not consider it any further.

6. I hold, therefore, that the finding of the lower Appellate Court is correct. The Second Appeal is, therefore, dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

(6) 14 M. L. J. 438.
(7) 59 Ind. Cas. 65 ; 38 M. L. J. 320 ; 11 L. W. 453.
(8) 77 Ind. Cas. 568 ; 45 M. L. J. 791 ; 18 L. W. 887; (1924) M. W. N. 53 ; (1924) A. I. R. (M). 201 ; 33 M. L. T. 175.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 153 OF 1923.

January 15, 1924.

Present :—Mr. Neave, A. J. C.

LAL KHAN AND OTHERS—PLAINTIFFS —APPLICANTS

versus

KIMMAN KHAN AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Contract Act (IX of 1872) ss. 23, 26, 27—Public policy, agreement opposed to—agreement to live among particular Community—whether can be enforced.

Sections 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all the instances of agreements which are contrary to public policy.

An agreement by which a man binds himself to associate for the whole of his life only with a certain body of his fellow-men and to abstain completely from associating with another body is opposed to public policy and ought not to be enforced.

In consideration of the marriage of defendant No. 2 to a girl belonging to the community of the plaintiffs, the defendants, father and son, agreed to live among the community of the plaintiffs and agreed to pay a fine of Rs. 5, if they ever left it.

Held, that the agreement was one opposed to public policy and no penalty could be claimed for its breach.

Revision against the order of the Additional Judge, Small Cause Court, Lucknow.

Messrs. *M. Wasim*, *A. Rauf* and *Manohar Lal*, for the Applicants.

Messrs. *Bisheshar Nath*, *Niamat Ullah* and *Raj Kumar Bose*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Court Act for the revision of an order of the Additional Judge of the Small Cause Court of Lucknow dismissing the plaintiffs-applicants' claim for recovery of Rs. 50 on the basis of an agreement executed in their favour by the defendants.

The facts of the case are that the *Bhisti* community of Lucknow is divided into two sub-divisions known as *Tat* Chauk and *Tat* Chikmandi. The plaintiffs are the *Chaudhris* of *Tat* Chauk and the two defendants who are father and son, originally belonged to Chikmandi. Some time ago a marriage was arranged between the defendant No. 2 and the daughter of a member of *Tat* Chauk. The plaintiffs refused to allow the marriage to take place unless the two defendants left *Tat* Chikmandi and became members of *Tat* Chauk. An agreement was executed by the defendants in favour of the Chaudhris of *Tat* Chauk under which they undertook to join *Tat* Chauk for the term of their lives 'on account of justice and good management of that *Tat*' and to pay a fine (jurmana) of Rs. 50 if ever they deserted *Tat* Chauk. After the marriage had taken place the defendants gave notice to the plaintiffs that they were not bound by the agreement and some months later left *Tat* Chauk and returned to *Tat* Chikmandi.

The present suit has been filed on the basis of the agreement to recover Rs. 50 as damages for its breach, various pleas were taken by the defendants such as undue influence and want of consideration but the case has been decided on a preliminary point contained in the third issue framed. This was that the agreement was illegal and against public policy and not enforceable at law. The learned Judge has relied on a decision of the Calcutta High Court reported in *Nitye Shaha* v. *Shoobal Shaha*(1). In that case the defendants had been fined by the *Zamindars* for associating with certain members of their caste who had been found guilty of some offence against caste custom and had then joined the society of the plaintiffs in whose favor they executed the following agreement.

"We shall eat and sit in your community and move therein, and, therefore, you pay the above fine for us. We shall not, without your permission, join any other community. If we do, we shall pay Rs. 50 with interest.

The plaintiff brought a suit in the Small Cause Court at Dacca not on account of contribution towards the fine which had been paid by them on behalf of the defendant but simply on the ground of breach of contract. The Judge referred the case to the Calcutta High Court for opinion on this point.

(1) 10 W. R. 349 ; 2 B. L. R. S. N. 4 (*b*).

"Can an agreement (thus to remain for ever in a particular community of men) be enforced, or a penalty, as above, allowed for breach of that agreement. ?"

Sir Barnes Peacock in delivering the judgment of the Bench decided "We are of opinion that such an agreement cannot be enforced and that the suit ought to be dismissed."

The learned Counsel for the applicants admits that he is unable to distinguish the facts of that case from those of the present case but he contends that the decision in that case was bad in law. His argument is that the only grounds of public policy on which a contract can be held unenforceable in this country are those provided in the Indian Contract Act and that unless this agreement can be brought under one of the sections of that Act it must under section 10 be held to be a lawful contract. He refers to page 166 of Pollock and Mulla's commentary on the Act and certain rulings of the House of Lords quoted therein to the effect that the contract must be enforced unless it infringes a principle of public policy recognized by the law and that the doctrine of public policy should not be extended beyond the classes of cases already covered by it. He contends that the *Tats* of the *Bhistis* are not castes but trading associations or guilds and that an agreement to belong to one or the other is as lawful as an agreement to become a life-member of any club or similar associations.

This argument from analogy ignores the power possessed by any member of the club or association to resign from it whenever he pleases. Obviously the onerous part of the agreement in question is not the promise to join a particular society but the undertaking not to quit it under penalty of a fine. The defendants fulfilled their promise by joining the plaintiff's society. It is because they afterwards left it that they are now to be penalised.

As has been pointed out by the learned Advocate for the defendants sections such as 23, 26, and 27 of the Indian Contract Act cannot be regarded as exhausting all the instances of agreements which are contrary to public policy and I am unable to hold that in extending the doctrine to such a case as the present, the learned Judges of the Calcutta High Court unduly strained the law. It seems to me clear that an agreement by which a man binds himself to associate for the whole of his life only with a certain body of his fellow men and to abstain completely from associating another body is one which ought not to be enforced and for the breach of which no penalty can be claimed.

I accordingly reject this application with costs.

Z. K. *Application rejected.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 18 OF 1921.

January 17, 1924.

Present :—Mr. Justice Wallace.

AIYISA BEVI AMMAL—PLAINTIFF —APPELLANT

versus

KALANDARSA ROWTHER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Mortgage, void possession under—Mortgage, converted into sale, void—Possession, whether adverse—Redemption, right of.

Where a person who is not the legal guardian of a Muhammadan minor executed a mortgage of the minor's properties on behalf of the latter and the mortgagee is put into possession of the properties, the mortgage is void and the mortgagee begins to prescribe for a mortgagee's title by adverse possession. If subsequently, the same person converts the mortgage into a sale, the sale is equally void as against the minor, but the nature of the mortgagee's possession is altered and from the date of the sale he begins to prescribe for a title as full owner, and after the expiry of the statutory period from the date of the sale, the minor's title to the properties is completely extinguished. The minor does not obtain a right of redemption on the sale being declared void, if the mortgagee has completed his adverse possession of the absolute title by that date. [p. 563, col. 1.]

Sontyana Gopala Dasee v. *Inaputalapuia Rami*, 64 Ind. Cas. 928 ; 44 M. 946 ; 13 L. W. 685 ; (1921) M. W. N. 885 ; 41 M. L. J. 194, referred to.

Appeal against the decree on remand of the Court of the Subordinate Judge, Mayavaram, in A. S. No. 29 of 1917 preferred against the decree of the Court of the District Munsif, Mayavaram, in O. S. No. 316 of 1916.

AIYISA BEVI AMMAL v. KALANDARSA ROWTHER

Mr. *V. Narasimha Iyengar*, for the Appellant.

Mr. *K. Sankara Sastry*, for the Respondents.

FACTS:—On 5th April, 1893 Jainab Ammal for herself and as guardian of her minor children, the plaintiff and the 3rd defendant, together with her co-wife Aiyisa Bivi, the 2nd defendant (not a party to the Second Appeal) executed a usufructuary mortgage (Ex. I) of the plaint properties for Rs. 650 in favour of Kalandarsa Rowther, the 1st defendant, and put him in possession thereof. June 30th 1898 was the date fixed for redemption. On 30th January, 1900 *i. e.*, after the death of Jainab, Aiyisa Bivi for herself and as guardian of the plaintiff and the 3rd defendant executed in favour of the 1st defendant a sale of some properties (Ex. III) for discharging the debt due under the aforesaid mortgage and other debts. The plaintiff alleging that her step-mother, the 2nd defendant was not her guardian and that the sale by her was not for any necessary and binding purposes, filed this suit on 10th August, 1916 for redemption of the usufructuary mortgage of 1893. The 1st defendant pleaded that the sale was for necessary purposes and that the claim for redemption was barred by his adverse possession for more than twelve years. The District Munsif held that the sale by Ex. III was for purposes binding upon the plaintiff and that the suit was barred by limitation and dismissed the suit. On appeal by the plaintiff the Subordinate Judge confirmed the decree of the 1st court. The plaintiff preferred Second Appeal No. 2087 of 1918 and the High Court Ayling and Coutts Trotter, JJ. held that in view of the decision of the Privy Council in *Imambandi* v. *Mutsaddi* (1), the sale under Ex. III was not binding upon the plaintiff as it was executed by her step-mother who was not her guardian under the Muhammadan Law and remanded the case to the Subordinate Judge's Court for disposal on the question of limitation. The latter Court was of opinion that the suit was barred under Art. 144 of the Limitation Act and dismissed the appeal. The plaintiff preferred this Second Appeal to the High Court.

(1) 47 Ind. Cas. 518; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; 1919 M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

Mr. *V. Narasimha Aiyengar*, for the Appellant.—The High Court on a former occasion has held that the sale, Ex. III, is not binding upon the plaintiff. If the sale goes, the mortgage of 1893, Ex. I stands. In the plaint I affirm the mortgage and ask for redemption of the same.

(*Wallace, J.*—If the sale is void, the mortgage is also void. How can you affirm a void transaction?)

If the mortgage is void, it is not binding upon the plaintiff but the 1st defendant having come into possession of the properties under the void mortgage, his possession can only be that of a mortgagee and he can prescribe only for a mortgagee's interest in the properties. He cannot prescribe as a full owner. His status being that of a mortgagee, the plaintiff is entitled to redeem. *Santyana Gopala Dasee* v. *Inaputalapula Rami* (2). The Article applicable is not 144 but Art. 148 which gives me 60 years. *Khiarajmal* v. *Daim* (3) is conclusive on this point.

It is of course open to parties to convert possession as mortgagee into possession as owner by mutual arrangement or agreement (*Vide Mudigadu* v. *Maneam Gopalu Reddy* (4) and *Karnam Kandasami Pillai* v. *Chinappa* (5). But in this case there was no such arrangement or agreement binding upon the plaintiff for, on the date of Ex. III, she was a minor, and her step-mother had no power under the law to bind her by any. Even if Ex. III be treated as any such arrangement, the High Court has already held that it is not binding upon the plaintiff.

Therefore possession taken by the 1st defendant under Ex. I retains its original character *Byari* v. *Puttama* (6); *Ramunni* v. *Kerala Varma Valia Raja* (7); *Chirakkal Kovilagath* v. *Saidammadath Ayakomba* (8); *Kuttiurath*

(2) 64 Ind. Cas. 328; 44 M. 946; 19 L. W. 685; (1921) M. W. N. 385; 41 M L J. 194.

(3) 32 C. 296; 1 C. L J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C.W N. 201; 2 A L. J. 71; 7 Bom. L. R. (P. C.)

(4) 63 Ind. Cas. 215; 13 L. W. 400; (1921) M. W. N. 251.

(5) 62 Ind. Cas. 603; 13 L. W. 423; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 44 M. 258.

(6) 14 M. 38; 5 Ind. Dec. (N.S.) 27.

(7) 15 M. 166; 5 Ind. Dec. (N. S.) 465.

(8) 7 Ind. Cas. 258; 8 M. L. T. 309; (1910) M. W. N. 460.

Kunhunni Panikar v. *Raman* (9) ; and unless he has been in possession for 60 years the plaintiff's right to redeem is not barred.

If the plaintiff is entitled to redeem, another question that arises is on what terms she should be allowed to do so.

(*Wallace, J.*—Before you go to that, I shall hear the other side on the question of limitation.)

K. Sankara Sastri, for the Respondent.—If Ex. III is void and not binding upon the plaintiff Ex. I is equally void and not binding. Possession taken by 1st defendant under Ex. I was adverse and whatever its original nature was it was converted into possession as owner from the date of Ex. III and he has been in possession as absolute owner since 1900. The suit having been brought up in 1916, it is barred by his adverse possession.

JUDGMENT.—The ruling in *Jamambandi* v. *Mutsaddi* 45 Cal. 878 which was relied on by this Court in its judgment of 10th February, 1920 for the holding that the sale Ex. III is not binding on the plaintiff is equally in point to hold that the mortgage Ex I is not binding on the defendants. Both transfers, being by a person not guardian of the minors, are equally void.

So that the position is this: 1st defendant was admitted into possession in 1893 under a void mortgage. The nature of his possession after that was nevertheless that of mortgagee and not absolute trespasser (See *Gopala Dasee* v. *Rami* (2) and he began then to prescribe by adverse possession for the legal status of mortgagee, which, if his possession was not altered or disturbed he would acquire, after twelve years of such possession ; *i. e.*, the plaintiff would after such a period of 12 years be barred by limitation from contending on the ground that the mortgage was a void one, that 1st defendant was not even mortgagee. But while the 1st defendant was thus prescribing for a legal mortgage title, the same mortgagor on behalf of the plaintiffs chose to sell the property to him in 1900 under Ex. III, This sale no doubt was equally void as the mortgage was. But it had the legal effect of altering the nature of the possession which 1st defendant had in the property. He began in 1900 to prescribe by adverse possession for a vendee's title just as in 1893 he had begun to prescribe for a mortgagee's title, and that the manner of his possession was prescribing for full ownership was known to the party who had deliberately converted the mortgage into a sale.

It seems to me, therefore quite clear that after 12 years from 1900 1st defendant had prescribed by adverse possession for a full vendee's title, *i. e.*, absolute ownership, and that it is not open to plaintiff now to contend that the mortgage title emerges again when the sale is held void, and the defendants must therefore prescribe for 60 years. The plaintiff's guardian converted the possession of 1st defendant as mortgagee into that of vendee.

If it should be argued that the adverse possession as vendee vanishes when the sale is held void, it must in the circumstances of this case equally follow that the adverse possession as mortgagee vanishes when the mortgage is held void. The plaintiff would then be in a worse case, since then 1st defendant would have been an absolute trespasser since 1893. and the suit would be long barred by limitation.

The Lower Appellate Court's decision is correct, and I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(9) 52 Ind. Cas. 675; 26 M. L. T. 382; 10 L. W. 427; (1919) M. W. N. 742.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 92 OF 1923.

March 25, 1924.

Present :—Mr. Justice Jwala Prasad.

NEKO TEWARI AND OTHERS—APPELLANTS

versus

KISHUN PRASAD PANDEY AND OTHERS—RESPONDENTS.

Court Fees Act (Act VII of 1870) s. (VI) (c), Sch. II, Art. 17 (III)—Suit for declaration and consequential relief—Appeal—Relief limited to declaration—Court-fee payable.

Where in an appeal arising out of a suit for a declaration and consequential relief, the relief sought is limited to the declaration, the appeal falls under

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Article 17 of Schedule II to the Court Fees Act and Court-fees are payable accordingly. [p. 567, col. 1.]

Where in a declaratory suit consequential relief is sought it is the value of the consequential relief that determines the duty to be levied upon the plaint. [p. 565, col. 2.]

Case-law discussed.

Stamp Reference by the Taxing Officer.

Mr. *Janak Kishore*, for the Appellants.

JUDGMENT.—This is a reference by the Taxing Officer under the Court-Fees Act, and the question raised is whether the memorandum of appeal in the present case is taxable under the Court-Fees Act, under Schedule II, Article 17, or Section 7 clause (iv) (c) of the Act. Under the former, the defendants Nos. 15 to 21 filed the memorandum of appeal on a Court-fee of Rs. 15. They are aggrieved by the decree passed by the Court below in a suit by the plaintiffs-landlords for a declaration that the lands in suit are their bakasht lands and of their co-sharers-defendants. The reliefs claimed in the plaint are as follows :—

(1) On consideration of the facts set forth above as also of the fact that defendants Nos. 1 to 5 and 15 to 21 acquired no *kashtkari* right to the lands entered in Schedules Nos. 4 to 8, below, by virtue of the purchase alleged by them as referred to above; that defendant Nos. 1 to 5 have no right to or possession over the lands mentioned in schedules Nos. 4 and 5; that the father of defendants Nos. 1 and 2 and defendant No. 3 are mere *farzidars* of defendants Nos. 6 to 14 who are in possession in their stead, a declaratory decree may be passed by the Court in favour of the plaintiffs to the effect that the lands set out in Schedules Nos. 4 and 5 are not *kasit* lands of defendants Nos. 1 to 5, that the lands mentioned in Schedules Nos. 6 to 8 are not the *kasht* lands of defendants Nos. 15 to 21 and that all those lands being as they are the mahlks' lands, *zerait* and *bakasht* are fit to be partitioned in the said partition case.

An injunction may be issued by the Court for the stay of the batwara proceedings and it may be ordered that until the disposal of this suit the parties should not proceed with the batwara case.

(3) Costs in Court with interest may be awarded.

(4) Any other relief to which, in the opinion of the Court, the plaintiffs be deemed entitled, may be awarded to them.

In paragraph 18 the plaintiffs valued the relief No. 2 for injunction at Rs. 500, for the purpose of Court-fee and paid a Court-fee of Rs. 37-8-0 with respect thereto. They also paid a Court-fee of Rs. 10 in respect of relief No. 1 for a declaratory decree. Thus they paid a Court-fee of Rs. 47-8-0. The value of the suit for the purpose of jurisdiction was stated to be Rs. 13,000 which represents 11 annas share of the plaintiffs in 132·5 bighas. On this valuation the plaintiffs were called upon in the Trial Court to pay an *advalorem* Court-fee which they did pay. A temporary injunction was issued during the trial of the suit. The decree was passed in the following terms :—

Suit be decreed with costs. Disputed lands are declared to be *bakasht maliks* and should be partitioned as such.

The terms of the decree exactly agree with those set forth in relief No. 1 of the plaint, which the Subordinate Judge had held to be a purely declaratory relief.

Against this decree two appeals have been preferred one by defendants 1 to 5 and the other by defendants 15 to 21. We are concerned with the latter appeal only. The appellants are interested in some of the lands covered by the suit, and their appeal is confined to those lands only. The appeal is directed against the declaration made in the decree referred to above, and the appellants pray that it be declared that the lands claimed by the appellants are their *kasht* lands and that they are not the *farzidars* of the plaintiffs.

The temporary injunction as a consequential relief prayed for in the plaint was granted during the pendency of the suit and lasted till the termination of the suit. It has now ceased to exist and is no longer the subject-matter of contention between the parties.

The appellants valued the appeal at Rs. 4,905-2-0 being the price of 44 *bighas*, the subject matter of the appeal, and paid a Court fee of Rs. 15 " under schedule II, Article 17 clause (vi) " of Act VII of 1870,

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The Stamp Reporter reported that the memorandum of appeal was insufficiently stamped by Rs. 337-8-0. The Taxing Officer has agreed with the view of the Stamp Reporter and has referred the matter to me as a Taxing Judge for decision.

The contention in supports of the view is that the suit against which the appeal has been filed was a suit for a declaratory decree plus consequential relief, and although in the appeal the relief is only a declaratory one the Court-fee must be levied upon the reliefs sought in the plaint and not upon the reliefs sought in the appeal. Accordingly, it is said that the Court-fee leviable on the memorandum of appeal should be *advalorem* under section 7, clause (iv) (*c*) of the Court Fees Act, that is, for a declaration with consequential relief, and not Rs. 15 only which the appellants have paid under Article 17, clause (3) of Schedule II of the Act, although the relief in the appeal is only for a declaration.

It is conceded that the view is opposed to authorities; for instance, vide *Rup Chand* v. *Fateh Chand*, (1). It is, however, contended that the view taken in those cases is not correct and is not borne out by the true interpretation of the relevant provisions in the Court-Fees Act and a plain reading of Article 17, Schedule II referred to above and relied upon by the appellants. That Article says :—

"Plaint or memorandum of appeal or cross-objection in each of the following suits.

(i) to alter or set aside a summary decision or order of any of the Civil Courts, not established by Letters Patent, or of any Revenue Court ;

(ii) to alter or cancel any entry in a register of the names of proprietors of revenue-paying estates.

(iii) to obtain a declaratory decree where no consequential relief is prayed ;

(iv) to set aside an award ;

(v) to set aside an adoption.

(vi) Every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.

(1) 11 Ind. Cas. 977; 33 A. 705; 8 A. L. J. 821.

The contention is that the Article will apply only to a memorandum of appeal in the suits of the nature mentioned in the aforesaid clauses of the Article ; for instance, the Article will apply to a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed (clause 3) but where the suit is for a declaratory decree and consequential relief the memorandum of appeal from a decree in that suit will not come under the Article although the relief in the appeal may be only to obtain a declaratory decree and no consequential relief is prayed. In short it is said that the reliefs in the plaint, and not the reliefs in the memorandum of appeal, will determine the clause under which the Court fee is to be levied.

It is said that the suit in the present case was a suit to obtain a declaratory decree where consequential relief was prayed for and consequently the suit did not come under clause (3) or clause (6) of Article 17, but it came under Section 7, clause (iv) (*c*) of the Act. This section reads as follows :—

> The amount of fee payable in suits to obtain a declaratory decree or where consequential relief is prayed shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

It is said that the suit unquestionably came under this class and hence the amount of fee payable in the appeal should be computed according to the amount at which the relief sought was valued in the memorandum of appeal. It seems to be a very plausible argument, but it is difficult to give practical effect to it. Conceding that Section 7, clause (iv) (*c*) applies to the memorandum of appeal in the present case, the question is how the amount of the fee payable upon the memorandum of appeal should be computed. The suit was to obtain a declaratory decree where consequential relief was prayed. The consequential relief was a prayer for a temporary injunction directing that the partition of the property should not take place during the pedency of the suit. Where in a declaratory suit consequential relief is sought, it is the value of the consequential relief that determines the duty to be levied upon the plaint. There is no dispute as to this, and in

fact it is concluded by authorities. I need not discuss in detail the following authorities cited at the Bar : —

Chethru Mahto v. *Khaja Muhammad Karim Nawab* (2). *The Secretary of State for India* v. *Basawa Singh* (3). *Rachappa Subrao Jadhav Desai* v. *Shidappo Venkatrao Jadhav Desai* (4). *Raj Krishna Dey* v. *Bipin Behari Dey* (5) and *Sahib Ditta* v. *Narinjau Das* (6). Most of these authorities were considered by this Court in the case of *Shama Pershad Sahi* v. *Sheoparson Singh* (7), and it was there laid down that where consequential relief is sought the plaintiff is bound to fix a reasonable valution upon the consequential relief. Reference in this case has been made to the cases of *Umatul Batul* v. *Nauji Kuar* (8) *and Boidya Nath Adya* v. *Makhan Lal Adya* (9).

In the case of *Azimuddin Sahib* v. *Kadirsa Rowther*, (10) it was held that in a suit for declaration and for injunction as a consequential relief the plaintiff is entitled to value the injunction alone for the purpose of jurisdiction and Court-fee, and the declaration and the injunctions are not to be separately valued. Therefore, in acting under section 7, clause (iv) (c) the Court-fee will be payable upon the value of the consequential relief. In the present appeal no consequential relief has been sought. Therefore, the appellants cannot be required to value the relief which they have not at all asked for, and consequently no Court-fee can be paid upon an imaginary relief. Therefore, although the suit originally came under section 7, clause (iv) (c), its nature changed after the relief for injunction ceased to exist. Hence the aforesaid provision will no longer apply. In order to get rid of this difficulty, the learned Government Advocate says that it is in the absolute discretion of the appellants to value the relief in any way they like and they can even put an arbitrary value upon the relief under section 7, clause (iv) (c), and relies upon the cases of *Azimuddin* v. *Kadirsa Rowther* (10) and *Vachhani Keshabhai* v. *Vachhani Nanbha Bavaji* (11), Be that as it may, the consequential relief no longer exists and hence a non-existent relief cannot be valued. The suggestion of the learned Government Advocate does not at all solve the difficulty. The memorandum of appeal therefore, is incapable of being dealt with under section 7, clause (iv) (c).

The learned Government Advocate then suggests that the Court-fee payable on the memorandum of appeal should be calculated upon the value of the subject-matter in dispute and *ad-valorem* court-fee should be paid under Schedule I, Article I of the Act. That Article is for the purpose of determining the amount of court-fee payable after the pecuniary valuation of the suit or appeal is determined. The pecuniary valuation is determined by reference to Section 7 and by finding out under which of the clauses in that section the particular plaint or memorandum of appeal would come. The suit was for a temporary injunction as a consequential relief. The injunction was sought for pending the disposal of the suit and was granted at an early stage of the suit. Thereafter the suit was reduced into a mere suit for declaration and it was tried as such with the result that the declaration was given in favour of the plaintiffs. Therefore at the stage when the plaintiffs filed their memorandum of appeal they appealed against the suit in which declaration without consequential relief was prayed. The nature of the relief sought may vary, as in this case, at the stage when the appeal is preferred, and the court-fee leviable will be upon the altered relief in appeal : vide *Kishun Dutt Misir* v. *Kasi Pandey* (12) where the suit for possession, pure and simple, was decreed, but a condition was imposed in the decree that the plaintiff shall pay off all incumbrances on the property. The plaintiff obtained possession of the property, but appealed againt the condition as to the payment by him of all encumbrances on the property. It was held that he was to pay court-fee upon the value of the

(2) 50 Ind. Cas. 328; 4 P. L. J. 297.
(3) 17 Ind. Cas. 764; 19 P. W. R. 1913; 57 P. R. 1913; 17 P. L. R. 1912 Sup.
(4) 50 Ind. Cas. 280; 24 C. W. N. 93; 46 I. A. 24; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489 43 B. 507; 10 L. W. 274; 1 U. P. L. R. (P. C.) 83 (P.C.).
(5) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N 591.
(6) 15 Ind. Cas. 272; 182 P. W. R. 1912; 226 P. L. R. 1912.
(7) 41 Ind. Cas. 95; 5 P. L. J. 894; 2 P. L. W. 178.
(8) 6 C L. J. 427; 11 C. W. N. 705.
(9) 17 C. 160; 8 Ind. Dec. (N. S.) 994.
(10) 43 Ind. Cas. 995; (1918) M. W. N. 40.
(11) 1 Ind. Cas. 108 ; 33 B. 307; 11 Bom. L. R. 80; 5 M. L. T. 280.
(12) 57 Ind. Cas. 481; 5 P. L. J. 455.

encumbrances as that was the relief sought for in the appeal. The appellants in the present case only want in appeal a declaration without any consequential relief, and I think in the circumstances the suit should be treated as falling under Article 17, Schedule II of the Act. The arguments against the view are not convincing enough to entitle us to alter the prevailing practice or to go against the weight of authorities in the other High Courts. The learned Vakil on behalf of appellants presses for his costs on the ground that the learned Government Advocate has opposed in this case. I think he is entitled to two gold mohurs.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 602 OF 1921.

January 23, 1924.

Present :—Mr. Justice Wallace.

SUPPAI GOUNDAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KANDASWAMI GOUNDAN—PLAINTIFF—RESPONDENT.

Pro-note—Endorsement by guardian of minor—Endorsement in personal capacity, validity of—Appeal, second—Finding of fact based on no evidence, whether binding.

Where the endorsement of transfer of a pronote was signed by the guardian of the minor son of the payee, but there was nothing either in the body of the note or appended to the signature to show that she signed as guardian ;

***Held*, that the transferee of the note could not be regarded as the holder of the note and had no *locus standi* to maintain a suit upon it.** [p. 567, col. 2.]

A finding of fact based on no evidence is not binding on the court in second appeal [p. 567, col. 2.]

Appeal against the decree of the 2nd Additional Subordinate Judge, Coimbatore, in A. S. No. 9 of 1920 (A. S. No. 255 of 1920 on the file of the District Court, Coimbatore) preferred against the decree of the Additional District Munsif, Coimbatore, in O. S. No. 420 of 1919.

Mr. *S. Subramania Iyer*, for the Appellants.

Mr. *S. Muthiah Mudaliar*, for the Respondent.

JUDGMENT.—This appeal may be disposed of on the short ground that there is no evidence that the plaintiff is the holder of the pronote. The allegation in the plaint was that the guardian of the minor son of the payee transferred the pronote to plaintiff in her capacity as guardian. In the written statement defendants challenged this allegation and put plaintiff to strict proof of it. Plaintiff has made no attempt to prove it. The endorsement of transfer is signed by the lady in her personal capacity, and there is nothing either in the body of the note or appended to the signature to show that she signed as guardian. Both the lower Courts have merely inferred, on no evidence, that she signed as guardian. The cases relied on by the District Munsif are of very little assistance, since in each case it has to be decided on its own facts whether the endorser endorsed as guardian or not.

When plaintiff was put to proof of this point and called no evidence, his suit must fail. It is not a case where evidence was not available. The widow, signatory could have been called and attestors could have been examined on the point.

I find that the plaintiff has no *locus standi* to maintain this suit and that the lower Courts have erred in law in coming to a finding of fact on no evidence. I reverse the judgment and decree of the lower Appellate Court and dismiss plaintiff's suit with costs to defendants throughout.

V. N. V. *Order accordingly.*
Z. K.

MATHURA PRASAD *v.* NAJU KHAN

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 520 OF 1920.

July 23, 1921.

Present:—Sir Jwala Prasad, Acting Chief Justice, and Mr. Justice Ross.

MATHURA PRASAD—DEFENDANT —APPELLANT

versus

NAJU KHAN—PLAINTIFF AND THAKUR GOPE AND OTHERS—DEFENDANTS— RESPONDENTS.

Transfer of Property Act (IV of 1882) *s.* 116, *applicability of—Landlord and tenant—Holding over, what constitutes—Consent of landlord, absence of—Dispossession of tenant—Possession, suit for, by dispossessed tenant, whether lies.*

The principle of section 116 of the Transfer of Property Act, applying to the holding over by a tenant after the expiry of his lease, implies that the tenant is left in occupation of the tenancy by the consent of the landlord, express or implied, and unless there is a new privity of contract between the parties after the expiry of the term, the old terms cannot be enforced between them. [p. 568, col. 2.]

The possession of a tenant who holds without the consent of the landlord is no better than that of a trespasser, and once he is dispossessed by a person who claims under a settlement from the landlord, he cannot recover possession of the tenancy on the strength of his former possession. [p. 569, col. 1.]

Messrs. *S. M. Mullick*, *J. Prasad* and *L. K. Jha*, for the Appellant.

Mr. *W. H. Akbari*, for the Respondents.

JUDGMENT.

Jwala Prasad, A.C.J.—This is an appeal by the defendant first party against whom the plaintiff has obtained a decree for ejectment from the land in suit. The land was settled with the plaintiff for a term of 9 years from 1316 to 1324 F. By a *kabala* dated the 17th March 1917 it was settled with the defendant first party by the defendants 2 to 7 who are the *maliks* proprietors of a 7 annas share. Defendants 8 and 9 are proprietors of the remaining 9 annas of the *milkiat* right by virtue of their purchase on the 9th June 1918 from the defendants Nos. 1 and 2 of the third party defendants. They of course were not parties to the settlement with the defendant first party. On the strength of his settlement the defendant first party dispossessed the plaintiff from the land in dispute. The plaintiff instituted criminal proceedings which were dismissed on the 12th January 1918 and subsequently in a proceeding under section 144 started at the instance of the plaintiff the possession of the defendant was confirmed. Hence the plaintiff instituted the present suit to recover possession of the land from the defendant first party making all the landlords parties to the suit. The chief ground upon which the plaintiff claims the land is that although his lease expired in 1224 F, that is, September 1917, yet he continued to be in possession of the land and was entitled to hold over unless and until he was lawfully ejected under the Bengal Tenancy Act by the landlords The landlords did not contest the suit and defendants 8 and 9 pleaded ignorance of the settlement either with the plaintiff or the defendant first party. The defendant first party contests the suit upon the ground that after the expiry of the lease of the plaintiff he was a mere trespasser upon the land and was liable to be ejected by the defendant who had taken settlement of the land from the landlords.

The plaintiff's contention prevailed in the Courts below. They were of opinion that the plaintiff was a non-occupancy tenant in respect of the land in dispute and after the expiry of the term he held over on the terms of his original lease and that he was therefore not a trespasser. The defendant had not taken settlement from all the proprietors and the settlement was not *bona fide*. He was a mere trespasser and had no right to dispossess the plaintiff.

The position taken by the Courts below appears to us to be untenable. The land was leased for a term of years and after the expiry of the lease the landlords were entitled to eject the plaintiff. He could hold over only with the consent of the landlords. The principle of section 116 of the Transfer of Property Act applying to the holding over by a tenant after the expiry of his lease implies that he was left in occupation of the tenancy by the consent of the landlords express or

implied and that is the reason why the landlords are entitled to enforce the terms of the expired lease. Unless there was a new privity of contract between the parties after the expiry of the term, on no principle can the old terms be enforced as between the parties. In the present case far from there being any consent the plaintiff's case is that the landlords are in collusion with the defendant 1st party and that he was dispossessed on account of that collusion. The dispossession in the present case therefore is virtually by the landlords. The plaintiffs therefore had no title to the land and his suit for a declaration of title must fail. As he was not in lawful possession, that is to say, without the permission of the landlords, his possession was no better than that of a trespasser, and once having been out of the land he cannot recover possession of it on the strength of his former possession when dispossession has taken place by a person who ostensibly claims to have settlement from the landlords. The question of *bona fides* or *mala fides* does not at all arise and I have not been able to appreciate the use of those terms by the learned Subordinate Judge. Even if the settlement was made by the landlord for the purpose of dispossessing the plaintiff that would be a valid and *bona fide* settlement, the object being lawful as the term had already expired and every landlord is expected to settle his land in anticipation to take effect from the expiry of the previous settlement. Nor does it matter that the settlement with the defendant first party was only by some of the landlords. It appears that the settlement was by the landlords defendants 2 to 7 of the 3rd party, defendants were the entire body of landlords on the date of the settlement with the 1st party. Defendants 8 and 9 were purchasers from some of those defendants at a date subsequent to the settlement. Even if the settlement was as I observed above by some of the landlords the title of the defendant first party cannot be said to be so defective as to render him a trespasser on the strength of it.

The result is that differing from the view taken by the Courts below we set aside the judgment and decree of the Courts below and dismiss the plaintiff's suit with costs throughout.

Ross, J.—I agree.

Z. K. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 33 OF 1924.

April 23, 1924.

Present :—Mr. Pullan, A. J. C.

THE G. I. P. RAILWAY COMPANY, BOMBAY, AND ANOTHER —DEFENDANTS - -APPLICANTS

versus

MATHURA DAS AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887) S. 25—Suit tried by Court not having jurisdiction—Revision.

Where owing to the misrepresentation of the plaintiff a suit is tried in a Court which has no jurisdiction to try it, and a decree is passed, the decree is liable to be set aside in revision. [p. 579, col. 1.]

Application for revision against the decree, of the Additional Judge, Small Cause Court, Lucknow, dated the 27th September 1923.

R. B. *N. N. Ghoshal* and Mr. *Ganesh Prasad*, for the Applicants.

Mr. *Sailen Roy*, for the Opposite Party.

JUDGMENT.—This is an application for revision of a decree passed by the Small Cause Court, Lucknow. The plaintiffs in the suit alleged that certain goods had been despatched to them at Lucknow from Bombay and that they had been tampered with in transit. A notice was given to this effect to the G. I. P. Railway and also to the Secretary of State as representing the O. & R. Railway. The railway concerned was unable to trace the consignment and asked for further time from the Court. It now appears, that the reason why the consignment was not traced was, that it was despatched to Cawnpore and not to Lucknow. This fact, had it been known, would have ousted the jurisdiction of the Court. It was not known until the G. I. P. Railway found out a clue to the original railway receipt. It was, however, known all along to the plaintiffs whose own invoice shows that the goods were despatched to Cawnpore and not to Lucknow. The plaintiffs have, therefore,

obtained a decree as far as the G. I. P. is concerned through mis-stating their plaint and concealing facts which were known to them. Had the facts been properly disclosed the G. I. P. Railway might have been able to make a valid defence. As the Oudh and Rohilkhand Railway sued through the Secretary of State, there is an order on the file dated 25th September, the day on which the evidence was taken, as follows:—

"Defendant 2 is discharged and its name to be struck off from the plaint. It will get its costs from plaintiffs."

This refers to the Secretary of State and through a pure oversight on the part of the decree-writer, due to the fact that the Judge made no further mention of this order in his judgment, the decree was wrongly prepared against defendant No. 2. The proceedings therefore are faulty in two respects; in the first place, owing to misrepresentation of the plaintiffs the case has been tried by a Court which has no jurisdiction, and in the second place the decree is contrary to the order passed by the Court. In such a case I am bound to interfere. I set aside all the proceedings of the lower Court from the time of the institution of the plaint and I order that the plaint be sent back to the lower Court for procedure according to law. As the lower Court had no jurisdiction to entertain the plaint it will now be returned for presentation to the proper Court. Owing to the failure of the appellants, even when they filed their appeal, to ascertain material facts apparent from the record, I make no order as to costs.

Z. K. *Case remanded.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 27 OF 1923.

November 12, 1923.

Present:—Sir Dawson Miller, Kt., K. C., Chief Justice, and Justice Sir B. K. Mullick.

DIPA MAHTON—APPELLANT

versus

SHEO NANDAN PRASAD AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) s. 158 B—Decree for consolidated rent of two holdings—Sale of one holding—Purchaser, position of—Purchaser of portion of holding—Annulment of incumbrances.

Where a decree is obtained for the consolidated rent of two holdings and one of the holdings is sold in execution of the decree, the sale does not confer upon the purchaser any greater title than the right, title and interest of the judgment-debtor. The same is the case where a portion of a holding is sold in execution of a decree for rent of the holding. [p. 571, col. 1.]

There is nothing in section 158 B of the Bengal Tenancy Act which gives to a purchaser in execution of a rent decree the right to acquire the rights mentioned in the section except by a purchase of the entire holding. [p. 571, col. 1.]

Mr. *Jalgobind Prasad Singha*, for the Appellant.

Mr. *S. N. Sahai*, for the Respondents.

JUDGMENT.

Miller, C. J.—The dispute in this case is between the auction-purchaser at a sale in execution of a decree for arrears of rent and the mortgagee or rather the transferee of the mortgagee of the holding. The question which arose was whether the purchaser had acquired the whole interest in the holding by his purchase at the auction sale or whether he had merely acquired the right, title and interest of the judgment-debtor. In the former case he would be entitled to annul the incumbrance of the mortgage. In the latter case he would not. The appellant is the auction-purchaser. The rent of the holding was payable partly by a cash rent and partly by *bhowali* rent. After the decree the portion of the holding upon which the

cash rent alone was payable was put up for sale and purchased by the appellant.

The learned Subordinate Judge on appeal from the Munsif found that there were in fact two holdings, in one of which the rent payable was *nagdi* and in the other *bhowali*, and that the decree was a decree for consolidated arrears of rent in respect of those two holdings.

The learned Judge of this Court on appeal agreed with the decision of the lower Appellate court and came to the conlusion that the question was really one of fact and dismissed the appeal.

It is not disputed that if there were in fact two holdings then the suit for a consolidated rent of the two holdings and a subsequent sale in execution of a decree would not confer upon the purchaser any greater title than the right, title and interest of the judgment-debtor. In my opinion the learned Judge was perfectly right in coming to the conclusion that the question was one of fact and he was not therefore, entitled to disturb the findings arrived at by the lower Appellate Court, but, in any event, it seems to me that the plaintiff is in this case upon the horns of a dilemma, because either there were two separate holdings in respect to which a suit was brought for their consolidated rent or if the holding was one only, then only a portion of it was subsequently sold in execution and it was that portion only which the purchaser acquired. There is nothing in section 158 B of the Bengal Tenancy Act or indeed in any other section so far as it has been drawn to our attention which would give the purchaser the right to acquire the rights therein mentioned except by a purchase of the whole holding. So that if he purchased a portion only of the holding he did not acquire the rights therein mentioned but merely the right, title and interest of the judgment debtor so that from any point of view it seems to me that this appeal must be dismissed with costs.

Mullick, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 792 OF 1921.

February 6, 1924.

Present :—Mr. Justice Wallace.

LEKKALA RAMU NAIDU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VETCHALAPU NAYANAPPA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) Sch. II, Para. 15 — Arbitration — Award based on Compromise—Validity of.

An award passed by arbitrators in a pending suit, which merely embodies a compromise of the parties themselves before the arbitrators is a perfectly valid award. [p. 572, col. 1.]

Deo Narain Roi v. *Jaisiri Rai*, A. W. N. (1885) 259 and *Mihr Ali Shah* v. *Muhammad Husan*, A. W. N. (1892) 79 ; 14 A. 413 ; 7 Ind. Dec. (N S.) 632, followed.

Such a proceeding is as much an adjudication of the case as is a decree of Court founded on a compromise. [p. 572, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Vizagapatam, in Appeal Suit No. 174 of 1920 (Appeal Suit No. 324 of 1920 on the file of the District Court, Vizagapatam) preferred against the decree of the Court of the District Munsif of Chodavaram, in Original Suit No. 395 of 1920.

Mr. *P. Somasundaram*, for the Appellants.

Mr. *Y. Suryanarayana*, for the Respondent.

JUDGMENT.—The argument put forward in this case is that an award passed by arbitrators in a pending suit, which merely embodied a compromise of the parties themselves before the arbitrators is not a valid award and that it was the duty of the arbitrators merely to record the compromise and pass it on the Court to deal with. I am not referred to any reported ruling which supports this proposition. On the other hand there are two reported rulings *Deonarain Rai* v. *Jaisiri Rai* (1), and *Mihr Ali Shah* v. *Muhammad Husan* (2), to the contrary, both of which refer to arbitrations in pending suits.

(1) A. W. N. (1885) 259.
(2) A. W. N. (1892) 79 ; 14 A. 413 ; 7 Ind. Dec. (N. S.) 632..

KISHEN PRASAD *v.* SASSARAM LIME, LTD.

I cannot see on principle why arbitrators should not accept a compromise of the parties before them and set out their award in terms thereof. Such a proceeding is as much an adjudication of the case as is a decree of a Court founded on a compromise. To admit that an award may be challenged on the ground that the arbitrators had not themselves independently considered and decided the matter would be contrary to the principle laid down in section 15, second schedule.

In my opinion the decision of the lower Appellate Court is right and this Second appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

PATNA HIGH COURT.

CIVIL REVISION No. 254 OF 1922.

November 19, 1923.

Present :—Mr Justice Kulwant Sahay.

KISHEN PRASAD—PETITIONER
versus
SASSARAM LIME, LTD —OPPOSITE PARTY.

Negotiable Instruments Act (XXVI of 1881) ss. 43, 44, 45, 118—*Cheque—Consideration—Holder in due course—Presumption—Partial consideration—Decree against drawer, whether can be passed.*

Under section 118 of the Negotiable Instruments Act there is a presumption that a cheque was drawn for consideration, that an endorsement appearing on it was made for consideration and that the endorsee is a "holder in due course". The presumption is a rebuttable one and it is open to the drawer or the payee of cheque to prove that the cheque was drawn without consideration, or that the endorsement was made without consideration, but so long as the presumption is not rebutted by evidence it must be presumed that the cheque was drawn for consideration and that the endorsee is a holder in due course. [p. 573, col. 1.]

Where the drawer of a cheque admits partial consideration for the cheque, or partial consideration is proved against him a decree can be passed against him to the extent of the consideration admitted by him or proved against him. [p. 573, col. 2.]

Messrs. *Ray T. N. Sahai* and *D. N. Varma*, for the Petitioner.

Mr. *S. S. Bose*, for Mr. *S. Dayal*, for the Opposite Party.

JUDGMENT.—This is an application in revision under section 25 of the Provincial Small Cause Courts Act. The petitioner was the plaintiff in the suit and he brought the suit for recovery of a sum of Rs. 89-11-0 besides interest on the basis of a cheque drawn by the defendant No. 1 in favour of the defendant No. 2. It appears that the defendant No. 2 was a contractor under the Sassaram Lime, Ltd. and that his contract was to throw earth work for construction of a road. The defendant No. 2 was given orders for the work on the 29th October 1921. Measurements used to be made and bills used to be submitted by the defendant No. 2 to Mr. Durant the Superintendent of the defendant No. 1 and payments were made from to time. Advance payments appear to have been made before the measurements were made and the bills submitted, and final accounts used to be made up after the bills were checked, and the sums actually found due were paid. Up to the 14th of February 1922 fully payment appears to have been made to the defendant No. 2 by Mr. Durant for works done up to that date.

The plaintiff's case is that on the 10th of March 1922 Mr. Durant as Superintendent of the defendant company drew a cheque for Rs. 89-11-0 in favour of the defendant No. 2 for work done by the defendant No. 2. The defendant No. 2 endorsed the cheque in favour of the plaintiff on the 11th of March 1922. He presented the cheque to the Bank of Bihar on the 18th of March 1922. The cheque was dishonoured, and the present suit has been brought for recovery of the sum of Rs. 89-11-0 besides interest either from the defendant No. 1 or from the defendant No. 2 whoever may be held liable. The defendant No. 2 did not appear and contest the suit. The defendant No. 1 appeared and contested the suit on the ground that the amount payable under the cheque was in excess of the work done by the defendant No. 2 ; that Mr. Durant had been dismissed on account of his accounts not being satisfactory ; and that the defendant No. 2 was asked to return the cheque and the Bank was also instructed to stop the payment thereof. The defendant No. 1, however, admits that a sum

of Rs. 24-9-0 was due to the defendant No. 2 and alleges that the balance of Rs. 65 odd was in excess of the amount actually due. He further pleaded that the transfer of the cheque by the defendant No. 2 to the plaintiff was a collusive transaction. The learned Judge of the Court of Small Causes put down two issues for determination ; first, whether the cheque was issued without consideration, and second, whether the plaintiff got the cheque from the defendant No. 2 for value paid.

As regards the first issue the learned Judge has come to a finding on a consideration of the evidence that the defendant No. 1 was liable for Rs. 24-9-0 only for work done between the 14th of February and 22nd of February 1922, and that to this extent the cheque was for consideration. Upon the second issue the learned Judge has come to the conclusion that the plaintiff was not a *bona fide* endorsee of the cheque for value. He has accordingly dismissed the suit. The plaintiff has come up to this Court in revision against this decree of the Court below.

The cheque was payable to the defendant No. 2 or bearer, and under section 9 of the Negotiable Instruments Act the plaintiff would be a "holder in due course," if he became the possessor of the cheque without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Under section 118 of the Negotiable Instrument Act, the presumption is in favour of the plaintiff. Under clause (A) of section 118, it must be presumed that the cheque was drawn for consideration, and that the endorsement was made for consideration. Under clause (*g*) of section 118 it must also be presumed that the plaintiff is a "holder in due course." The presumption is a rebuttable one, and it was open to the defendant to prove that the cheque was drawn without consideration, or, that the endorsement was made without conideration ; but so long as the presumption is not rebutted by evidence, it must be held that the cheque was drawn for consideration, and that the plaintiff is a "holder in due course." The defendant No. 2 does not appear in the case and does not adduce any evidence to rebut the presumption arising in favour of the plaintiff as regards the endorsement being for consideration ; and the learned Judge in the Court below was clearly wrong in holding in the absence of any evidence whatever, that the transfer of the instrument by the defendant No. 2 to the plaintiff was a collusive transaction and without consideration. His finding is based on mere surmise and is not supported by any evidence whatsoever. I am, therefore, of opinion that it must be held that the plaintiff is a "holder in due course." and that as against the defendant No. 2 is clearly entitled to a decree.

As regards the defendant No. 1, although the presumption is in favour of the plaintiff, but it has been found by the learned Judge in the Court below on a consideration of the evidence on the record that the consideration failed to the extent of Rs. 65-odd, and that the cheque was for consideration to the extent of Rs. 24-9-0 only. Having regard to the principle involved in sections 43, 44 and 45 of the Negotiable Instruments Act, I think that there is no reason why a decree to that extent should not be made in favour of the plaintiff as against the defendant No. 1.

I, therefore, set aside the decree of the Court below, and decree the suit to the extent of Rs. 24-9-0 as against the defendant No. 1, and the balance Rs. 65-2-0 as against the defendant No. 2, with proportionate costs and interests. The petitioner is entitled to his costs in this Court as against the defendant No. 1. Hearing fee two gold mohurs.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 1073 OF 1923.

February 5, 1924.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

R. VISWANATHA PILLAI—PETITIONER

versus

T. K. PERIASAMI PILLAI AND OTHERS—RESPONDENTS.

Madras District Municipalities Act (*V of* 1920) *s.* 303 (2) (4), *rules framed under, rr.* 14, 17—*Municipal Election—Ballot papers initialled and marked on face-validity of—Identification of voters—Marking of ballot papers, rule requiring whether* ultra vires.

VISWANATHA PILLAI *v.* PERIASAMI PILLAI

Where at a Municipal Election held under Rules framed under section 303 (2) (4) of the Madras District Municipalities Act of 1920, the polling officer initialled the ballot papers not only on the back as directed in Rule 14 (1) but also placed his initials on the face of the ballot papers ;

Held (1) that the action of the polling officer did not *per se* contravene Rule 14 (1) of the Rules and did not invalidate the votes ;

(2) that such act did not in any way facilitate the identification of the particular voters and consequently the provisions of Rule 17 (1) were not infringed thereby. [p. 574, col. 2.]

Where the serial number appearing in the counterfoil of the ballot papers was printed not only on the back of the ballot papers but also upon the face, although the form prescribed under the Rules distinctly stated that the numbers shall be printed only upon the back.

Held, that the number was not a mark by which the voters could be identified within the meaning of Rule 17 (1) and the placing of the number on the face of the ballot papers did not invalidate the votes. [p. 575, col. 1.]

It must be only from the mark itself that the means of identification must be obtained so as to constitute a violation of the secrecy, within the meaning of Rule 17 (1) of the Madras Municipal Election Rules.

The rule providing for the marking of the serial number on the back of the ballot paper is a reasonable one made for the identification of the ballot paper and for the prevention of insertion of false papers and is not *ultra vires* of the Government. [p. 575, col. 1.]

Petition under section 115 of Act V of 1903 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Trichinopoly, dated the 8th November 1923, in O. P. No. 126 of 1923.

Messrs. *T. R. Ramachandra Aiyar* and *S. R. Dikshit*, for the Petitioner.

Mr. *K. Rajah Aiyar*, for the Respondents.

JUDGMENT.—This petition relates to an election held in the Trichinopoly Municipality, and the only question for consideration is whether certain ballot papers that were then recorded are valid or not. These ballot papers are objected on the ground that they infringe R. 17 (1) of the rules for the conduct of Elections of Municipal Councillors. That rule is as follows :—

> "Any ballot paper which is not duly marked, or on which votes are given to more candidates than there are members to be elected, or on which any mark is made by which the voters may afterwards be identified, shall be invalid."

In the present case, the contention before the District Judge of Trichinopoly was that these votes were invalid, because the polling officer had initialled the ballot papers not only on the back as directed in R. 14 (1) but had also placed his initials on the face. This placing of initials does not contravene R. 14 (1) and we agree with the District Judge that in itself it cannot invalidate the votes and we also agree with the District Judge that the placing of these initials does not in any way facilitate the identification of the particular voter and consequently, the provisions of Rule 17 (1) have not been infringed thereby.

In this Court a fresh objection is taken to these ballot papers on the ground that the serial number which appears in the counter-foil for the ballot papers has been printed not only on the back of the ballot papers itself but also upon its face, although the form prescribed under the Rules distinctly states that the numbers shall be printed only upon the back. It is argued that this number is a mark by means of which the voter may be identified. The rules, however prescribe that all the ballot papers shall have this number upon the back and there is no doubt that, when the ballot paper is handed to the voter, a candidate or his agent may very easily see this number and make a record of it. Similarly as there is no provision that the backs of the ballot papers shall not be seen during the counting, it would appear that, if the candidate, had recorded these numbers with the voter's name against each it would be possible to identify the voter of any particular ballot paper. The putting of these numbers on the face would render such a process easier still but it must be remembered that, although the Rules are framed with a view to obtain secrecy of voting, it is impossible to defeat all attempts which may be made to violate the secrecy, and probably no Rules could be framed which could defeat every deliberate attempt made by a candidate's agent to violate secrecy. It is suggested that even the

number on the back of the ballot paper is liable to violate this secrecy but it is also essential that the ballot paper shall bear some mark on the back for purposes of identification, for, otherwise there will be no means of preventing false ballot papers being inserted into the box. If it is once conceded that this number on the back is essential, we do not think that the addition of that number on the face would make any difference, unless it were proved that a list of names with the corresponding serial number had been prepared and that the voters could, therefore, be identified. No doubt in this case such a list might have been prepared and the voters identified thereby, but it has been laid down in *Woodward* v. *Sarsons* (1), that the idenification must be made by seeing the paper itself or by reference to other available facts. Here the inspection of the paper would not reveal the voter's identity and, if there is no list such as mentioned above available for reference, the identity could not be discovered. We think, therefore, that this number is not a mark by which the voter may be identified within the meaning of Rule 17 (1) and in this connection reference may also be made to the judgment of Field, J., in *Isaacson* v. *Durant* (2) in which he follows *Woodward* v. *Sarsons*, and says that it must be only from the mark itself that the means of identification must be obtained. We would, therefore, however, point out that the printing of the number on the face of the ballot paper is not authorised under the Rules and should not be repeated in future elections.

A further contention is raised that the Rule providing for the marking of the serial number on the back of the ballot paper is *ultra vires* because it is not conducive to the secrecy of the ballot for which purpose the rules were framed. As remarked above it is impossible to obtain absolute secrecy if persons are deliberately scheming to violate it. The Rule is in a reasonable one made for the identification of ballot papers and for the prevention of insertion of false papers and, consequently, we cannot say that it is in any way *ultra vires* of the Government.

(1) (1875) 10 C. P. 733; 44 L. J. C. P. 293; 32 L. T. 867.

(2) 4 O' M. & H. 34; 54 L. T. 684.

In the result, the petition is dismissed with costs.

V. N. V. *Petition dismissed.*
Z. K.

PATNA HIGH COURT.

CIVIL REVISION NO. 435 OF 1923.

April 28, 1924.

Present :—Mr. Justice Das.

Sheikh HAMIDUR RAHMAN—PETITIONER
versus
SHAHANAND DAS AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 148, 151—Appeal accepted subject to payment of costs within certain period—Default in payment—Extension of time - Power of Court - Revision

Section 148 of the Civil Procedure Code applies only to the case of an act to be done by a party under the provisions of the Code itself. [p 576, col. 1.]

Where an appeal is accepted subject to the condition that the appellant should pay to the respondent a certain sum of money by way of costs within a certain period and the condition is not complied with, the Court has no power either under section 148 or under section 151 of the Civil Procedure Code to extend the time limited in the order for payment of the money. [p 576, col. 1.]

The High Court should not exercise its powers of revision under section 115 of the Civil Procedure Code except in aid of justice. [p. 576, col. 2.]

Revision from an order of the Subordinate Judge, Purnea, dated the 1st August 1923.

Mr. *P. C. Rai*, for the Petitioner.

Mr. *S. Hussain*, for Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—This application is directed against the order of the learned Subordinate Judge of Purnea, dated the 1st September 1923. The petitioner in this Court was the auction purchaser of certain properties which were sold in execution of a Civil Court decree. The

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opposite party, who is the judgment-debtor, applied for setting aside the sale under the provisions of O. XXI, r. 90 of the Code. That application failed in the Court of first instance. On appeal the learned Subordinate Judge passed the following order : "The result is that this appeal is allowed and the case remanded to the Court below for a fresh trial in accordance with law and in the light of these directions indicated above. On this express condition that the appellants do pay to the contesting opposite party respondents a sum of Rs. 50 as costs within a week in default therein this appeal shall stand dismissed without further reference to this Court."

The order was duly signed by the learned Subordinate Judge and there is no question that it was a good and operative order. It is conceded that the sum of Rs. 50 was not paid by the opposite party within the time allowed by the Court ; but the opposite party made an application to the learned Subordinate Judge, after the expiry of the period of limitation by the Court, for leave to put in the money on the ground that he was not aware that the money should be filed within 7 days from the date of the order of the Appellate Court. The learned Subordinate Judge accepted the excuse put forward on behalf of the opposite party and exercised the power under section 148 of the Civil Procedure Code and extended the period for paying the money into Court. He thought that in the circumstances of the case he should exercise his inherent jurisdiction in the matter.

Now, I should like to point out that the learned Subordinate Judge had no power whatever to exercise under section 148 of the Code. Section 148 provides as follows: "Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired." Now the doing of the act in this case, namely, paying the sum of Rs. 50 to the petitioner was not the doing of an act prescribed or allowed by the Code. In these circumstances section 148 has no application whatever. It is obvious that section 148 applies only to the case of an act by the party under the Civil Procedure Code itself, nor in my opinion, was there any inherent jurisdiction in the Subordinate Judge to vary the order passed by him on the 23rd July 1923.

But the question is whether I should interfere with the order passed by the learned Subordinate Judge. It is well settled that jurisdiction under section 115 should not be exercised by this Court except in aid of justice. The respondents were no doubt late in bringing the money into Court ; but they were late only by a single day, and the circumstances show that they have a substantial grievance in the way the case was tried in the Court of first instance. In these circumstances I do not think that I should interfere in this case, although I am clearly of opinion that the order passed by the learned Subordinate Judge was wrong.

I would, therefore, dismiss this application but in the circumstances of the case, without costs.

Z. K. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE NO. 2 OF 1924.

July 28, 1924.

Present :—Mr. Wazir Hasan, J. C.

MESSRS. LOUIS DREYFUS & Co., KARACHI AGENCY AT RUDAULI—APPLICANT

versus

EMPEROR THROUGH PRESIDENT NOTIFIED AREA OF RUDAULI—OPPOSITE PARTY.

U. P. Municipalities (Act II of 1916), *ss.* 162 (2), 194 *Sub-Sec.* (1), *Cl.* (*b*)—*Rudauli, notified area of—Assessment of tax on non-residents.*

The liability for tax on non-residents, owning property within the limits of the notified area of Rudauli, arises in virtue of the rule framed by the Local Government under the U. P. Municipalities Act, and the tax can be assessed with regard only to the value of their property or trade. The words quoted have no reference whatsoever to profits or losses forming the basis of assessment or exemption.

NARENDRA LAL CHOWDHURY *v.* BENODE BEHARI SADHUKHAN

Reference under section 162 (2), U. P. Municipalities Act (II of 1916) by the Deputy Commissioner, Bara Banki, with his letter No. 53, dated the 5th June 1924.

Mr. *B. Aditya Prasad*, for the Applicant.

ORDER.—This is a reference under section 162 (2) of the U. P. Municipalities Act (II of 1916) by the Deputy Commissioner of Bara Banki in an appeal preferred to him by Messrs. Louis Dreyfus and Co., Karachi from an assessment of tax of Rs. 120 against them by the Committee of notified area in the town of Rudauli. The learned Deputy Commissioner is of opinion that the case raises a question as to "the principle of assessment of a tax." He has, therefore, made the reference under consideration. But on the facts found by him it appears to me that there is no such principle involved in the case.

The assessee's objection was that he had earned no profits in the business during the year for which the tax is assessed and that on the contrary he suffered loss. The learned Deputy Commissioner on an examination of the evidence produced by the assessee has come to the conclusion that there was an income of more than Rs. 12,000 and that that fact justified the assessment. The amount of the tax is the maximum which the Committee could impose, so even if the contention of the assessee that the tax could be assessed on the actual profits alone be accepted, the tax, having regard to the finding of the learned Deputy Commissioner, was justified. In this view of the case the determination of the principle of assessment applicable to this particular case is wholly unnecessary.

It may, however, be pointed out that the liability for the tax under consideration arises in virtue of the rule framed by the Local Government under section 194, sub-section (1), clause (*b*), of the U. P. Municipalities Act, 1900, regulating the assessment of tax on circumstances and property in the notified area of Rudauli. That rule is as follows :—

"All persons residing or carrying on any trade or profession, or owning property within the limits of the notified area shall be liable to be taxed according to their circumstances and property, provided that in the case of non-residents the tax shall be assessed with regard only to the value of their property within the said area."

It is admitted that the case of Messrs. Louis Dreyfus and Co. is a case of "non-residents," the tax as against them shall, therefore, be "assessed with regard only to the value of their property or trade." The interpretation of the quotation given above is to my mind perfectly clear. Those words have no reference whatsoever to profits or losses forming the basis of assessment or exemption. The learned Deputy Commissioner has found that Messrs. Louis Dreyfus and Co. have dealt with no less than Rs. 8,43,683-11-8 worth of grain through their Rudauli agency during the year 1923. I am, therefore, of opinion that he has acted rightly in dismissing the appeal preferred to him by Messrs. Louis Dreyfus and Co. The papers will be returned.

S. D. *Reference answered accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 431 OF 1919.

January 25, 1923.

NARENDRA LAL CHOWDHURY AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BENODE BEHARI SADHUKHAN—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885) ss. 50, 115, ch. X —Object of s. 50—Raiyat at fixed rate, status of—Presumption under s. 50—Occupancy raiyat, whether excluded from presumption—Rent receipts for twenty continuous years not produced, effect of.

A *raiyat* at a fixed rate is not created by section 50 of the Bengal Tenancy Act, which merely furnishes a rule of evidence to enable a person to prove with facility that he is a *raiyat* at a fixed rate. Such a *raiyat* may become a settled *raiyat* of the village under section 20, and thus acquire a right of occupancy within the meaning of section 21. The status of a tenant at a fixed rate can be combined with that of an occupancy *raiyat*, the higher status superseding so much of the lower as might be inconsistent with it, and either status might be used as a shield so far as it extends. [p. 578, col. 2.]

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An occupancy *raiyat* is not excluded from the category of a *raiyat* for the purposes of section 50 of the Bengal Tenancy Act, nor does section 115 debar such a *raiyat* from the benefit of section 50, as that section only comes into operation when all possible proceedings under Chapter X have been exhausted. [p. 578, col. 2.]

To entitle a *raiyat* to the benefit of the presumption under section 50 of the Bengal Tenancy Act, what has to be established is not the actual payment of rent, but the fact that the tenancy has been held at a certain rate. Where, therefore, rent receipts for twenty continuous years are not produced, but the discontinuous receipts produced show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods. [p. 579, col. 1.]

Appeal against the decree of the District Judge, Hughly, dated the 13th December 1918, reversing the decree of the Assistant Settlement Officer, Hughly, dated the 27th of June 1917.

Dr. *Jalunath Kanjilal*, for the Appellants.

Babu *Santosh Kumar Pal*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs-landlords in a proceeding instituted by them under section 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent by way of enhancement of the existing rent of the disputed holding. The defendant has been entered as an occupancy *raiyat* in the Record-of-Rights. But in answer to the claim for enhancement of rent he contended that he had the status of a *raiyat* at a fixed rate. In support of this position he produced rent-receipts to show that he had held the tenancy at the same rate for more than 20 years. The Settlement Officer held that inasmuch as he was an occupancy *raiyat* he was not entitled to the benefit of the presumption formulated in section 50 of the Bengal Tenancy Act. On appeal, the Special Judge held that although the defendant might be an occupancy *raiyat* he was entitled to the benefit of the presumption mentioned in section 50. The Special Judge then considered the rent-receipts, and although receipts for twenty continued years had not been produced, he held that there was sufficient evidence to show that the tenant had held at a uniform rate for more than twenty years. This presumption in his opinion was not rebutted in any way. In this view he dismissed the application for enhancement of rent.

On behalf of the plaintiffs we have been pressed to hold that an occupancy *raiyat* is not entitled to the benefit of section 50. We are of opinion that this contention is opposed to the clear terms of sub-section (1) of that section which provides that where a *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of alteration in the area of the holding. This embodies the substantive rule of law. Sub-section (2) then proceeds to lay down that if it is proved in any suit or other proceeding under the Bengal Tenancy Act that a *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. This deals with the mode of proof and raises a rebuttable presumption. We can see no reason why an occupancy *raiyat* should be excluded from the category of a *raiyat* for the purposes of this section. Section 4 mentions the following classes of tenants, namely, tenure-holders including under tenure-holders, *raiyats* and under-*raiyats*. *Raiyats* are then classified as (*a*) *raiyats* holding at fixed rates, (*b*) occupancy *raiyats* and (*c*) non-occupancy *raiyats*. This implies, it is argued, that a person cannot come under two of these categories. This contention is opposed to the decision in *Sarbeswar Patra* v. *Bijoy Chand Mohatap* (1), where it was held that a *raiyat* at a fixed rate may become a settled *raiyat* of the village under section 20 and thus acquire a right of occupancy within the meaning of section 21; that the status of a *raiyat* at a fixed rate can be combined with that of an occupancy *raiyat*; that the higher status would supersede so much of the lower as might be inconsistent with it, and either status might be used as a shield so far as it extended. There is nothing in the deci-

(1) 68 Ind. Cas. 986; 26 C. W. N. 15; 34 C. L. J. 233.

sion in *Bansidas* v. *Jagadip Narain Choudhury* (2), which militates against this view. We may add that a *raiyat* at fixed rate is not created by section 50, which merely furnishes a rule of evidence to enable a person to prove with facility that he is a *raiyat* at a fixed rate. We hold accordingly that the defendant was entitled to the benefit of section 50 notwithstanding the fact that he was recorded as an occupancy *raiyat*.

It has finally been urged that section 115 debars the defendant from the benefit of section 50. This contention is based entirely on a misapprehension. That section, as has been pointed out by a Full Bench of this Court in the case of *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (3), does not come into operation until all possible proceedings under Chap. X have been exhausted. The proceeding now before the Court is a proceeding under section 105.

As a last resort, we have been pressed to hold that as the rent-receipts for twenty continuous years have not been produced, the presumption under section 50 has not been established. This argument is opposed to the decisions in *Kattyani Dabea* v. *Soondures Dabea* (4) and *Elahee Buksh Chowdhury* v. *Roopun Telee* (5), which were accepted as good law in *Satis Chandra Biswas* v. *Nilmadhab Saha* (6) (decided by Mookerjee and Rankin, JJ., 10th August 1922). If the discontinuous receipts produced show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods; see *Secretary of State* v. *Upendra Narain Roy* (7). We must further remember that what has to be established is not actual payment of rent but the fact that the tenancy has been held at a certain rate. Reference may in this connection be made to the decision in *Mohinikanta Sahu Choudhury* v. *Preonath Neogy* (8).

(2) 24 C. 152 ; 12 Ind. Dec. (N. S.) 767.
(3) 3 Ind. Cas. 449 ; 37 C. 80 ; 13 C. W. N. 1149 : 10 C. L. J. 348.
(4) 2 W. R. Act X Rul. 60.
(5) 7 W. R. 284.
(6) 73 Ind. Cas. 77 ; 37 C. L. J. 598 ; (1928) A. I. R. (C.) 665.
(7) 71 Ind. Cas. 849 ; 36 C. L. J. 336 ; (1923) A. I. R. (C.) 247.
(8) 67 Ind. Cas. 381 ; 49 C. 661 ; 35 C. L. J. 309 ; (1922) A. I. R. (C.) 141.

The result is that the decree made by the Special Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold *mohur*.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 795 OF 1922.

March 24, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Dalal.

SOBHADDI LAL—DEFENDANT—APPELLANT
versus
GOBINDSINGH—PLAINTIFF AND KHANNU LAL—DEFENDANT—RESPONDENTS.

Hindu Law—Sudras—Ascetics—Disinheritance.

The Hindu texts applicable to the disinheritance of ascetics do not apply to Sudra ascetics unless some usage or custom to the contrary is proved. Therefore, a Sudra ascetics can inherit the property of another man and can be succeeded by others on his death. [p. 580, col. 1.]

Harish Chandra Ray v. *Atir Mohamed*, 18 Ind. Cas. 474 ; 40 C. 545; 17 C. W. N. 517 ; *Somasundaram Chettiar* v. *Vaithilinga Mudaliar*, 41 Ind. Cas. 546; 40 M. 846; 6 L.W. 253; *Ramdas Gopaldas Sadhu* v. *Baldevdas*, 26 Ind. Cas. 607 ; 39 B. 168 ; 16 Bom. L. R. 757, followed.

Appeal from a decree of the Subordinate Judge, Farrukhabad, dated the 22nd February 1922.

Dr. *K. Nath Katju*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The plaintiff's suit for the possession of a house against certain trespassers was dismissed by the Court of first instance, the Additional Munsif of Farrukhabad, and the defendants' appeal was dismissed by the Subordinate Judge who heard the appeal. The plaintiff's case was that the house was originally owned by two persons Fitam Singh and Parmoda Singh and on their death the plaintiff's brother Gopal Das succeeded to the property. Gopal Das died about eight months prior to the institution of the suit and the plaintiff claimed to succeed his brother by

right of survivorship. It was argued in this Court that Gopal Das was an ascetic and had renounced the world ; so neither could he succeed to the property nor could the plaintiff succeed to any property left by him. It was, therefore, submitted that the plaintiff had no cause of action and could not dispossess the defendants who were actually in possession. In reply the plaintiff-respondent's learned Counsel Dr. Sen quoted rulings where it was held that for a man to be a *sanyasi* he must belong to the three regenerate classes of Brahmin, Chhattri or Vaishya. The plaintiff and his brother were *Sadhus* and there was evidence before the first Court of witnesses produced on behalf of the defence that *Sadhu* was not a Brahmin or a Chhattri or a Vaishya. He must, therefore, belong to one of the unregenerate classes. In *Harish Chandra Roy* v. *Atir Mahmud* (1), a Bench of the Calcutta High Court held that Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras unless some usage or custom to the contrary is proved. This case followed an earlier ruling of the Madras High Court. In 1916 this proposition of law was reaffirmed by the Madras High Court in a ruling reported in *Somasundaram Chettiar* v. *Vaithilinga Mudaliar* (2). A Bench of the Madras High Court held that the texts of Hindu law of disinheritance applicable to *Yati* or *Sanyasi* do not apply to *Sudra* ascetics unless a usage to this effect is established. The same view has been taken in Bombay in *Ramdas Gopaldas Sadu* v. *Baldevdasji* (3). At page 174 of the report the Judges gave it as their opinion that *Sanyasis* were confined to the members of the twice-born castes. The first Court has pointed out in its judgment that no special custom was pleaded by the defence in the written statement and so the learned Munsif did not permit any evidence to be produced to prove such a custom. In the absence of any custom to the contrary we hold that Gopal Das did inherit the house and that the plaintiff as his successor-in-interest is entitled to its possession.

The appeal is dismissed with costs including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

(1) 18 Ind. Cas. 474 ; 40 C. 545 ; 17 C. W. N 517.
(2) 41 Ind. Cas. 546 ; 40 M. 846 ; 6 L. W. 253.
(3) 26 Ind. Cas. 607 ; 39 B 168 ; 16 Bom. L. R. 757.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2393 OF 1920.

January 25, 1923.

Present :—Mr. Justice Ghose and Mr. Justice Panton.

Syed ALI KAZEMINI MATWALI—PLAINTIFF—APPELLANT

versus

MANIK CHANDRA PRAMANIK—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenancy, origin of, unknown—Nature of tenancy, proof of—Permanency of tenancy—Permanent structures erected by tenant—Estoppel.

Where the origin of a tenancy, or the incidents of the tenancy at its inception, are unknown, evidence of the mode of dealing with the demised land, and the acts and conduct of the parties constitute the best if not the only, evidence for the purpose of proving the nature of the tenancy. [p. 581, col. 2.]

Where a tenant points to permanent structures on land occupied by him, and invites the Court to infer that his tenancy is of a permanent character, to enable him to avail himself of the plea of acquiescence or estoppel against the landlord, it is necessary for the tenant to show that, in spending money for the erection of buildings of a permanent character, he was acting in an honest belief that he had a permanent right in the land and that the landlord, knowing that he was acting in that belief, stood by and allowed him to go on with the construction of the buildings. [p. 582, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 4th June 1920, reversing the decree of the Munsif, 1st Court, Hooghly, dated the 24th March 1919.

Mr. *A. S. M. Akram*, for the Appellant.

Babus *Mahendra Nath Roy* and *Bijan Kumar Mukherjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff as *mutwali* of the Hooghly Imambara for a declaration that the defendant has no permanent right in respect of the land referred to in the plaint and for a mandatory injunction that certain walls which had been erected by the defendant should be demolished by him and for a permanent injunction restraining the

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defendant from making any permanent structure on the land in question. The defendant in his written statement urged that the *jama* of the land in question had been fixed at Re. 1 13 as. 10 gds. from before the decennial settlement and that the holding had been in the occupation of tenant on payment of rent at a uniform rate for a long period and that it had been transferred on several occasions at auction sales and by mortgages and conveyances to the knowledge of the landlord. He also stated in his written statement that if it was found that the holding in question was included within the *wakf* estate of the Hooghly Imambara, then it should be held to have been in existence from before the creation of the *wakf* estate. The learned Munsif who tried the case in the first instance came to the conclusion that the plaintiff was entitled to a declaration that the defendant had no permanent rights whatsoever in respect of the land in suit and that he should be restrained from erecting any fresh permanent structure on the land. As regards the existing structures the Munsif held that they should remain. On appeal by the defendant, the lower Appellate Court has held that the defendant's tenure was of a permanent nature and that the buildings on the land had been erected to the knowledge of the landlord and that in the circumstances the suit should stand dismissed with costs. The *mutwali* has now appealed to this Court, and on his behalf it has been contended that having regard to the fact that he is the *mutwali* of a *wakf* estate, it should have been held that under the Muhammadan Law he or his predecessor-in-interest had no power whatsoever to grant any permanent interest in respect of any land within the ambit of the *wakf* estate. In the second place, it has been urged that on the facts found, the presumption of permanency which has been drawn by the lower Appellate Court is wrong.

As far as we can gather from the judgments of the two Courts below, there is no document produced in this case showing the origin of the tenancy or the incidents of the tenancy at its inception. In the absence of any such document we are left to find out what the nature of the tenancy was and is from the evidence of the mode of dealing with the demised land and from the acts and conduct of the parties during such period. It is settled law [see the case of *Ismail Khan* v. *Jaigun Bibi* (1)] that in the absence of any governing document in cases of this description, the evidence of the mode of dealing with the demised land and the acts and the conduct of the parties constitute the best, if not the only, evidence for the purpose of proving the nature of the tenancy. The documents such as we have in this case are Exs. C, B and B 1. Ex. (C) is a sale-certificate showing that the holding in question had been brought to sale in execution of a decree for arrears of rent at the instance of the landlord, namely, the then *mutwali*, and that it was purchased some time in September 1884, by one Alimuddin. It appears from the next exhibit in order of date that Alimuddin sold the holding to one Ram Chander Das on or about the 15th November 1884. Then there is Ex. (B), dated the 26th June 1894, from which it appears that Ram Chander Das sold the property in question to the present defendant. There is no doubt that Ram Chander Das was recognised by the landlord. There is also no doubt that after the sale to the present defendant on the 26th June 1894 the rent which previously stood at Re. 1 13 as. 10 gds. was raised to Rs. 3 per annum. There is not in this case, as is to be found in various cases in the reports, a series of successions and a series of recognitions by the landlord, the rent being allowed to continue at a uniform rate and without any variation for a long series of years. The documents, so far as we can see, are of modern times and besides the circumstances to which we have alluded, there are no other circumstances to which the tenant can point as showing that his case is within the principle of the cases decided by their Lordships of the Judicial Committee where a permanent grant has been inferred from a series of successions and transfers followed by recognition. The defendant tenant points out, however, that there are permanent structures on the land and that some of them were erected about 20 years ago and he has invited us to infer from these circumstances that the tenancy was of a permanent character and that if it were not permanent he would not have been allowed to erect permanent structures on the land.

Now, to start with, the nature of the tenancy was perfectly well-known to the defend-

(1) 27 C. 570; 4 C. W. N. 310; 14 Ind. Dec. (N. S.) 374.

ant. That it was so is apparent from paras. 7 and 8 of his written statement. In the second place, it is settled law that in order that the tenant might avail himself of the plea of acquiescence or estoppel, it is necessary for the tenant-defendant to show that in spending money for the erection of buildings of a permanent character he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed him to go on with the construction of the buildings. See the case of *Beni Ram* v. *Kundan Lal* (2) and *Ramsden* v. *Dyson* (3). In this case there is an entire absence of evidence showing any circumstances under which the present defendant's case can be brought within the rule just referred to. It is, however, urged that the finding is that the erection of the *pucca* building on the land in suit was known to the *mutwali* or his agent. That is not enough. The tenant must in the first place show that he had an honest belief that he had a permanent right in the land and that the landlord knew that the tenant-defendant was acting under such a belief and further that the landlord knowing that the tenant-defendant was acting under such a belief stood by and allowed the erection of the permanent structure. It has been urged on behalf of the tenant-defendant that in the Courts below the nature of the limited interest of the plaintiff-landlord was not gone into and that the case was not approached from that point of view. There may be some room for this contention ; but having regard to the very comprehensive nature of the written statement filed by the defendant and having regard to the broad and comprehensive issues settled between the parties in this case, it is difficult at this stage to direct a remand. We see, therefore, no reason to direct a remand in this case and having regard to what has been stated above, we have no other alternative but to hold that the plaintiff-appellant is entitled to succeed.

The result, therefore, is that the appeal is allowed with costs and the judgment and the decree of the Munsif are restored.

S. D. *Appeal allowed.*

(2) 26 I. A. 58; 3 C. W. N. 502; 21 A. 496; 7 Sar. P. C. J. 523; 1 Bom. L. R. 400; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022.

(3) (1866) 1 H. L. 129 ; 12. Jur. (N. S.) 506 ; 14 W. R. 926.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 219 OF 1923.

August 4, 1924.

Present :—Mr. Kendall, A. J. C.

RAM CHHOR BAKSH—PLAINTIFF —APPELLANT
versus
RAM SURAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Adverse possession of mortgagee against mortgagor—Rival mortgagors—Possession of mortgagees, whether adverse against each other—Plea of adverse possession—Right of Court to raise suo moto.

The possession of a mortgagee is not adverse to his mortgagor. But where there are rival mortgagors, the possession of their respective mortgagees cannot but be mutually adverse. [p. 583, col. 1.]

A Court is justified in raising *suo moto* the plea of adverse possession as the point is one of limitation. [p. 583, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Gonda, dated the 3rd April 1923, in an appeal preferred against the decree of the Munsif, Gonda, dated the 15th December 1922.

Messrs. *Ram Prasad* and *Moti Lal Saksena*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This appeal is made from the decision of the learned Additional Subordinate Judge of Gonda upholding the Judgment of a Probationary Munsif dismissing the plaintiff-appellant's suit for possession of two plots on foot of a mortgage-deed dated 1st August 1910 said to have been executed by one Ramphal. The property in suit is proved to have belonged to one Kalka, and the plaintiff's mortgage was executed by Kalka's son.

This mortgage-deed is a usufructuary one, and it is admitted that the appellants have never obtained possession. The facts which have been proved in the Courts below are that the contesting respondents obtained possession of the property in suit

under a mortgage-deed executed by Kalka's widow in 1907. In spite of the fact, therefore, that on Kalka's death, his son Ramphal who had been separated from him may have been his heir in preference to the widow, the possession of the respondents was adverse and the plaintiffs' suit had become barred by time.

The only serious argument in the grounds of appeal which has been argued in this Court is that the first Court was not justified in raising a plea of adverse possession *suo moto*. It is true that no issue was framed on the point, but this is a defect in the proceedings, nevertheless the point is one of limitation and the Court was bound to raise it. Moreover, it is in evidence that Ramphal, through whom the appellant claims, was himself a witness to the mortgage-deed of 1907, and the possession of the respondents (mortgagees in that deed) is admitted. The appellant was, therefore, not prejudiced by the failure of the Court to record a definite issue on the point. It is suggested finally that the possession of the respondents was not adverse because the respondents were mortgagees. No doubt the possession of a mortgagee is not adverse to his mortgagor. Where, however, there are rival mortgagors, the possession of their respective mortgagees must be held to be mutually adverse. This is the case here and I have no doubt that the appeal was rightly dismissed. The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL
NO. 40 OF 1922.
March 25, 1924.

Present :—Mr. Kincaid, J. C., Mr. Kennedy, A. J. C., and Mr. Aston, A. J. C.

MANGALSEN—APPELLANT
versus
FIRM OF BHAGWANDAS PARMANAND
—RESPONDENTS.

Contract Act (IX of 1872) s. 251—Partnership—Partner, whether can release cause of action—Fraud, absence of.

Per *Kincaid, J. C.* and *Aston, A. J. C.* (Kennedy, A. J. C. dissenting):—In the absence of fraud one partner may release a cause of action in which he and his partners are plaintiffs.

Case-law discussed.

Per *Aston, A.J.C.* :—As a rule it is necessary for carrying on the business of a partnership in India, that a managing partner should have power to release causes of action even after suit whether he has signed the plaint or not and a Court will not set aside a release given by one partner unless fraud can be clearly established [p. 584, col. 2.]

Per *Kennedy, A.J.C.*—It is not possible to lay down a rule which will generally empower all partners to bind the other members of the partnership by a compromise or a rule to prohibit all partners from so binding their fellow partners. The question is in each case whether the act done by the partner is one which is usual or necessary for the business of the partnership. [p. 585, col. 2.]

Appeal from the judgment and decree of Mr. Raymond, Additional Judicial Commissioner, dated the 12th October 1922.

Mr. *Ladharam Anand*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for the Respondents.

JUDGMENT.

Aston, A. J. C.—This is an appeal from an order of the learned Additional Judicial Commissioner, dated 12th October 1922 directing a compromise to be recorded in suit No. 290 of 1919 dismissing the plaintiff's suit with no order as to costs, the defendants abandoning their claim-counter.

The facts of the case are clearly set out in the Judgment of the learned Additional Judicial Commissioner.

The firm of Mayadas Lakhmidas consisted of 3 brothers Mayadas, Lakhmidas and Mangalsen who had equal shares; according to the evidence Mayadas and Lakhmidas had contributed to the capital of the firm but Mangalsen was the principal capitalist partner.

It is admitted by Mr. Ladharam who appeared for the appellants that Parjaram, Doulatram and Dayaram worked as managers of the firm in Karachi.

Dayaram and Doulatram were the sons of Mayadas while Parjaram was the son of Lakhmidas.

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The learned Additional Judicial Commissioner has held that it is conclusively established that Dayaram was one of the managing partners of the plaintiffs' firm.

The suit was filed in 1919 to recover Rs. 32,614-0-0 from the defendants on a Commission agency account.

The defendant's counter claimed for Rs. 20,000-0-0. On the 27th April 1922 Lakhmidas died.

In May 1922 at Gujarkhan one Lakhmichand expressed his willingness to settle the case.

On the 10th of June an application was made by Mr. Ladharam who was the Counsel appearing for the firm, to Mr. Fatehchand the Special Commissioner for an adjournment for the purpose of settlement.

The hearing was again postponed to June 12th. On the 16th Mr. Ladharam suspected that Dayaram intended to settle the case because he had gone to the house of Lakhmichand with whom the defendants were residing.

On June 17th Mr. Ladharam delivered the following letter to Mr. Fatehchand.

"It is prayed on behalf of Mangalsen son of L. Ramditta that Dayaram Mayadas the manager of the plaintiff's firm has been won over by Lakhmichand Ghandoomal who is making efforts to remove my client Mangalsen who is the capitalist partner of the firm of Mayadas Lakhmidas. It is submitted that Dayaram has got no authority to settle or compromise with defendants or refer the matter. No one else except Mangalsen who is the capitalist partner has got such power."

On June 18th, a Sunday, Parmanand the defendant and Parjaram Dayaram Lakhmichand and the defendant in another suit which was compromised went to Mr. Fatehchand at Clifton and told him they had been talking of the compromise of the 2 matters but they had not yet been finally settled.

On June 19th Mr. Fatehchand received an application signed by Dayaram the Managing Partner of the plaintiffs' firm and Bhagwandas Parmanand on behalf of the defendants as follows :—

" We agree to the following consent report being submitted to the Court."

"That the suit of the plaintiffs against the defendants be dismissed with no order as to costs. The defendants abandon their counterclaim."

The compromise has been attacked by the appellants on the following grounds.

Dayaram had no authority to compromise.

Even assuming he had authority to compromise his authority was revoked (*a*) by the death of Lakhmidas and (*b*) by Mr. Ladharam.

The compromise was collusive and fraudulent.

The learned Additional Judicial Commissioner was of opinion that no fraud has been established, that Dayaram was managing partner, had authority to make the compromise, which was based on valuable consideration and that Dayaram's authority had not been revoked.

I entirely agree with these findings. For the reasons mentioned in my judgment in Suit No. 866 of 1919 I am of opinion that as a rule it is necessary for the carrying on the business of a partnership in India, that a managing partner should have power to release causes of action even after suit whether he has signed the plaint or not and that a Court will not set aside a release given by one partner unless fraud can be clearly established.

Dayaram no doubt has obligingly made very damaging admissions against himself with a view to getting the compromise set aside, he has also made the ridiculous allegation that he was unaware of the contents of the document which he signed. I think the learned Additional Judicial Commissioner rightly rejected his evidence in the suit as worthless.

The fact that Dayaram effected a compromise behind the back of the Counsel engaged in the case does not appear to me to be any indication of fraud. It is a matter of common knowledge, I think that partners not infrequently settle disputes and inform their pleaders afterwards.

The learned Additional Judicial Commissioner after considering the evidence recorded by the Special Commissioner came to the conclusion that it might well be that Dayaram thought that he would best consult the interests of the partnership if the plaintiffs withdrew their claim on condition that defendants relinquished theirs. The account books of

the plaintiffs were apparently of doubtful value. Signatures had been erased, pages torn and there are mistakes in the entries.

There is no evidence that Dayaram or Parmanand were aware of Mr. Ladharam's letter to Mr. Fatehchand at the time they entered into the compromise as distinct from the time when they asked Mr. Fatehchand to record it and the death of Lakhmichand while dissolving the partnership would not affect the rights of the parties ; see section 263, Indian Contract Act, for the remedy would survive to the co-partners, see the Commentary of Pollock and Mulla on section 45, Contract Act (4th Edition, page 301).

There does not appear to have been anything clandestine or secret about the negotiations for settlement. In the first instance it was Mr. Ladharam himself who asked for a postponement. Dayabhai and Parjaram and Lakhmichand and the defendant subsequently told Mr. Fatehchand, they were trying to settle, and it was within Parjaram's knowledge that Dayabhai went to the defendant.

It is suggested by Mr. Ladharam that Lakhmidas was an enemy who was bent on deceiving his brother Mangalsen, but it is admitted that both before and after the compromise Mr. Ladharam was running about with Lakhmidas, and that it was to Lakhmidas that Mr. Ladharam went to solicit his help in getting the compromise set aside.

Taking all the circumstances into consideration, I see no reason to differ from the findings of law or of fact of the learned Additional Judicial Commissioner and I would dismiss this appeal with costs.

Kennedy, A.J.C.—It need hardly be said that I am extremely diffident in differing from the opinion of my brother Aston and all the more so when that opinion is in accordance with the opinion of my brother Raymond and I only do so with the greatest hesitation. But I am not able to concur. It is not necessary to go into the facts for those facts are very fully given in the judgments delivered to-day by my brother Aston in Mis. Appeals Nos. 40 of 1922 and 16 of 1923 and my difficulty may be put very shortly and concisely.

I am not concerned with the question whether Dayaram was trying to defraud the other partners, and particularly Mangalsen. Even assuming that he was, the settlement with Bhagwandas will be good assuming (1) that the fraud was unknown to Bhagwandas, (2) that the effecting of the settlement was within the scope of the authority of Dayaram.

The question of fraud may be eliminated because the question as to the nature of the settlement in this particular case has not been gone into, and it is impossible to import into the consideration of these cases the conduct of Lakhmichand in the subsequent litigations and Dayaram who is obviously trying to get off out of the settlement which he effected should not be believed even when he asserts that he was acting fraudulently.

It is as regards the question whether Dayaram was acting within the scope of his authority and was supposed to be so acting by Bhagwandas that I feel a difficulty. In my opinion, it is not possible to lay down a rule which will generally empower all partners to bind the other members of the partnership by a compromise or a rule to prohibit all partners from so binding their fellow-partners. The question as I take it is in each case whether the act done by the partner is one which is usual or necessary for the business of the partnership. I can well imagine cases in which a partner has the authority, and may be supposed to have authority to settle pending cases. For such conduct may often be necessary in the interests of the partnership. The English Law as regards the rights of the partners is not here a very safe guide because the conditions differ so much in India. In the first place litigation and settlement are very much more part of routine of business here than in England. In India moreover one frequently finds a family firm with hundreds of sleeping partners, and one frequently finds a firm whose members are widely scattered. In such cases I think, it would be held, that the actually litigating and managing partners had authority to bind the other partners by settlement.

But here there were three families constituting this firm. Representatives of two of these families were prosecuting the litigation in these and in allied suits. They had employed as Counsel Mr. Ladharam who was a member of the third family and brother of the head of that family. A member of the third family Mulraj was also in Karachi. The third family was therefore effectively represented here.

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Mr. Ladharam undoubtedly seems to have taken part in the negotiations for a settlement, but he took no part in the final settlement and protested against it to the Commissioner, while it was in train of negotiations. In such circumstances, I do not think it was usual or necessary for the representatives of the two other branches to enter into an arrangement, without obtaining the consent of the third branch, or the person who effectively represented that third branch which person was moreover their own legal representative and who being a Barrister could, without special authority, have entered into the settlement in this litigation.

Nor do I think that Bhagwandas could have supposed that Dayaram had such authority. The actions of the settling partners and the defendants seem to me to have been rather those of men who were anxious to confront Mr. Ladharam with an accomplished fact in the hope that Mangalsen might be induced to accept it.

I would therefore hold that the decree of the lower Court should be set aside.

As I have the misfortune to differ the appeal has to go to a third Judge.

Kincaid, J. C.—This matter has been referred to me as a third Judge owing to the difference of opinion that has arisen between Messrs. Kennedy and Aston, Additional Judicial Commissioners in an appeal from a decision of Mr. Raymond, Additional Judicial Commissioner.

The facts of this case are really quite simple and have several times been stated. I shall shortly recapitulate them.

The firm of Mayadas Lakhmidas was a Punjabi firm trading in Karachi. The partners were three joint families, namely, the families of Mayadas and Lakhmidas and Mangalsen. In the course of their business they filed a number of suits, one of which was against the firm of Bhagwandas Parmanand. The plaintiffs claimed Rs. 32,614-0-0 from the defendants who counter-claimed for Rs. 20,000-0-0. At the request of the parties Mr. Fatehchand a well-known pleader of this Court was appointed Special Commissioner with power to record findings on all the issues framed by the Court. Mr. Fatehchand held some sittings, examined the accounts and fixed the final hearing to 10th June. On that date Mr. Ladharam, brother and Counsel of Mangalsen asked for and obtained an adjournment in order to arrive at a settlement, an adjournment from the 10th to the 17th June and again from the 17th to the 19th June.

On the 19th June Dayaram the Managing partner of the plaintiff's firm and Bhagwandas Parmanand the Managing-partner of the defendants' firm made the following application to Mr. Fatehchand.

"We agree to the following consent report being submitted to the Court."

"That the suit of the plaintiffs against the defendants be dismissed with no order as to costs. The defendants abandon their counter-claim."

Mr. Fatehchand accepted the document, but before filing it in Court gave notice of it to Mr. Ladharam. He on behalf of his client Mangalsen denounced it as fraudulent. The matter came up before Mr. Raymond, Additional Judicial Commissioner, who on the 12th October 1922 examined the whole question with the greatest care and directed the compromise to be recorded. He dismissed the plaintiffs' suit and the defendants' counter-claim with no order as to costs. Mangalsen appealed to a Division Bench of this Court who on the 15th February delivered differing judgments. Because of this difference the case has come to me for decision.

Mr. *Ladharam* appeared for the Appellant Mangalsen.

Mr. *Kimatrai*, appeared for the Respondents.

The trying Judge and both Judges of the Division Bench have agreed that no fraud was committed, and that all the allegations of Mr. Ladharam's client are untrue. These findings I accept, and the only question for my decision is whether in the absence of fraud one partner can bind a firm by compromising a suit to which the firm is a party.

Mr. Ladharam has raised two other points which I shall shortly discuss. He has relied on a letter, dated the 17th June which he addressed and delivered personally to Mr. Fatehchand. Therein he warned Mr. Fatehchand that Dayaram had been won over by a certain Laxmichand, who was trying to ruin Mangalsen and that the latter, as the Capitalist partner in the firm, had alone power to compromise suits. But in the

absence of fraud mere allegations of fraud will not invalidate a compromise. Here Mr. Ladharam was constantly in Laxmichand's Company after the 19th June when the compromise was accepted and Mr. Fatehchand has stated that on the 19th June Mr. Ladharam actually saw the compromise and made no objection to it.

Mr. Ladharam's second point is that one of the partners had died and his death dissolved the partnership ; but Mr. Raymond has pointed out that the shares in the firm were not held by individual partners but by three joint families. As the death of a single member did not affect the existence of the joint family, the ex-joint family continued as before to be a partner.

I now return to the main question whether a partner can bind a firm by compromising a suit on its behalf. The pertinent section 251 of the Contract Act runs as follows :—

"Each partner, who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent appointed for that purpose."

The question arises whether the compromise of a suit is an act necessary for or usually done in carrying on the business of such a partnership. On this point Mr. Kennedy, Additional Judicial Commissioner has observed as follows :— "In the first place litigation and settlement are very much more part of routine of business here than in England," with this observation I entirely agree ; but it is settled law in England that a partner has, in the absence of fraud, power to compromise suits on behalf of the firm. On this point Lindley has made the following remark (Lindley on Partnership at page 328.)

"But if it is competent to one partner to sue for the firm, it is as competent to any other partners to stay proceedings, or to put an end to the action altogether by means of a release ; and although the Court will not allow this to be done by collusion with the defendant, for the purpose of defrauding other partners of their rights, the release will be effectual where there is no fraud in the case." In *Furnival* v. *Weston*, (1) the Court decided that there could be no doubt but that one of two plaintiffs might release the action ; that unless fraud could be imputed by direct evidence to the defendant, as well as the plaintiff, they could not interfere. In *Arton* v. *Booth Dakas* (2) Ch. J. Dakas ruled as follows:—" It is quite clear that one plaintiff (the plaintiffs were partners) may release a cause of action brought by two and, therefore, the Courts have laid it down as a leading principle, that a release may be set aside if there be fraud between the parties, but that the party applying must make out a very strong case of the fraud."

These decisions appear to me to place the matter beyond doubt. The difficulty of the learned Additional Judicial Commissioner was this:—as Mr. Ladharam, who represented the third partner, namely, Mangalsen and was present in Karachi, it was not either usual or necessary to enter into an agreement without his consent. No doubt if Mr. Ladharam had given his formal consent on behalf of Mangalsen, the matter would have ended there. But the question is whether in the absence of Mr. Ladharam's consent Mangalsen was bound by the action of his partner. As there was no fraud I decide that Mangalsen was (so) bound. Mr. Raymond has pointed out that not only was there no fraud but there was probably a good reason for the compromise ; and, as I have already mentioned, Mr. Ladharam when he first saw the compromise took no objection to it.

I confirm the lower Court's finding and decree with costs and I dismiss the appeal.

P. B. A. *Appeal dismissed.*
Z. K.

(1) (1822) 24 R. R. 687; 7 Moore 356.

(2) (1820) 21 R. R. 740 ; 4 Moore 192.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 211 OF 1922.

November 16, 1923.

Present :—Mr. Justice Dass and Mr. Justice Ross.

NRIPENDRANATH CHATTERJEE AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

JHUMAK MANDAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

· *Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Mortgage suit—Arbitration—Award directing sale of mortgaged property—Preliminary and final decrees—Procedure.*

A decree under O. XXXIV, r. 5 of the Civil Procedure Code cannot be asked for unless a preliminary decree under O. XXXIV, r. 4 has been passed by the Court. [p. 588, col. 2.]

An arbitrator passing an award is in no way bound by the provisions of O. XXXIV r. 4 of the Civil Procedure Code. [p. 589, col. 1.]

Where a mortgage suit is referred to arbitration and the arbitrator makes an award for a sum of money and directs that it should be realised by sale of the mortgaged property and a decree is passed in terms of the award, the decree is enforceable as one passed by a competent Court and it is not open to the executing Court dealing with the matter to say that the decree cannot be executed unless the procedure indicated in O. XXXIV r. 5 of the Civil Procedure Code has been complied with. [p. 589, col. 1.]

Appeal from an order of the Subordinate Judge, Bhagalpur, dated the 24th July 1922.

Messrs. *Susil Madhab Mullick* and *Subal Chandra Mazumdar*, for the Appellants.

Messrs. *Yunus* and *Reazat Hussain*, for the Respondents.

JUDGMENT.

Das, J.—The appellants are the decree-holders and they object to the order passed by the learned Subordinate Judge of Bhagalpur on the 24th July 1922. The appellants brought a suit on a mortgage and the dispute between them and the respondents who are the judgment-debtors was referred to the arbitration of one Babu Rajendra Nath Singh. The arbitrator in due course made his award and the learned Subordinate Judge on the 19th December 1921 passed a decree in terms of the award. The material portion of the decree is in these words: "It is ordered and decreed that a decree be given to the plaintiff for Rs. 35,000 principal and Rs. 35,319-10-1½ interest in all for Rs. 70,319-10-10½ according to the corrected award dated 16th December, 1921 and that the decretal amount be realized by sale of the mortgaged properties mentioned in the mortgage-bond and detailed below, in execution of decree, without bringing a fresh suit." This decree was passed, as I have said, on the 19th of December 1921. On the 27th February 1922, the decree-holders presented an application for execution of the decree; and, by their application, they asked that a notice under O. XXI, r. 66 of the Civil Procedure Code be issued against the judgment-debtors and the mortgaged properties be then put up for sale and the decretal amount of the decree-holders be realized therefrom. The learned Subordinate Judge rejected this application on two grounds: first, on the ground that a final decree under O. XXXIV, r. 5 not having been obtained the decree was incapable of execution, and, secondly, that the decree-holders could not ask for execution of the decree unless and until decree-holder No. 2 surrendered possession of the mortgaged property.

In my opinion the judgment of the learned Subordinate Judge is wrong and should be set aside. I will first deal with the question, whether it was necessary for the decree-holders to obtain a final decree under O. XXXIV, r. 5 of the Code. Now it is obvious to my mind that a decree under O. XXXIV, r. 5, Civil Procedure Code could not be asked for unless a preliminary decree under O. XXXIV, r. 4, Civil Procedure Code had been passed by the Court. The second part of O. XXXIV, r. 5 is in these words: "Where such payment is not so made, the Court shall on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with as is mentioned in r. 4." But this decree was never passed under O. XXXIV, r. 4, Civil Procedure Code and, therefore, in my opinion it was not open to the decree-holders to

apply for a final decree under the provisions of O. XXXIV, r. 5. Mr. Yunus contends that a mortgage decree is incapable of execution unless the final decree under O. XXXIV, r. 5 has been passed. With this contention I am unable to agree. Mr. Yunus concedes that compromise decrees stand on a different footing; but, in my opinion, there is no difference in principle between a compromise decree and a decree in terms of an award. The arbitrator passing an award is in no way bound by the provisions of O. XXXIV, r. 4, Civil Procedure Code. In this case the arbitrator passed a decree for a sum of money and directed that that decree should be realised by sale of the mortgaged property. In my opinion, the decree is enforceable as a decree passed by a competent Court, and it was not open to the learned Subordinate Judge dealing with this matter to say that the decree could not be executed unless the procedure indicated in O. XXXIV, r. 5, Civil Pocedure Code had been complied with. As I have already mentioned, it is quite impossible for a decree-holder to have recourse to the provisions of O. XXXIV, r. 5, unless the decree is in terms of O. XXXIV, r. 4. The decree in the present case was not in terms of O. XXXIV, r. 4, and the objection is really to the terms of the decree as passed by the Arbitrators and this is an objection which was not open to the learned Subordinate Judge who was executing the decree.

The next point is that it was necessary for the decree-holder No. 2 to surrender possession of the mortgaged property before executing the decree. This question is entirely irrelevant to the present dispute between the parties and if the judgment-debtors are at all affected by the fact that the decree-holder No. 2 is still in possession of the property it is open to them to pursue their remedy in a different suit. So far as this matter is concerned the question does not arise in the present proceedings.

It appears that the learned Subordinate Judge came to the conclusion that it was necessary for the decree-holders to render an account before applying for execution of the decree. It was not really necessary for him to deal with this point because he had already come to the conclusion that the decree was incapable of execution. But lest this opinion of the learned Subordinate Judge should embarrass the present Subordinate Judge in any way we desire to say that the question of rendering account does not at all arise in the present proceeding. In the course of execution it is open to the judgment debtors to take any objection which the law allows them.

I allow the appeal, set aside the order of the learned Subordinate Judge and direct that he should proceed with the execution. The appellants are entitled to their costs in this appeal.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 160 OF 1922.

March 23, 1923.

Present :—Mr. Justice B. B. Ghose

IDOL SRI SRI GOKUL NATH JIN—PLAINTIFF APPELLANT

versus

THE NEW BIRBHUM COAL CO.—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Court-fees Act (VII of 1870), Sch. II, Art 17—Declaratory suit—Consequential relief not claimed—Dismissal of suit—Appeal—Court-fees—Appellate Court, duty of.

In determining the amount of Court-fees payable on a memorandum of appeal against a decree dismissing a suit for a declaratory decree on the ground that the plaintiff might and ought to have prayed for consequential relief, but did not do so, it is not the province of the Court to see whether the suit is properly framed, or whether the plaintiff is entitled to the declaration asked for, or what would be the effect if the plaintiff succeeded in obtaining the declaration asked for. The Court has only to see whether it is a memorandum of appeal in a suit in which no consequential relief is prayed, and has been stamped accordingly. [p. 590, col. 2.]

Reference by the Taxing Officer under Section 5 of the Court Fees Act.

Babus *Baronashibasi Mukerjee* and *Krishna Lal Banerjee*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty* and *Surendra Nath Guha*, for the Government.

JUDGMENT.—The memorandum of appeal in this case was filed with a Court-fee of Rs. 20 in accordance with the provisions

of Sch. II, Art. 17 (*iii*) of the Court Fees Act, 1870, as amended by Bengal Act, IV of 1922. There being a difference of opinion as to the fee payable between the Stamp Reporter and the Vakil for the Appellant, the Taxing Officer referred the matter to the Chief Justice who has appointed me to decide the question under Section 5 of the Court Fees Act. I thought it necessary to look into the plaint in order to enable me to decide it, and the learned Vakil for the Appellant supplied me with a copy of it and also another copy to the learned Government Pleader who appeared on behalf of the revenue authorities. It is contended on behalf of the Appellant that the court-fee paid is sufficient. Art. 17 of Sch. II of the Court Fees Act runs thus:—"Plaint or memorandum of appeal in each of the following suits:—(*iii*) to obtain a declaratory decree where no consequential relief is prayed." The third column prescribes the fixed fee payable. The fixed fee is payable under this article only when the suit is for a declaratory decree without any prayer for consequential relief. One of the grounds for dismissal of the suit by the Trial Court was that the plaintiff ought to have asked for consequential relief, which he had not done. I also find that the plaintiff has not prayed for any consequential relief in his plaint. It struck me on reading the plaint that on the statement of facts the plaintiff might and ought to have prayed at least for an injunction, if not for any other relief. The learned Vakil for the Appellant, however, argued that assuming it is so, he has not made any such prayer and says that, if his suit is found to be badly framed having regard to the provisions of section 42 of the Specific Relief Act, his appeal and the suit would be liable to be dismissed on that ground, but he cannot be asked to pay additional fee having regard to the fact that he has not prayed for any consequential relief. I am of opinion that his contention should be accepted. I think, the observation of Jenkins, C. J., in *Deokali Koer* v. *Kedar Nath*, (1) is appropriate to this case where he says: "It is a common fashion to attempt an evasion of Court-fees by casting the prayers in the plaint into a declaratory shape. Where the evasion is successful, it cannot be touched, but the device does not merit encouragement or favour." The learned Chief Justice further observed:—"If the Courts were astute, as I think they should be to see that the plaints presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases, would no longer arise." It is, however, not within my province to see whether the suit is properly framed, whether the plaintiff is entitled to the declaration asked for or what would be the effect if the plaintiff succeeds in obtaining a declaration as prayed for. If the Court trying the appeal finds that the suit as framed is not maintainable, it will either dismiss it or make such other order as it considers proper. I have only to see whether it is a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed. I think, it is such a suit. The learned Government pleader states that, if the plaintiff frames his prayer in this manner with full knowledge as to its effect, he cannot ask that the plaintiff should be compelled to pay additional Court-fee. Under the circumstances it seems to me, the Court-fee paid is sufficient according to the provisions of Sch. II, Art. 17 (*iii*) of the Court Fees Act.

N. H. *Order accordingly.*

(1) 15 Ind. Cas. 42; 39 C. 704 at p. 707; 16 C. W. N. 838.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 210 B OF 1922.

November 27, 1923.

Present:—Mr. Prideaux, A. J. C.

RAMACHANDRA—APPLICANT

versus

HARDEO—NON-APPLICANT

Limitation Act (*IX of* 1908) *s.* 18—*Suit barred by time—Fraud, proof of knowledge of plaintiff—Burden of proof.*

When a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who in such circumstances desires to invoke the aid of section 18 of the Limitation Act must establish that there has been fraud, and that by means of such fraud, he has been kept from the knowledge of his right to sue. Once it is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. [p. 591, col. 1.]

GANGA v. PANCHAM

Biman Chandra Datta v. *Promatha Nath Ghose*, 68 Ind. Cas. 94; 49 C. 886; 36 C. L. J. 295; (1922) A. I. R. (C.) 157, relied on.

Revision against the decree of the Judge, Small Causes Court, Basim, dated the 25th October 1922.

Mr. *P. N. Rudra*, for the Applicant.

Mr. *M. R. Bobde*, for the Non-Applicant.

JUDGMENT.—The question before me is whether Article 62 or 95 of the Limitation Act applies to the case. It seems to me very clear that the former Article is the correct one, for the money received by the defendant is, according to the plaintiff's case, money received by him for the plaintiff's use. Under that Article the suit is time-barred unless the plaintiff can invoke the aid of section 18 of the Limitation Act. It has been held in these cases that when a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its oridinary effect. A person who in such circumstances desires to invoke the aid of section 18 must establish that there has been fraud, and that by means of such fraud, he has been kept from the knowledge of his right to sue. Once it is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud *Biman Chandra Datta* v. *Promotha Nath Ghose* (1).

With these remarks I set aside the decree of the lower Court dismissing the plaintiff's suit, and remand the case to that Court for a fresh trial. It will re-examine the parties and obtain from the plaintiff a statement whether the fraud complained of in the plaint was kept from his knowledge, and the Court will decide whether section 18 of the Limitation Act does or does not apply. If it does apply, the case must be decided on the merits. Costs to abide the result. I fix pleader's fees at Rs. 15.

Z. K. *Order set aside.*

(1) 68 Ind. Cas. 94; 49 C. 886; 36 C. L. J. 295; (1922) A. I. R. (C) 157.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 158 OF 1923.

May 28, 1924.

Present :—Mr. Pullan, A. J. C.

GANGA —DEFENDANT—APPELLANT
versus
PANCHAM —PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 25—Failure to frame issue—Suit, when should be remanded—Hindu Law—Widow, re-marriage of—Estate, whether devolves on second husband

A suit should not be remanded because a certain issue was not framed unless there appears a reasonable chance that a decision of that issue will affect the final result of the suit. [p. 592, col. 1.]

There is no authority that among any caste of Hindus the property inherited by a widow on the death of her husband can on her death devolve on her second husband whether she has or has not married him in accordance with the custom of her caste. [p. 592, col. 1.]

Appeal against the decree of the District Judge, Rai Bareilly, dated the 8th March 1923, confirming the decree of the Munsif, Dalmau, dated the 16th December 1922.

Mr. *S. N. Roy*, for the Appellant.

Dr. *J. N. Misra*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for possession of a house and grove brought by the reversioners of a Hindu widow against an outsider who is in possession of the property. The defendant raised numerous pleas, first he stated that the widow *Musammat* Surji became unchaste in the lifetime of her husband and lived with his (defendant's) father Bhola. Consequently she could not inherit her husband's property, but ultimately obtained the ownership by adverse possession. On her death the property passed to the defendant's father and so to himself. The defendant, however, failed to make good this case, and the lower Courts have held that Surji inherited her husband's property as a Hindu widow. Against this the defendant argues that according to the custom of the sub-caste to which the parties belong the widow made a second marriage with the

defendant's father who inherited her property. The lower Courts refused to frame an issue on this pleading on the ground that it was unreasonable and immoral. Consequently I am asked in second appeal to remand the case in order that the defendant may prove the custom he has set up. In my opinion the Court of first instance might very well have framed an issue as desired by the defendant, but it did not do so, and the lower Appellate Court also declined to give the defendant the opportunity which she desired. It is no doubt in the power of this Court to remand the suit, but a suit should not be remanded because a certain issue was not framed unless there appears a reasonable chance that a decision of that issue will affect the final result of the suit. The learned Counsel for the appellant has not been able to show any book of law or custom which admits the possibility of an inheritance such as is claimed by the defendant respondent. He argues that the parties belong to a very low caste and that among such low castes of Hindus. widow re-marriage is permitted. This proposition cannot be denied but once it has been held as it has been in the present case, that the woman is a Hindu widow inheriting a life-interest in her husband's property, there is no authority that among any caste of Hindus her property, so inherited can on her death devolve on a stranger, whether she has or has not married him in accordance with the custom of her caste. Such inheritance is totally contrary to Hindu Law and as a matter of fact I do not find that the *Muraos* are a low caste. They are a sub-caste of *Kachis* and are well-known respectable cultivators. They are described in Crook's book which is the standard authority on the subject as orthodox Hindus. To remand this case on the remote chance that the defendant respondent would be able to prove by oral evidence that in his sub-caste a widow's limited estate would pass on her death to a man with whom her marriage is tolerated by caste custom but not recognised by Hindu Law, would be an order involving the parties in useless expense without any prospect of a modification of the decree already passed. I decline to interfere and dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 163 OF 1923.

April 30, 1924.

Present : —Mr. Justice Walsh and Mr. Justice Neave.

SITA RAM—APPLICANT
versus
Musammat GOBINDI—OPPOSITE PARTY.

Guardian and Wards Act (VIII of 1890), ss. 34 (c) (d), 35, 36, 45, 47—Object of Act—Power to investigate accounts filed by Guardian—Court, whether can order payment of balance due—Disciplinary action, whether inconsistent with remedy by suit—Order refusing to take action—Appeal—Revision.

The Guardian and Wards Act must be construed with due regard to the object intended to be allowed by the legislation. That object is the protection of the helpless minor and the control of the guardian charged with looking after his estate. [p. 594, col. 1.]

Under section 34 (*c*) and (*d*) of the Act the Court has jurisdiction to investigate the accounts exhibited by the guardian, to amend them by striking out objectionable items and to direct the guardian to pay the balance due on a true and just account. [p. 595, col. 1.]

Jagan Nath Pandey v. *Mahesh Chandra Pal*, 36 Ind. Cas. 286 ; 21 C. W. N. 688 ; 25 C. L. J. 149, not followed.

If the guardian fails to pay the balance found by the Court on a correct account, he becomes contumacious and can be dealt with under section 45 of the Act. [p. 595, col. 1.]

The disciplinary action taken under section 45 of the Guardian and Wards Act is not inconsistent with and does not bar the minor's remedy by suit provided by sections 35 and 36 of the Act. [p. 595, col. 2.]

An order refusing to take action under section 45 of the Guardian and Wards Act is not appealable. [p. 596, col. 1.]

Certain accounts filed by the Guardian having come up for consideration the District Judge *held* that the amount alleged to have been spent by the Guardian upon certain repairs to property was not justified and ought to be made good, but no formal order to that effect was made Some time after the minor again put in an application objecting to various acts of the guardian including the failure to refund the above-mentioned amount and the District Judge took the view that no action could be taken under section 45 of the Guardian and Wards Act, as the amount was not a sum in the hands of the Guardian. The Wards appealed to the High Court.

SITA RAM *v.* GOBINDI

Held (1) that the order was not appealable.

(2) but that the Judge had failed to exercise a jurisdiction which was vested in him and the High Court could interfere in revision. [p. 596, col. 1.]

Civil Revision from an order of the District Judge, Benares, dated the 11th October 1923.

Mr. *Jang Bahadur Lal*, for the Applicant.

Dr. *K. N. Katju* and Mr. *M. N. Raina*, for the Opposite Party.

JUDGMENT.—This appeal raises various important questions with regard to the true interpretation of the Guardian and Wards Act, relating to the class of matters which had become the subject of controversy between this particular ward and his guardian, and also relating to the right of appeal. There being no express authority in this Court upon the subjects which have been raised before us we hold ourselves free to take an independent view of the intention of the Legislature while at the same time paying due regard to the decisions of the High Courts in other Provinces which have been relied upon in the argument on behalf of the guardian.

So far as the facts are concerned the matter is extremely simple. The controversy relates to the conduct of the guardian and the accounts filed by the guardian, when the minor was still a ward. The guardian is the adoptive mother of the ward. It appears that there is a substantial dispute as to the adoption but this for the purpose of this appeal is immaterial there being no question as to the adoption, while the minor was her ward and continued to be her ward until he reached his majority. The minor was possessed of certain property and the dealings by the guardian of the estate of the minor came from time to time before the District Judge. Substantially we are only concerned with two orders made by the District Judge, namely, one of the 4th of August of last year and a more or less consequential order, which is the one under appeal, made on the 11th of October 1923.

On the 4th of August certain accounts, which the guardian had been, no doubt, previously ordered to file, came before the learned Judge for consideration. For the present it is only necessary to refer to three matters contained in these accounts. There was some question with regard to some moveable articles, which is not now before us at all. Secondly, there was a question with regard to certain expenditure on the minor's marriage; and thirdly, there was a question with regard to the expenditure by the guardian upon certain repairs to property; the two latter of course affecting the balance due from the guardian which she would be required to hand over upon the hypothesis that the items of expenditure which she had accounted for were approved by the learned Judge.

With regard to the marriage expenses the learned Judge took a very reasonable view. The guardian improperly proceeded with the marriage and with the expenditure therefor without obtaining the necessary sanction of the Judge. The Judge upon *ex post facto* material was satisfied that, in spite of the absence of the original sanction, that expenditure ought to be approved. He seems to have taken with regard to the repairs exactly the contrary view. In that case there had been no preliminary sanction and he comes to the conclusion (it is said that he did it without adequate material, that is a matter which we will deal with in a moment or two) that Rs. 900 alleged to have been expended by the guardian upon these repairs was not justified and ought to be made good. The logical consequence of that conclusion was—and according to our view it could have been ordered by the learned Judge, that the account should be amended and the balance payable by the guardian enhanced by the addition of the Rs. 900, the expenditure of which he refused to sanction. No formal order, however, of that kind appears to have been made. In October the matters came up again through an application by the minor who had then reached his majority and who objected to various acts of the guardian including the failure to replace or refund this sum of Rs. 900; and the learned Judge with regard to that latter item made the order which is now in question. It is convenient to quote the order as made. "I agree with the objection that as no action can be taken under section 45 with respect to the money, as this is not a sum in the hands of the guardian. It is only a matter which affects her discharge. It is difficult to follow that order. The learned Judge appears to hold that his powers are confined as regards action against the guardian

to cases in which a sum of money is actually in the hands of the guardian. To take an extreme illustration of that view it would appear to apply to a contumacious guardian who deliberately threw a box of rupees amounting to half a lakh belonging to the minor into the Ganges, and would presumably prevent, if the learned Judge's view is right, any amelioration by the Court having jurisdiction under this Act against a guardian for a wicked act of that kind. That illustration seems to suggest that there must be something wrong in the reasoning. To say that the matter only affects the discharge would indefinitely postpone the decision and seems to lead to an *impasse*, because if the Court has no power to order the money to be refunded, the refusal of the discharge would have no effect except that it would leave the minor embarrassed in the only alternative remedy left to him, namely, a suit at law against the guardian to restore the money. It is obvious, therefore, that this contention put forward on behalf of the guardian, namely, that no action can be taken against him (or her) by the Court at all except with reference to actual property under his control or money in his hands, raises a very serious question of the interpretation of the Act. We are of opinion that the Act must be construed with due regard to the object intended to be attained by the Legislature. The object may be summarised as the protection of the helpless minor and the control of the guardian charged with looking after his estate. In order to exercise that jurisdiction this Court has been vested with disciplinary powers which experience has shown are more effective in nine cases out of ten than the ordinary enforcement of rights by the prosecution of a suit under which individuals, who are *sui-juris*, are left by the Legislature for the determination of their dispute. For example, if the guardian is threatening to destroy or make away with property belonging to the minor and has not been called upon, possibly because of near relationship to give a bond at the commencement of his office of any substantial amount if the District Judge's view is correct, the Court has no power to call upon him to replace what he has wasted and to submit to punishment if he does not do so. The only remedy left is by an action at law, which may be indefinitely delayed by various obstructive means and prove in the end to be infructuous. It seems, therefore to us that we ought not to cut down by narrow interpretation provisions which appear to have been made by the Legislature to enable this jurisdiction to be exercised unless there are plain indications in the Act which prohibit us from taking what may be described as the wider view.

Coming now to the point raised by this appeal the whole discussion really turns upon the true meaning to be given to the provisions contained in section 34 (*c*) and (*d*). It is useful to make this preliminary observation that the draftsman obviously intended these provisions to be read continuously as part of one proceeding. These sub-sections provide that the guardian shall as and when required by the Court and in such form as the Court shall direct exhibit his accounts, and when required by the Court pay into Court the balance due on such accounts. The argument for the guardian is that the Court's power to direct payment of the balance is limited by such balance as the guardian chooses to show in the account which he exhibits. Indeed this argument is supported by the express language of more than one decision which has been cited to us from the reports of the High Court at Calcutta. It is not without significance that the cases cited are not to be found in the authorised Law Reports. We propose to deal with only one of them as illustrating the argument on behalf of the guardian, namely. *Jagannath Pande* v. *Mahesh Chandra Pal* (1), which carries with it the authority of the well known Judge Sir Asutosh Mukerji and Mr. Cuming. They definitely held that in the case before them on the accounts exhibited under section 34 (*c*) the only order which the Court was competent to make was to call upon the guardian to bring into Court the sum so shown. We think that the learned Judges could hardly have realised the logical consequence of so holding. The word "account" used in this connection must mean a just and true account. It is inconceivable that the Legislature intended to enable the guardian to satisfy this duty under section 34 (*c*)

(1) 36 Ind. Cas. 286 ; 21 C. W. N. 688 ; 25 C. L. J. 149.

by saying in the account, "As to a sum of Rs. 2,000 I yesterday paid this away to an insistent creditor of mine to prevent my arrest and I am therefore unable to produce this sum of money and the balance due from me is 8 annas". It is quite clear that it would be the duty of the Court on having such an account presented to it to strike out the sum of Rs. 2,000 paid away by the guardian for his own purpose, and to add it to the balance of 8 annas as shown by the guardian in the accounts, thereby making a balance due to the ward of Rs. 2,000-8-0. The Court may do it of course in one of two ways. Where the amount is a liquidated sum and clearly earmarked for a purpose it can amend the accounts by striking out the objectionable amount or it may reject the accounts on the ground that it is an untrue account of the guardian's liability and direct the guardian to submit a first account within a limited time. But it was never intended that it was not the duty of the Court, but the duty of the guardian, to decide what is the balance due on a true and just account. Then comes into play sub-section (*d*) of the same section (section 34) by which the Court directs the guardian to pay the balance. If this interpretation is correct and this procedure is adopted disciplinary action can be brought to bear on the guardian without the embarrassment from which the learned Judge seems to have suffered in this case, and without the Court being compelled to hold that its hands were tied because the balance directed to be paid was not a sum actually in the hands of the guardian. If the guardian fails to pay the balance found by the Court on a correct account he becomes contumacious and can be dealt with under Section 45. Sub-section (*b*) of section 45, clearly contemplated that such penalties are applicable to the misconduct of the guardian either in failing to exhibit the accounts it would be the case of course if original accounts such as we have suggested by way of illustration being rejected he fails to file a true amended account or to pay into Court the balance due as founded by the court upon the basis of a true and just account. We think that this is the only common sense view of the matter and it is the only productive interpretation which can be put upon these provisions.

Reduced to its most concrete form the only formidable objection against this view, which Dr. Katju in his argument was able to press upon us was that sections 35 and 36 of the Act contemplate remedies by suit but these remedies are not really inconsistent; they may well subsist together. As one of us pointed out during the argument a foolish and obstinate guardian who chooses to go to prison and suffer the uncomfortable personal penalties would not thereby be relieved from his responsibility, and it is possible that those sections were merely a precautionary provision to prevent the argument that the disciplinary penalties under section 45 were intended to make an end of the matter. It is important to observe that the legislature would have been guilty of a very short sighted view if it had really intended that the minor should be left to a remedy by a suit in the manner we have attempted to illustrate. He may be only five years old. The extent of the untruth of the account might be successfully hidden by the guardian from the Judge and until the minor reached some age of discretion when he was able to make discoveries which the Judge was not. In such a case it would be necessary, after the minor had discovered flagrant waste of this kind, to remove the guardian and to appoint another, and to direct the new guardian to take steps by way of suit on behalf of the minor for the recovery of the compensation due from the ex-guardian, who by the time a decree has been obtained might have disposed of any property which would make the decree of the least value to the minor. For these reasons we differ from the view which has been pressed upon us as the view hitherto taken in Calcutta, and we have less hesitation in doing so as we are not dealing here with a question of substantive law or of legal principle but merely of the true intention of the Legislature with regard to an administrative statute.

In conclusion we decide that the learned Judge was wrong. On the merits, if he was of opinion that the Rs. 900 was an amount in excess of what the guardian could rightly claim to have lawfully expended on repairs, he should have insisted upon fresh accounts correcting the balance due, and ordering her to pay such amount plus the Rs. 900 into Court. If he had done so he would have been able under section 45 to accede to the application of the minor unembarrassed by the difficulties which he felt in the order under appeal. It

is however pointed out to us on behalf of the guardian that on the other hand in arriving at this amount the learned Judge, not appreciating according to our view the extent of his jurisdiction, did not go as carefully as he might have done into the question of the amount, that is to say by a summary order he accepted Rs. 900 as representing the liability of the guardian for unjustifiable expenditure-whereas in truth and in fact, according to the contention on behalf of the guardian before us, that amount might, if the learned Judge took up the matter again, be to some extent modified. We therefore think it our duty, if we have the power to do it, to overrule both the orders in this case—namely, the orders of the 4th of August and of the 11th of October, and to send the matter back to the learned Judge to reconsider the position of the guardian as regards these repairs in the light of what we have said and in the light of such evidence and arguments as the guardian is able to produce to satisfy him that he ought to alter his decision as regards the amount; and having come to a fresh decision in the matter to order the guardian to pay the balance due and after giving her a reasonable time for payment of such amount if she is ordered to pay to exercise the powers given him under section 45.

This brings us to the further legal difficulty raised by this appeal. Unfortunate as it may appear we are of opinion that section 47 does not give a right of appeal against this order. It is not an order regulating the conduct of the guardian which is the only clause which can be suggested as covering this case. It is rather an order inflicting a penalty upon a guardian for breach of an order. But in this particular case we hold that the learned Judge has failed to exercise the jurisdiction which was vested in him. One can understand his view if he consulted the Calcutta cases. Indeed the same view appears in at least one text book on the subject. But taking the view we do of the intention of the Act we come to the conclusion that he had jurisdiction to amend the account and direct payment of the balance due on the amended account and that he failed to exercise this power and perform the duty cast upon him by the Act. The appeal is formally dismissed. We allow the revision, cancel the orders of the 4th of August and of the 11th of October and send the case back to the Court below for decision of the question of accounts having regard to our views expressed above. The applicant will get one set of costs in this case including fees on the higher scale.

K. S. D. *Revision allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION NO. 414 OF 1923.

April 8, 1924.

Present:—Mr. Rupchand BILARAM, A. J. C.

FIRM OF MAHOMEDALI A. KARIMJI & SONS—RESPONDENTS 1

versus

CHARATSING BUDSING—RESPONDENT 2.

Arbitration—Award based on equitable considerations, validity of—Arbitrator, duty of—Reference, scope of—Award based on erroneous grounds, legality of—Remission of award—Bias of arbitrator—Discretion of Court.

An arbitrator is not competent to pass an award according to what he considers to be an equitable arrangement under the circumstances of a particular case, but must decide according to the legal rights of the parties. [p. 597, col. 2.]

An arbitrator is inflexibly limited to the decision of the particular matters submitted to him and his award must conform both in substance and form to the submission. [p. 597, col. 2.]

Juggabundhu Saha v. *Chand Mohan Saha*, 31 Ind. Cas. 33; 22 C. L. J. 237, followed.

Where in his award an arbitrator states reasons for his decision which are erroneous on a point of law, there is an error of law on the face of the award and the award is bad and should be set aside. [p. 597, col. 2.]

Champsey Bhare & Co. Ltd., v. *The Jivraj Baloo Spinning & Weaving Co., Ltd.*, 73 Ind. Cas. 486; 47 B. 578; 44 M. L. J. 706; 25 Bom. L. R. 583: (1923) A. I. R. (P. C.) 66; (1923) M. W. N. 596; 50 C. 130; 33 M. L. T. 419; 28 C. W. N. 397 (P. C.), relied upon.

A Court should in the exercise of its discretion decline to remit an award to an arbitrator when there is the existence of any circumstance in the situation of the arbitrator which tends to produce a bias in the mind of the arbitrator. [p. 598, col. 1.]

Kemp v. *Rose*, (1858); 114 R. R. 429; 1 Giff. 258; 4 Jur. (N. S.) 919; 32 L. T. (O. S.) 31; 65 E. R. 910; relied upon.

MAHOMEDALI A. KARIMJI & SONS *v.* CHARATSING BUDHSING

Application of Respondent II under the Indian Arbitration Act (IX of 1899) to have award taken off the file.

Mr. *Tahilram Maniram*, for the Respondents I.

Mr. *Pahlajsing B. Advani*, for the Respondent II.

ORDER.—This is an application under the Indian Arbitration Act to have the award of Mr. X. taken off the file. It appears that Messrs. Mahomedali, A. Karimji & Sons, who are the landlords, claimed a right to eject their tenant Seth Charatsing on the ground that he had sublet a portion of the premises rented to him, and was, therefore, liable to be ejected under the provisions of the amended Bombay Rent (War Restrictions) Act. They also claimed a certain amount as due to them for rent. It is not, however, clear from the reference if the non-payment of rent was also urged as an additional ground for ejectment. In his award the arbitrator holds that the rent of the premises in 1916 was Rs. 120 and that, therefore, the rent which the landlords were entitled to recover from his tenant was Rs. 164-12-0 per month after adding to it Municipal taxes and the increase of rent permissible under the Rent Act. He further holds that as the tenant had sublet a portion of the premises on a rent of Rs. 75-0-0 per month, he was liable to eviction. However, curiously enough, in the operative part of the award he holds that the tenant should pay to the landlords a sum of Rs. 1,482-12-0 as arrears of rent from 1st January 1923 up to the 30th September 1923 calculated at the rate of Rs. 164-12-0 per mensem, and after that date he should pay a sum of Rs. 189-12-0 per month which includes a further sum of Rs. 25 being one-third of the amount realized by him as rent from the portion sublet by him. The reference on which this award is based is dated the 4th July 1923.

The first objection is that the aribitrator has exceeded his jurisdiction in passing the award. The submission is limited (1) to the alleged right of the landlords to eject the tenant, and (2) to the arrears of rent due up to the date of the reference. The arbitrator having come to the conclusion that the landlord was entitled to eject the tenant, it was open to him to order ejectment. He has, however, not done so, but ordered the tenant to pay Rs. 25-0-0 more per month than the amount fixed by him as the standard rent so long as his sub-tenant continues in occupation. He has also awarded arrears of rent up to the date of the award, and not up to the date of the reference. He has no doubt passed an award according to what he considered to be an equitable arrangement, which the parties should agree to and on which they should continue their relationship for the future. This was beyond his competence. An arbitrator is inflexibly limited to the decision of the particular matters submitted to him, and his award must conform both in substance and form to the submission: Per Mukerji, J. in *Juggabundhu Saha* v. *Chand Mohan Saha* (1). I am of opinion that the arbitrator has exceeded his jurisdiction. The second objection is that the award is illegal on the very face of it. This objection should also prevail. The Bombay Rent (War Restrictions) Act prevents a landlord from receiving more than the standard rent. The arbitrator has found as a fact that the standard rent is Rs. 164-12-0 per month. He has awarded more than this rent and has given his reasons in the award for doing so, which are contrary to law and erroneous. This objection, therefore, falls within the scope of the rule laid down in the recent ruling of their Lordships of the Privy Council in *Champsey Bhara & Co. Ltd.* v. *Jivraj Baloo Spinning & Weaving Co., Ltd.* (2).

Both these objections are technical and ordinarily I should have had no hesitation in remitting back the award to the arbitrator. Unfortunately, however, the firm in which the arbitrator is a partner have been engaged as pleaders for the landlords and Mr. Tahilram has appeared in support of the award. The tenant has objected to the award being remitted back to Mr. X. on the ground that his firm being engaged as pleaders, it is a circumstance which may tend to produce a bias in his mind. Though I have no doubt that Mr. X. would deal with the dispute with an unbiassed mind, I think it is a fit case in which I should in the exercise of my discretion decline to remit it back to him. As

(1) 31 Ind. Cas. 33 ; 22 C. L. J. 237.

(2) 73 Ind. Cas. 436 ; 47 B. 573 ; 44 M. L. J. 706 ; 25 Bom. L. R. 583 ; (1923) A I. R. (P.C.) 65 ; (1923) M. W N. 596; 50 C. 130 ; 33 M. L. T. 419; 28 C.W.N. 897 (P. C.).

pointed out in *Kemp* v. *Rose* (1), the existence of any circumstance in the situation of the arbitrator which tends to produce a bias in the mind of the arbitrator is sufficient to justify the interference of the Court, whether in fact such circumstance has any operation in the mind of the arbitrator must for the most part be incapable of evidence and may remain even unknown to himself. Under the circumstances, it is not necessary for me to go into the other objections raised by the tenant which are also of a technical nature. I order the award to be taken off the file. Each party to bear his own costs.

P. B. A. *Application allowed.*

Z. K.

(1) (1858) 114 R. R. 429 ; 1 Giff. 258 : 4 Jur. (N.S.) 919 ; 32 L. T. (O S.) 31 ; 65 E. R. 910.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT NO. 1480 OF 1922.

December 5, 1922.

Sm. SHOSHI MUKHI DEBYA AND OTHERS —APPLICANTS

versus

KESHAB LAL MUKHERJI AND OTHERS— OPPOSITE-PARTY.

Land Acquisition Act (I of 1894), s. 18—Award by Collector—Third party claiming title and asking for reference—High Court, whether will stay reference.

A Land Acquisition Collector made an order directing the payment of compensation in respect of certain property to A. B set up a title to the property and applied for a reference under section 18 of the Land Acquisition Act, and subsequently brought a suit against A to recover possession of the property : after institution of the suit, B applied for stay of the reference, but this was refused. He then moved the High Court for revision of the order refusing to stay the reference, or in the alternative for an injunction restraining A from proceeding therewith, or in the alternative for transfer of the reference so that it may be heard along with the suit:

Held, that B having chosen his *forum* must abide by the decision of the tribunal to whom the reference was made. [p. 600, col. 1.]

Application for revision of the order of the Calcutta Improvement Tribunal, dated the 14th August 1922 in case No. 138 of 1922.

Mr. *N. Sarkar*, for the Applicants.

Sir *B. C. Mitter* and Mr. *M. N. Basu*, for the Opposite Party.

JUDGMENT.—This is an application by *Srimathi* Shoshi Mukhi Debya to restrain Keshab Lal Mukherji from proceeding with case No. 138 of 1922 now pending before the Calcutta Improvement Tribunal until the final determination of this suit, or in the alternative for the transfer of the case to this Court for determination with this suit or in the alternative for revision of the order of the Tribunal of the 14th August 1922.

The facts are shortly as follows :—One Panchanon Bannerjee died on the 19th July 1878 leaving him surviving his widow, the plaintiff *Srimathi* Shoshi Mukhi, and three daughters. One daughter is dead and the surviving daughters are co-plaintiffs with her in the suit. Pachanon left a Will, dated the 23rd June 1878, whereby he appointed one Kenaram Bannerjee and one Tripura Sundari Debi executor and executrix. Probate was granted to Kenaram alone on the 4th December 1901 out of the Hughli Court. By Cl. 8 of the Will it was provided that any of the executors should in case of death be able to appoint by will another executor to carry out the directions of the will. Kenaram died on the 7th September 1921 having by his Will dated the 30th September 1905 appointed the defendant executor of his Will and also executor and trustee of Panchanon's estate. The Defendant proved Kenaram's Will in this Court on the 21st February 1912 ; he has not I understand, applied for administration *de bonis non* of Pachanon's estate. Whether this was necessary or not it is not necessary for me to decide for the purposes of this application.

Srimathi Shoshi Mukhi states that in February of this year she came to learn that a scheme had been framed (I suppose by the Improvement Trust) for the acquisition of 11, Sooterkin's Lane, one of the properties of the estate. On the 8th March 1922, she filed a petition before the 2nd Land Acquisition Collector stating that the defendant had no title to the property and that upon the true construction of Panchanon's will she was entitled to the premises and to the rents, issues and profits thereof for her life and asking that

her name should be recorded as a person interested and that upon an award being made the matter should be referred to the Court of the Calcutta Improvement Tribunal for the determination of her rights.

On the 18th April of this year the Collector made his award awarding Rs. 57,500 and directing the money to be paid to the Defendant as executor and *shebait*. I should state that by cl. 5 of Panchanon's Will on the happening of certain events the property was made *debutter*.

On the 24th April *Srimati* Shoshi Mukhi was served with a notice, dated the 20th April 1922, from the Land Acquisition Collector stating that she had been treated as a person interested in the premises, that an award had been made, and asking her to file her objections before him on or before the 25th April. She accordingly on the 25th April filed a petition asking (*inter alia*) that the matter should be referred to the Tribunal for the determination of her rights and the Collector made the following entry in the order-sheet: — "Petition filed on behalf of *Sm.* Shoshi Mukhi Debi refer to the Tribunal if in order and in time."

The compensation money was deposited with the Tribunal on the 28th April and this suit was instituted on the 1st May. On the 3rd May the President of the Tribunal notes receipt of the cheque and adds "Await reference." On the 26th June a reference (No. 370) was made by the Collector.

On the 11th July the plaintiff was given notice by the Tribunal to file her written statement on the reference. On the 3rd August the plaintiff petitioned the Tribunal to stay the reference. On the 14th August the Tribunal refused to stay the reference as it was made prior to the suit and the 4th September was fixed for settlement of issues.

I am asked to stay the proceedings before the Tribunal on the ground that the daughters are parties to the suit and not to the reference and that they will not be bound thereby and that accordingly there might be conflicting decisions of the Tribunal and of this Court. It is further said that the Tribunal was wrong in holding that the reference was prior to the suit and it is urged that the suit is more comprehensive and that the Tribunal's proceedings will be useless as they will not operate between the parties as *res judicata*.

As against this it is said on behalf of the defendant : —

(1) That the Tribunal has exclusive jurisdiction and can alone determine the matter.

(2) That the plaintiff by her application under section 18 of the Land Acquisition Act has chosen the forum and cannot now go back on this.

(3) That she has taken her chance before the Tribunal by applying for a stay and has failed and that she is bound by this decision.

(4) That she is in effect asking for a stay order on the Tribunal.

(5) That this Court has no jurisdiction to review the Tribunal's decision.

(6) That in any case there is an appeal from the Tribunal to the High Court and ultimately to the Judicial Committee.

And reliance was placed on a recent decision of this Court in its Appellate jurisdiction, *Saibesh Chandra Sarkar* v. *Sir Bejoy Chand Mahatap Bahadur* (1). In that case after the compensation moneys had been apportioned by the Collector, and neither party served with notice under section 9 of the Land Acquisition Act had applied for a reference under section 18 of the Act, a civil suit was instituted by one of the parties served with notice to recover part of the compensation moneys awarded by the Collector, and it was held that the suit was not maintainable as the Land Aquisition Act created a special jurisdiction and provided a special remedy and that section 31 of the Act applied only to cases where a person was under a disability or was not served with notice before the Collector. As against this I was referred to *Bhandi Singh* v. *Ramadhin Roy* (2). In that case a reference under section 18 had been struck off for non-appearance and it was held that those who were parties to the reference could not litigate the matter anew in a Civil Court but Mookerjee, J., states at p. 998 that having regard to the 3rd proviso to section 31 read with section 18 where the dispute is as to the persons amongst whom the compensation moneys are apportionable or as to the extent of their interest

(1) 65 Ind. Cas. 711; 26 C. W. N. 506; (1922) A. I. R. (C.) 4.

(2) 10 C. W. N. 991; 2 C. L. J. 359.

the matter could be litigated either on a reference under section 18 or in a Civil Court.

For the purposes of the present application it is not necessary for me to express my own opinion on the divergence of judicial opinion which appears in the two cases cited above, for in the application before me the plaintiff has chosen her forum by applying for a reference under section 18 and I think she must abide by it, and on that ground I dismiss the plaintiff's application with costs.

Learned Counsel for the plaintiff stated towards the conclusion of the argument that although the application was in form by the plaintiff alone, this was an error and he asked me to treat it as if the co-plaintiffs (the daughters) had also joined in the application. I regret that I cannot do so as I have not the facts before me with regard to the daughters. I do not know whether or not they were served with notice under section 9: presumably they were not, but the defendant has had no opportunity of dealing with this. If they were not served, presumably under section 31 their rights are preserved but I am not deciding this question. All that I decide is that the plaintiff having made her election under section 18 and applied to the Tribunal for a stay which has been refused, cannot, even assuming that a civil suit was open to her, succeed on this application. The result may be unfortunate, as if the suit continues so far as the daughters are concerned two Tribunals may be dealing with the same question and different decisions may result, but I regret that in the view I hold on the present application I cannot help this.

W. C. A. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL NO. 20 OF 1924.

July 8, 1924.

Present:—Mr. Wazir Hasan, J. C.

KUNWAR JANG BAHADUR—JUDGMENT-DEBTOR—APPELLANT

versus

Lala GUR PRASAD—DECREE-HOLDER—RESPONDENT.

Execution of decree—Decree against son for debt due by father—Personal property of son, whether liable.

Plaintiff brought a suit against the defendant for recovery of money due on a hand-note executed by the defendant's father and obtained a decree. He then took out execution and attached certain lands belonging to the judgment-debtor:

***Held*, that the judgment-debtor under the decree merely represented the estate of his deceased father and that execution could, therefore, proceed against the estate alone and the personal property of the judgment-debtor was not liable for attachment in execution. [p. 601, col. 1.]**

Bhujawan Prasad Sival v. *Ram Narayan*, 65 Ind. Cas. 224; 2 P. L. T. 396, followed.

Appeal from the order of the District Judge, Hardoi, dated the 25th March 1924, in Miscellaneous Appeal No. 104 of 1923 preferred against the order of the Munsif, Sandila, dated the 5th April 1923.

Mr. *H. D. Chandra* and *Kuar Krishna Bahadur*, for the Appellant.

Messrs. *H. N. Dass* for the Respondent.

JUDGMENT.—This is an appeal by the judgment-debtor. The respondent is the decree-holder. The appellant's father borrowed money from the respondent under a hand-note of the 13th July 1917 and died in April 1920 without having repaid the debt. In November 1920 the respondent brought a suit for the recovery of the said debt. The only defendant impleaded in the suit was the present appellant, Kunwar Jang Bahadur. A decree was passed in favour of the respondent under a compromise which directed the repayment of the decretal amount by two instalments. In the ordinary course, a decree was prepared in terms of the judgment in the case and naturally the appellant is described therein as the judgment-debtor. The decree-holder took out execution and the judgment-debtor paid him certain sums of money from time to time. There still remained a balance of Rs. 865-6-3 including interest on the unpaid amount of the decree. On the last occasion the decree-holder has attached certain *sir* produce of the appellant. The appellant now contends that the property attached is his personal property and that the execution could be taken out by the decree-holder against the property of the deceased debtor alone.

The Court of first instance allowed the objections and withdrew the attachment. The learned District Judge of Hardoi on appeal by

the decree-holder rejected the objections and has ordered the execution to proceed. The ground, on which the decision of the learned Judge is based, is that the decree in terms being against the judgment-debtor is a personal decree and consequently the judgment-debtor's own property was rightly attached in execution thereof.

In my judgment the learned Judge has missed the whole point of the case. It is admitted that the debt in respect of which this decree was obtained was due not from the judgment-debtor but from his deceased father and it is further admitted that the appellant was sued for that debt for the reason of his being the legal representative of his deceased father. On those facts, the question is not whether the decree was personal or otherwise. The real question for determination is whether in execution of the decree any property other than that of the deceased can be proceeded against in satisfaction of the decree. It is certainly a personal decree in the sense that proceedings taken for the satisfaction of the decree must be taken, as against the judgment-debtor but the question still remains as to what property would be liable for the satisfaction of a decree passed in relation to a debt of the nature of the present debt. The word "legal representative" is defined in clause (11) of section 2 of the Code of Civil Procedure, 1908, and means a person who in law represents the estate of a deceased person. The appellant, therefore, when appearing as a judgment-debtor under the decree in question merely represents the estate of his deceased father and the execution can, therefore, proceed against that estate alone. The conclusion at which I have reached is supported by a decision of a Bench of the Patna High Court in the case of *Bhujawan Prasad Singh* v. *Ram Narayan* (1).

The appeal is, therefore, allowed, the order of the lower Appellate Court is set aside and that of the Court of first instance restored with costs throughout.

K. S. D. *Appeal allowed.*

(1) 65 Ind. Cas. 224 ; 2 P. L. T. 396.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO 11 OF 1924.

April 15, 1924.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

BIJADHAR BHAGAT—DEFENDANT—APPELLANT

versus

JEAT CHAMAR—PLAINTIFF—RESPONDENT.

Letters Patent (Allahabad), cl. 10—Letters Patent appeal—Finding of fact, whether can be questioned—Procedure.

In a Letters Patent Appeal, the judgment appealed against must be judged with respect to the law laid down in it, in accordance with the facts stated at the Bar. If the Counsel choose to submit questions of law based upon a statement of facts which they do not challenge, in fact which they convey to the Court, they cannot afterwards be heard to question it in a Letters Patent Appeal. The proper remedy, if there has been any misunderstanding or slip, so that an erroneous statement of fact has crept in the judgment, is to ask for a review. [p. 602, col. 2.]

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Kanhaiya Lal.

Mr. *S. C. Das*, for the Appellant.

JUDGMENT.—We are satisfied that this decision is right and that it would be idle to issue notice. The case had got into a muddle by the time it reached our brother Mr. Justice Kanhaiya Lal, but on the view of the evidence taken by him, there can be no doubt that the law laid down is correct. The point is quite simple. It is found that Manohar, the predecessor of the plaintiff, was the holder of an occupancy tenancy. This he purported to lease in 1897 for 23 years to one Ram Kishun, the *Zemindar* of the village. It would appear doubtful whether Ram Kishun interested himself very much in the tenancy, and whether he actually cultivated or occupied, but there is no doubt that at a later date, Bijadhar, who was also defendant in the suit, came into possession. If he came into possession with the permission of Ram Kishun, he would be either his sub-tenant or assignee. He would, therefore, be lawfully in possession. Mr. Das says that he has been found to be the *Zemindar*. It

may be so, but it does not appear exactly how. Mr. Das says it is immaterial, but we can only suppose that it is either by purchase from Ram Kishun or by some other method known to the law, but inasmuch as the transaction was subsequent to the lease, it could not affect the lessor's right, and, therefore, Bijadhar being in possession, could only claim to be so through Ram Kishun the lessee. If he does not like that capacity and repudiates Ram Kishun, then he becomes a mere trespasser. Bijadhar, having appeared upon the scene, got his name entered as in possession and this property entered as his *khudkasht*. This moved the plaintiff into activity and produced this suit. He treated it as what has been called a "cloud upon his title" and sued for a declaration. He could not claim possession as he had leased the property.

The mere statement of these facts is sufficient to show that the plaintiff had a clear case to which there was no defence. All sorts of defences were raised, and it is difficult to understand the law, either of the Assistant Collector, or of the District Judge. The most serious thing is a finding of fact in favour of Mr. Das' client, namely, that the lease was fictitious. But fictitious is an ambiguous phrase and nobody suggests that it did not exist. Indeed the District Judge complains that Ram Kishun refused to produce the document and the lower Court had to rely on a certified copy. We agree with Mr. Justice Kanhaiya Lal that there was no evidence upon which the Court in this case would find that the lease was fictitious. Upon these facts, extracted with difficulty from the cloud of misunderstanding in the Courts below, Mr. Justice Kanhaiya Lal has applied the law correctly and it is impossible to find fault with his judgment. Mr. Das was originally instructed, when opening the appeal, to challenge the statement of the learned Judge that Bijadhar was the successor-in-interest of Ram Kishun. We think that this is a correct statement of the position, but we desire also to say that even if it were not, we should decline to listen to an appeal against a statement of fact in the judgment to which Counsel themselves have made themselves parties. We wish it to be clearly understood that in matters of law, like a second appeal in this Court, the position is not the same as an appeal from a trial, where the evidence and the findings of the Judge can be reconsidered in the Appellate Court. The Judge is required by law to express his opinion on the question of law submitted to him, and if Counsel choose to submit to him questions of law based upon a statement of facts which they do not challenge, in fact which they convey to the Court, they cannot afterwards be heard to question it in a Letters Patent Appeal. In other words, the Judge's judgment must be judged with respect to the law laid down by him, in accordance with the facts stated at the Bar. The proper remedy, if there has been any misunderstanding or slip, so that an erroneous statement of fact has crept into the judgment, owing to a slip by Counsel or a misunderstanding by the Judge, is to go back to the learned Judge in review, and ask him to review his judgment on the ground that he has decided the law upon a misunderstanding of what the facts found in the Court below were. We wish Counsel to understand that they must not allow the Judge to decide a point of law upon one hypothesis of fact to which they are parties, and then come up and argue a point of law on another hypothesis altogether. This appeal must be dismissed.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 10 OF 1924.

July 29, 1924.

Present :—Mr. Wazir Hasan, J. C.

GUR CHARAN AND ANOTHER—APPELLANTS

versus

FASIHUDDIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 2, 4—Minor appointed as next friend for other minors—Proceedings against such minors, effect of.

A minor is incompetent to act as the next friend of other minors and proceedings taken against minors under the guardianship of a minor are null and void and must be set aside. [p. 603, col. 2.]

Appeal from the order of the third Additional District Judge, Lucknow, dated the 1st November 1923, in an appeal preferred against the decree of the Subordinate Judge, Unao, dated the 23rd April 1923.

GUR CHARAN *v.* FASIHUDDIN

Mr. *S. N. Sinha*, for the Appellants.

Mr. *Ali Mohammad*, for the Respondents.

JUDGMENT.—This is the defendant's appeal under O. XLIII, r. 1 (*u*), of the Code of Civil Procedure from an order passed by the District Judge of Lucknow on the 1st November 1923. The facts are as follows :— One Tasawwar Ali brought a suit in the Court of the Subordinate Judge of Unao to obtain a decree for foreclosure on the basis of a mortgage. He died during the pendency of the suit. His five sons were substituted on the record of the case as plaintiffs in place of their deceased father and the suit was proceeded with. The Subordinate Judge dismissed the suit on merits. Four of Tasawwar Ali's sons were admittedly minors. The fifth and the eldest one, Fasihuddin, was on his own application appointed guardian *ad litem** of his minor brothers. From the decree of dismissal passed by the Subordinate Judge, one Musahib-ud-din acting as the guardian of all the five sons of Tasawwar Ali preferred an appeal to the Court of the District Judge of Lucknow. This appeal was filed on the 23rd May 1923. On the 22nd September 1923 Musahib-ud-din was duly appointed guardian of the sons of Tasawwar Ali including Fasihuddin by a competent Court in proceedings under the Guardians and Wards Act. On the date of the hearing of the appeal, the order of the 22nd September 1923 was produced before the learned Judge. The view which the learned Judge has taken is, that the proceedings of the Court of first instance subsequent to the death of Tasawwar Ali were null and void for the reason that the order of the 22nd September 1923 conclusively establishes that Fasihuddin, who was appointed guardian *ad litem* of his minor brothers by the Court of first instance, was himself a minor. In pursuance of this view the lower Court has set aside the decree passed by the Court of first instance and remanded the case for disposal according to law. The appeal before me is against this order of remand as already mentioned.

The argument in support of the appeal is, that Fasihuddin must be deemed to continue a properly appointed guardian *ad litem* till his appointment was revoked according to law and that, therefore, the appeal filed by Musahib-ud-din was an incompetent one and should have been dismissed. I am unable to accept this argument. In my opinion, the effect of the order dated the 23rd September 1923 declaring Fasihuddin a minor must be given retrospective effect in the sense that he was a minor as a matter of fact even on the date of the order. This being so, he could not have been appointed guardian *ad litem* of his minor brothers. It follows that an appeal by him if he had preferred one would have been incompetent. On the same reasoning and in virtue of the provisions of O. XXXII, r. 4, of the Code of Civil Procedure the only person who could have been validly appointed guardian *ad litem* of the minor plaintiffs was Musahib-ud-din. The appeal preferred by him was in my opinion validly preferred. Having thus got the proper seizin of the appeal the learned Judge of the Court below was quite within his powers in setting aside the order of the Court of first instance appointing Fasihuddin guardian *ad litem* of his minor brothers.

It was also argued that the learned Judge accepted the evidence furnished by the certificate of guardianship without giving any opportunity to the appellants to adduce evidence to rebut the declaration as to the minority of Fasihuddin. But there is nothing on the record to show that the appellants ever asked for such an opportunity.

The appeal is, therefore, dismissed with costs.

S. D. *Appeal dismissed.*

* *Note.*—The expression "guardian *ad litem*" seems to have been used throughout the judgment for the words "next friend."

RAMACHARI *v.* KRISHNAMACHARI

MADRAS HIGH COURT.

CIVIL REVISION PETITION NOS. 86, 87 AND 116 OF 1924.

April 4, 1924.

Present :—Mr. Justice Wallace.

K. V. RAMACHARI—DEFENDANT —PETITIONER

versus

K. V. KRISHNAMACHARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (V of 1908), s. 115, O. XI, rr. 14, 15—Documents produced by one party with request not to allow inspection without hearing objections—Right of other party to claim inspection—Jurisdiction of Court—Procedure.

The privilege of inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted, and it is to be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits. [p. 606, col. 1.]

When a party has produced in Court under O. XI, r. 14, Civil Procedure Code documents in his possession but has urged that inspection should not be allowed before hearing his objections, the Court has no right to ignore that protest and the other party has no legal right to inspect all documents relating to all issues and to all stages of the trial of the suit *i. e.*, the mere production by one party does not give an immediate and indefeasible right of inspection to the other. [p. 605, col. 1.]

Interference in revision by the High Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good. But the revisional powers must be exercised where the lower Court has not properly understood certain provisions of law and the result of its order may be wholly unnecessary and may cause irrepairable damage to a party's interests. [p. 604, col. 2.]

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Second Additional Subordinate Judge, Madura, dated the 1st December 1923, the 2nd November 1923, and the 1st December 1923 and made in I. A. No. 238 of 1923 in O. S. No. 8 of 1923, plaintiff's memo. dated the 24th October 1923 and the said I. A. No. 238 of 1923 in O. S. No. 8 fo 1923 respectively.

Mr. *A. Krishnasamy Iyer*, Mr. *T. M. Ramasamy Iyer* and Mr. *F. S. Vaz*, for the Petitioner.

Mr. *K. Raja Iyer* and Mr. *V. Ramasamy Iyer*, for the Respondents.

JUDGMENT.—First defendant in O. S. No. 8 of 1923 on the file of Second Additional Subordinate Judge's Court, Madura, has put in two Revision petitions Nos. 86 and 87 of 1924 asking for revision of two interlocutory orders of Subordinate Judge with reference to inspection of his documents by plaintiff. Interference by this Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good, but in the present case I think that the revisional powers of this Court must be exercised, partly on the ground that the lower Court has not properly understood the provisions of O. XI, r. 14 of the Civil Procedure Code and partly on the ground that the result of its orders may be wholly unnecessary and may cause irremediable damage to first defendant's interests.

There are two main contentions in the suit (*a*) that plaintiff is really a partner in first defendant's firm and trade (*b*) that plaintiff is, therefore, entitled to a taking of the partnership accounts. In his written statement first defendant referred, without giving particulars, to a number of documents on which he proposed to rely. Later on he filed various lists of them at various times and produced about 1,400 documents and put in a final affidavit of documents on 20th September 1923 in which he prayed the Court that it should not allow inspection of any document by plaintiff without specific orders and without notice to him. On 24th October 1923 plaintiff, without filing any affidavit, put in a memo. asking for inspection of all documents filed in Court by defendants and followed that up on 1st November 1923 by an affidavit in which he requested that one Mannar Aiyar be permitted to inspect on his behalf. On that the lower Court on 2nd November 1923 passed the first order now under revision, permitting plaintiff to inspect 212 documents, but refusing to allow Mannar Aiyar to inspect as he was not a power of attorney agent for plaintiff.

I cannot assent to the proposition that, when a party has produced in Court under

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O. XI, r. 14, documents in his possession but has urged that inspection should not be allowed before hearing his objections, the Court has a right to ignore that protest and the other party has a legal right to inspect all documents relating to all issues and to all stages of the trial of the suit, *i. e.*, that the mere production by one party, gives an immediate and indefeasible right of inspection to the other. I do not read O. XI, r. 14 as justifying any such conclusion. As the Court was proceeding according to the usual practice in the moffussil, to allow inspection in Court under O. XI, r. 14 and not under r. 15, I hold it was bound to consider first defendant's objections to inspection and especially bound to consider whether plaintiff was entitled to inspect all these documents *at the stage of the case, viz.*, before trial had begun. As pointed out above the first point to be decided in the case is whether plaintiff is or was a partner in first defendant's trade. Until that is decided, in plaintiff's favour, obviously plaintiff has no right whatever to be allowed to inspect the trade accounts, apart from those which bear on the question of partnership. The Court has no right to assume that plaintiff is a partner, and if it must hold that he is not, unless and until he proves that he is, clearly it is unjustified in law in allowing a stranger merely on the allegation that he is a partner, permission to inspect all the trade accounts of first defendant. The conduct of business would be impossible under such conditions and the Court has clearly lent itself to a course which is wholly opposed to public policy and it is, therefore, necessary for this Court to interfere.

On this part of the case then, *viz.*, on C. R. P. No. 87 of 1924, the proper order is that plaintiff cannot be allowed, unless and until he has established that he is a partner, to inspect any documents which do not bear on the question of partnership and that as regards documents which do bear on it the lower Court must hear first defendant's objections before it passes its order. If and when plaintiff has established his partnership, then the lower Court will similarly consider if plaintiff is entitled to inspect the remaining documents. I revise the order under Revision in C. R. P. No. 87 of 1924 and order accordingly.

In C. R. P. No. 86 of 1924 the lower Court has still further wandered from what I regard as the first principles of public policy. Following on its order of 2nd November 1923, it passed a further order on 1st December 1923 permitting Mannar Aiyar to inspect all first defendant's documents, (Mannar Aiyar having by then obtained a power-of-attorney from plaintiff), provided plaintiff undertook not to examine Mannar Aiyar as a witness. Plaintiff, in his turn has filed C. R. P. No. 116 of 1924 against the imposition of this condition. Now, without going into the details of affidavits on the relations of first defendant and Mannar Aiyar, the following points are clear:—(*a*) this Mannar Aiyar was employed in first defendant's firm for at least 20 years from 1898 to 1918 writing up and keeping up the firm's accounts: (*b*) he left the first defendant's service in 1918 and reverted to plaintiff's side in the dispute between plaintiff and first defendant and is now actively supporting plaintiff under circumstances which indicate that he personally is ill-disposed towards first defendant and (*c*) that plaintiff wants Mannar Aiyar to inspect the accounts and Mannar Aiyar himself wants to inspect them because he already knows the firm's business so thoroughly that he will be able to detect if there has been any tampering with accounts.

As *Supra* the Court is for the present to assume that plaintiff is an outsider to the firm who has been able to gain over to his side a disgruntled former employee of first defendant, and has given him a power-of-attorney for the express purpose of setting him to a roving inspection of first defendant's accounts and this is what the lower Court is permitting him to do. Such a course seems to me in the highest degree objectionable and contrary to public policy. That any outsider by mere allegations in a plaint should be able to obtain from a Court the power of inspection of all the firm's books by a former employee of the firm who knows the firm's business for over 20 years and who is employed by the plaintiff for the purpose of that inspection, not because of the skill as accountant and auditor but because of his exclusive and intimate acquaintance with all the firm's business, is a position that cannot be defended, and to permit it would be to put an end altogether to any privacy and confidential dealings in business.

The various rulings of English Courts which have been cited to me clearly establish the

proposition that a Court can and must exercise discretion as to whom it is going to permit to conduct such an inspection and the case in *Enamul Huq* v. *Ekramul Huq* (1) is to the same effect. The absence of a power-of-attorney (as in the case) does not alter the personality of the proposed inspecting agent. I am strongly of opinion that until and unless plaintiff establishes that he is a partner of the firm, Mannar Aiyar is, from his previous connection with the firm a wholly undesirable person to allow to inspect the accounts for plaintiff. If, however, plaintiff establishes that he is and was a partner, then as such partner he is entitled to the fullest scrutiny and knowledge of the firm's accounts and affairs, and the objection to an inspection of all the firm's books on his behalf by Mannar Aiyar, who would then in his connection with the firm have been servant of plaintiff as much as of first defendant, would disappear.

I must, therefore, reverse the order under revision in C. R. P. No. 86 of 1924 also and order that unless and until plaintiff establishes his plea of partnership, inspection on his behalf by Mannar Aiyar cannot be permitted and such inspection as the lower Court permits must be by some one else.

First defendant will get his costs on both these petitions, C. R. P. No. 116 of 1924 is dismissed with costs, Rs. 50 being allowed for printing.

I must impress on the lower Court that such a privilege as inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted, and that it is to be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.

S. D. *Order accordingly.*

(1) 25 C. 294 ; 13 Ind. Dec. (N. S.) 197.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 137 OF 1923.

August 4, 1924.

Present :—Mr. Wazir Hasan, J. C.

Shaikh NAQI HUSAIN—PLAINTIFF—APPELLANT

versus

Musammat CHHAJI BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pensions Act (V of 1871), section 4—Interpretation of Act—Suit for declaration of heirship to deceased pension holder—Specific Relief Act (I of 1877), section 42—Nature of relief.

The relief for a declaration of status is substantial relief *per se* and, under the provisions of section 42 of the Specific Relief Act, such a claim is maintainable though it has no reference whatsoever to any right as to any property. [p. 607, col. 1.]

Qamar Ara Begam v. *Peare Sahaba*, 2 O. C. 57, referred to.

In determining the application of section 4 of the Pensions Act, the Court should not inquire into the motives of the plaintiff. The fact that the plaintiff has the intention of using the declaration, which he may obtain from the Court, for the purpose of inducing the authorities concerned to accept his claim to the pension, cannot be either a bar to the maintainability of the suit for a declaration under section 4 of the Pensions Act, or a sufficient ground for dismissing it in the exercise of the discretion under section 42 of the Specific Relief Act. [p. 607, col. 1.]

The provisions of the Pensions Act being in derogation of the ordinary rights of a citizen must be construed strictly. [p. 607, col. 1.]

Balvant Ramchandra Natu v. *Secretary of State*, 29 B. 480 ; 7 Bom. L. R. 497, referred to.

Appeal against the decree of the Additional District Judge, Lucknow, dated the 8th January 1923, in an appeal preferred against the decree of the Additional Subordinate Judge, Lucknow, dated the 6th July 1921.

Messrs. *Haider Husain* and *Ali Mahommad*, for the Appellant.

Messrs. *Shahenshah Husain* and *Ghulam Hasan*, for the Respondents.

ORDER.—This is the plaintiff's appeal in a suit for a declaration that the plaintiff is the legal heir of Mt. Lutfunnisa Begam deceased

and also for the recovery of certain moveable property of the value of Rs. 60. The Court of first instance, the Additional Subordinate Judge of Lucknow, decreed the suit. The lower Appellate Court, the Additional District Judge of Lucknow, on appeal by the defendant No. 2, Chhaji Begam, has reversed the decree of the Court of first instance and dismissed the plaintiff's suit. As regards the claim for moveables the Court below has found that it was not established. As regards the declaration it has been refused on two grounds. First, that the claim was barred by section 4 of the Pensions Act (V of 1871) and, secondly, that the object of the declaration being simply to enable the plaintiff to receive the pension it should not be granted, the exercise of jurisdiction under section 42 of the Specific Relief Act being merely discretionary.

I am unable to agree with the view taken by the learned Judge. It appears that the plaintiff and the defendants claim the pension which the deceased lady enjoyed as heirs in exclusion of each other. The authorities controlling the distribution of the pension have awarded it to the defendant No. 2. It may be that the plaintiff has the intention of using the declaration which he may obtain from the Court for the purpose of inducing the authorities concerned to accept his claim to the pension but this motive of his cannot in my opinion be either a bar to the maintainability of the suit for a declaration under section 4 of the Pensions Act or a sufficient ground for dismissing it in the exercise of the discretion under section 42 of the Specific Relief Act. In determining the application of section 4 of the Pensions Act the Court should not inquire into the motives of the plaintiff. The provisions of the Act being in derogation of the ordinary rights of a citizen must be considered strictly—*Balvant Ram Chandra Natu* v. *Secretary of State for India in Council* (1). The relief for a declaration of status is substantial relief *per se* and under the provisions of section 42 of the Specific Relief Act such a claim would be maintainable though it has no reference whatsoever to any right as to any property. This was clearly pointed out by Mr. Spankie in a case similar to the present one—*Qamar Ara Begam* v. *Peare Sahaba* (2). The suit as framed for the relief of declaration and recovery of moveable property cannot be construed to be a suit relating to any pension.

I, therefore, allow the appeal, set aside the decree of the Court below and remand the case to the lower Appellate Court under O. XLI, r. 23, of the Code of Civil Procedure, with directions that the appeal be restored to its original number and disposed of according to law. The appellant will get his costs in this Court. The other costs will abide the event.

S. D. *Case remanded.*

(1) 29 B. 480; 7 Bom. L. R. 497.
(2) 2 O. C. 57.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 316-B OF 1923.

April 15, 1924.

Present :—R. B. Kinkhede, A. J. C.

NARAYAN AND OTHERS—DEFENDANTS —APPELLANTS

versus

Mt. TULSHI AND OTHERS—PLAINTIFFS —RESPONDENTS.

Hindu Law—Widow, gift by—Inaction by reversioner—Acquiescence—Waiver—Conduct, evidence of—Procedure—Second Appeal—New Question of Law—Suit, institution of—Events subsequent to suit—Court, whether can consider.

A plea of acquiescence by inaction on the part of a reversionary heir must be very clearly made out, if itis relied on as a bar to the enforcement of his rights as such reversioner. Laches to bar a plaintiff's rights must amount to waiver, abandonment or acquiescence and to raise a presumption of any of these evidence of the conduct must be plain and unambiguous. [p. 609, cols. 1 and 2.]

Although it is not competent to a Hindu widow to make a gift of the property inherited by her from her husband and the gift is void beyond her life time, the interest which the donee gets cannot come to an end with the death of the donee and if the gift be in favour of a daughter the property will be *stridhan* in her hands so as to pass after her death to her personal heirs, subject of course to the condition that the gift must cease to be operative at the death of the donor. [p. 609, col. 2.]

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy it is not only competent but expedient in the interest of justice to entertain the plea.

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The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea. [p. 610, col. 1.]

The general rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement but under proper circumstances a trial, as well as an Appellate Court may take notice of events which happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. [p. 610, col. 2.]

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 58 of 1923, dated the 9th July 1923.

Sir *B. K. Bose*, for the Appellants.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants against whom the claim has been decreed by both the Courts below. One Bhaoo Raut was the owner of Survey No. 254 of *mouza* Pal of Morsi Taluk. He died about 1894. He had a widow named Jani and a daughter named Bani. Bani was married to one Udebhan from whom she had a son by name Babu and a daughter by name Tulshi, plaintiff No. 1. Shortly after the death of Bhaoo his widow Jani executed a registered sale-deed in respect of the aforesaid field on 15th November 1895 (Exhibit P-2), which was really a gift in favour of her daughter Bani. Bani, however, died on 28th September 1918. Shortly after the death of Bani, her son Babu sold the northern half share of the field by a registered sale-deed on 21st November 1919 (Exhibit 1 D-1) to defendant No. 1 Narayan, and the defendants Nos. 2 and 3, have purchased the remaining half share of the field by another sale-deed dated 7th February 1922 (Exhibit 2 D-1) for Rs. 1,800 from Bhaoo. Plaintiff No 1 has sold half her interest to plaintiffs Nos. 2 and 3 by a registered deed, dated 15th February 1922 (Exhibit-P-3). The present suit is, therefore, brought by Tulshi and her transferees for possession against her brother's transferees. The decision of this case, therefore, depends upon the question whether the gift by Jani to her daughter, Bani, conveyed an absolute estate to her so as to make it her *stridhan*, which might devolve on her death upon her daughter, Tulshi alone or on her son or on both or revert to the heir of Bhaoo including Jani. Plaintiffs contended that the property being gifted by Jani to Bani, plaintiff No. 1 Tulshi succeeded to the property as her mother's *stridhan* in preference to Babu. On behalf of the defendants it is contended that even if the field be the *stridhan* of Bani, Babu and not Tulshi is the lawful heir to it. The Court of first instance held that the sale as per Exhibit P. 2 by Jani to Bani was virtually a gift and that plaintiff Tulshi and not her brother, Babu was the rightful owner to inherit it on Bani's death. Plaintiff's claim was accordingly decreed. The lower Appellate Court upheld the findings of the Court of first instance and dismissed the defendant's appeal holding that the property was *stridhan* in the hands of Bani and that therefore plaintiff No. 1 Tulshi succeeded to it in preference to Babu and that the defendants Nos. 1, 2 and 3 had no right thereto under the purchase from Babu.

In Second Appeal the defendants-appellants have stated that Jani died on 18th June 1923. This fact is not disputed by the respondents. It is agreed that the death of Jani having taken place during the pendency of this litigation, the question as to whether by virtue of the gift of 1895 Bani acquired an absolute interest in the land in suit so as to make it devolve on her personal heir as if it was her own *stridhan* has lost its importance. It is contended that on Jani's death the estate must revert to her husband's heirs and whatever interests Tulshi or her transferees may have had in the field must cease with the death of Jani, because Jani as a Hindu widow could not by gift alienate more than her life interest and consequently the gift could not prejudice the reversionary rights of Babu as Bhaoo's daughter's son to succeed on Jani's death to his grandfather's estate. It is further contended that in any case as Bani left a daughter Tulshi and a son Babu existing at the time of her death on 28th September 1918, Bani's interest in the field if it was her *stridhan* devolved equally on both under the *Mayukh* which applies to Berar. Reliance is placed on *Shriram* v. *Rajaram*, (1) decided

(1) 78 Ind. Cas. 367 ; 19 N. L. R. 193 ; (1924) A. I. R. (N.) 83.

by Kotval, A. J. C., in support of this contention. The defendants say that in any case the claim of Tulshi and her transferee must stand dismissed to the extent of half share inherited by Babu.

On behalf of the respondents it is contended that the case must be decided in conformity, to the general rule of granting relief according to the state of things existing at the date of suit, and not, to the exception which recognises the power of the Court to grant relief according to altered circumstances. It is urged that plaintiffs' claim cannot be defeated by taking into consideration events which have come into existence subsequent to the institution of the suit, and that if the fact of Jani's death on 18th June 1923 be ignored plaintiffs are entitled to succeed, and the decree cannot be varied. It is however conceded that if the case of *Shriram* v. *Rajaram* (1) is followed Babu will have half share in the field. Reliance is placed on an unreported decision of Prideaux, A. J. C., in *Govinda* v. *Doomi* (2) That case is distinguishable from the present one on the ground that there it was specifically held that the Mayukha did not apply to the particular family concerned in that case, and that decision is more or less based on the view that Mayukh is only a secondary authority, whereas in the reported decision it is held that in Berar whenever the Mitakshara and Mayukh differ the Mayukh predominates. It is further contended that Babu who was entitled to quarrel with the gift as affecting his reversionary interest has acquiesced in it, and in fact claimed title under it and cannot, therefore, now claim to assert his right through the transferees and resist the plaintiffs' claim.

The argument of the respondents that Babu acquiesced in the gift as also in its validity does not seem to me to be sound. In asserting that the transfer of 1895 which though worded as a sale has been interpreted by the Courts below to be a gift, was taken in the name of his mother Bani only *benami* for him, a Babu certainly was setting up his own title to the land, and not admitting in any way the title of Bani, and he could not, therefore, be said to have acquiesced in Bani's title in any way. A plea of acquiescence by inaction on the part of a reversionary heir must be very clearly made out, if it is relied on as bar to the enforcement of his rights as such reversioner. Laches to bar a plaintiff's right must amount to waiver. abandonment or acquiescence and to raise a presumption of any of these the evidence of conduct must be plain and unambiguous: *Peer Mahomed* v. *Mahomed Ebrahim* (3). The very fact that Babu sold his interest to the defendant, and put them in possession of the property is a strong indication of his repudiation of the gift. I am not, therefore, impressed with this argument and I do not see my way to uphold it.

The learned advocate for the appellants has conceded that although it is not competent to a Hindu widow to make a gift of property inherited by her from her husband and the gift is, therefore, void beyond her life-time the interest which the donee in such a case gets cannot come to an end with the death of the donee. He therefore concedes that the field was *stridhan* in Bani's hands so as to pass by inheritance to her personal heirs subject of course to the condition that the gift must cease to be operative at the death of Jani the donor and let in the claim of the heir of the last male holder. This contention appears to me to be sound and reasonable. The widow was certainly entitled to alienate her own right of enjoyment for her life-time to anybody she pleased, and the reversionary heirs could not be heard to say that because the alienee died during the life-time of the alienor the alienees heirs should not be allowed to succeed to the property, as if the alienation gave the alienee an interest which would enure for his (alienee's) own life-time and not for the life-time of the alienor. A transfer operates on the whole of the interest the transferor has or is capable of transferring at the date of transfer. Jani could transfer whole of her life interest by sale or gift to Bani, and it must therefore enure till Jani's death. In this view of the case according to the decision of Kotval, A J.C., the property devolved on plaintiff No. 1 and Baboo in equal shares when Bani died on 28th September 1918. The sales in favour of the present appellants by Babu were, therefore, operative, not to the full extent but to the extent of his own half share. His transferees could not resist plaintiff No. 1 or her transferees' claim in respect of the remaining half

(2) 65 Ind. Cas. 671 ; 5 N. L. J. 187.

(3) 29 B. 284 ; 6 Bom. L. R. 1013.

share, which devolved on her. The decree passed by the Courts below for possession of the entire field cannot therefore stand, and the appeal must succeed to that extent.

The appellants as stated above say that this Court should take into consideration the event of Jani's death on 18th June 1923 and vary the decree accordingly by dismissing the plaintiffs' claim even as regards the other half share on the ground that Bani's daughter Tulshi is not entitled under Hindu Law to succeed to Bhaoo the last male holder, and that this variation of the decree will shorten litigation and avoid multiplicity of suits. On behalf of the respondents however it is contended that there are no exceptional circumstances why the general rule of granting relief with reference to the cause of action as it existed at the date of its commencement should be departed from in this case and why the Court should exercise its exceptional power to take cognizance of events happening during the pendency of the litigation, and vary the decree already granted by the Subordinate Courts to suit the altered circumstances. This opens up a difficult question of law which I propose to discuss in the next paragraph.

The following quotation from *Connecticut Fire Insurance Co.* v. *Kavanagh* (4) is very apposite :

> " When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below."

But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea. As the fact and date of death of Jani was not expressly admitted at the hearing, I gave to the respondent's Counsel an opportunity to ascertain the truth of the assertion. The appellants have also filed an extract from the death Register. This extract coupled with the admission is sufficient proof of the fact that Jani died on 18th June 1923. The next thing is whether I should take cognizance of this fact and mould the relief so as to suit the altered conditions. This necessitates a discussion as to what the general rule is and how it is controlled or restricted by the exceptions.

The general rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement. This accords with what Lord Kingsdown laid down in *Anundmoyee* v. *Sheeb Chunder Roy* (5) that in appeal the question is whether the decision of the primary Court is correct on the facts as they stood when the judgment was rendered, and that no subsequent event or devolution of interest can affect that question because to give effect to them, should justice require it, would be the office not of an appeal but of some supplementary proceedings. But several exceptions to this general rule have been recognized in many English, American and Indian cases. I need not refer to all of them. They are all collected together in *Ram Ratan Sahu* v. *Mohant Sahu* (6). They show that a Court may take notice of events which happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. It appears this power is exercisable not only by the trial Court but also by the Court of appeal. Justice Mookerjee in delivering his judgment in *Ram Ratan Sahu* v. *Mohant Sahu* (6), makes the following observations and citations in this connection :—

> " This power of a Court of appeal to take cognizance of facts which have happened since the date of the judgment of the Court below, has been widely recognized; and is stated by Mr. Justice Thayer in *Ransom* v. *City of Pierre* (7), to be based on the principle that it is the duty of the Court which still retains control of the judgment to take such action as will

(4) (1892) A. C. 473 at p. 480; 61 L. J. P. C. 50 ; 67 L. T. 503 ; 57 J. P. 2.

(5) 9 M. I. A. 287 at pp. 291, 301; Marsh. 455; 2 W. R. P. C. 19 ; 1 Suth. P. C J. 485 ; 1 Sar. P. C. J. 854; 19 E. R. 750.

(6) 6 C. L. J. 74 ; 11 C. W. N. 732.

(7) (1900) 41 C. C. A. 585 ; 101 Fed. Rep. 665.

shorten litigation, preserve the rights of both parties and best subserve the ends of justice."

The principle which underlies the exercise of such a power was elaborately examined in the case of *Mills* v. *Green* (8) where Mr. Justice Gray in delivering the unanimous opinion of the nine Judges of the Supreme Court of the United States, affirmed the doctrine that it is not only in the power, but it may sometimes be the duty of a Court of Appeal to take notice of events which have happened during the pendency of the appeal and that such events when not appearing on the record may be proved by extrinsic evidence. The danger of not taking such events into consideration was also pointed, and it was said that the exercise of such power was necessary, as otherwise the Court might decide matters no longer in controversy, or deliver judgment which could not be carried into effect and could not in any manner affect the matter in issue in the case before it.

A similar view was taken in England in *Quilter* v. *Mapleson* (9) and *Attorney-General* v. *Birmingham, Tame,* and *Rea District Drainage Board* (10) where the principal was recognised that on appeal such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. The case of *Quilter* v. *Mapleson* (9) was a case of ejectment like the present one and though the plaintiff got a decree for ejectment in the first Court, the same was varied in appeal by giving relief against forfeiture as the new Statute of Conveyancing and Law of Property Act, 1881, came into operation under which power to relieve against forfeiture was given to Courts.

To the Indian cases already cited in *Ram Ratan Sahu* v. *Bishun Chand* (6) I may add a few more. *Hazari Mull* v. *Janaki Prosad* (11) and *Udit Chobey* v. *Radhika Prasad Upadhya* (12) where it is recognised that it is not only competent to a Court of appeal but it may be its duty under certain circumstances to take notice of events which have happened since the order challenged in appeal was made. The present is presumably a case of that kind. The appellants' transferor Babu is the person who is lawfully entitled to the property in dispute as the daughter's son of the last male holder. The cases of *Hedlot Khasia* v. *Karan Khasiani* (13), *Bunwari Lal* v. *Daya Sunker Misser* (14), *Rai Charan Mandal* v. *Biswa Nath Mandal* (15), and *Nuri Mian* v. *Ambica Singh* (16) are cases which affirm the same principle. Only recently in a Bench appeal before this Court this power of varying the first Court's decree in order to suit the altered conditions was exercised in a partition suit by one widow against her co-widow and the latter's daughter and daughter's son, and the order of the first Court which refused to take cognizance of the death of the defendant widow and to give benefit of an enlarged share to the plaintiff who was the surviving co-widow was set aside: *Mt. Radhabai* v. *Mt. Sonabai* (17), (First Appeal No. 89 of 1922).

I have myself followed the case of *Nuri Mian* v. *Ambica Singh* (16) in *Kashiram* v. *Mangal* (Second Appeal No. 440 *of* 1923) and set aside the decree for possession passed in plaintiff's favour, as the one year's lease on the basis of which he filed the suit had determined during the pendency of the suit, on the ground that the relief granted would in view of the determination of the period of the lease be inappropriate, and I granted only a declaration that plaintiff was entitled to possession but was unlawfully dispossessed by the defendant in order that plaintiff may get the benefit of that declaration in case he thought of recovering *mesne profits* for the period during which he was kept out of enjoyment of the land covered by his lease. I therefore see no valid reason why I should maintain the decree for possession passed in plaintiff's favour, when their right to possession has determined by the death of Jani on 18th June 1923. Perhaps defendants could not have brought the fact of the death to the notice of the lower Appellate Court before the date of the hearing which took place within 10 days of the

(8) (1895) 159 U. S. 651 ; 12 R. N. 785 ; 3 Thompson's Notes 631.
(9) (1882) 9 Q. B. D. 672 ; 52 L. J. Q. B. 44 ; 47 L. T. 562 ; 31 W. R. 75.
(10) (1912) A. C. 788 at p. 802; 82 L. J. Ch. 45; 107 L. T. 858 ; 76 J. P. 481.
(11) 6 C. L. J. 92.
(12) 6 C. L. J. 662 ; 3 M. L. T. 41.
(13) 13 Ind. Cas. 377 ; 15 C. L. J. 241.
(14) 1 Ind. Cas. 620 ; 13 C. W. N. 815.
(15) 26 Ind. Cas. 410 ; 20 C. L. J. 107.
(16) 34 Ind. Cas. 869 ; 44 C. 47 ; 20 C. W. N. 1099 ; 24 C. L. J. 140.
(17) 76 Ind. Cas. 682.

death or before 9th July 1923 when the judgment was delivered I do not think their failure to bring the fact to the notice of the lower Appellate Court in any way disentitles them from bringing that event to this Court's notice.

For all these reasons I reverse the decree passed by the lower Appellate Court and dismiss the suit in its entirety, so far as the costs of this litigation are concerned I think the only order that I think would be just in the circumstances of this case is that each party should bear his own costs in all the Courts.

G. R. D. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 44 OF 1924.

July 31, 1924.

Present:—Mr. Kendall, A. J. C.

Pundit DHARAM NARAIN—PLAINTIFF—APPLICANT

versus

THE UNAO COMMERCIAL BANK UNAO —DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order—Determination of case - Revision.

No revision will lie against an interlocutory order which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined thereafter. [p. 612, col. 2.]

Havenchand Kunwar v. *Kanhai Lal*, 4 Ind. Cas. 878; 12 O.C. 405; *Brij. Indra Bahadur Singh v. Deputy Commissioner of Kheri*, 47 Ind Cas. 676; 5 O. L. J. 430, relied upon.

Petition for revision from the order of the Second Additional District Judge, Lucknow, dated the 25th January 1924, passed in Appeal No. 55 of 1923.

Mr. *Ali Zaheer*, for the Applicant.

Mr. *K. P. Misra*, for the Opposite Party.

ORDER.—This is an application under section 115, Civil Procedure Code for the revision of an order passed by the learned Second

Additional District Judge of Lucknow, sitting at Unao, framing an additional issue in a civil appeal between the parties, and remanding it to the first Court for a decision on the point. As has been pointed out by the learned Counsel for the Opposite Party, it is settled law that no revision will lie against an interlocutory order which does not determine the case, but which is made with the object of collecting materials upon which the case is to be determined thereafter *Havenchand Kunwar* v. *Kanhai Lal* (1) and *Brij Indra Bahadur Singh* v. *Deputy Commissioner of Kheri* (2). It is admitted by the learned Counsel for the applicant that this objection is fatal to the present application, but it is urged that the issue as framed by the learned Judge will lead to difficulties and suggests that the words "before the respondent paid Rs. 771-14-0 to Insurance Co.," should be expunged. As I am not interfering in revision with the orders passed, I am certainly not in a position to give a decision on this point. If the issue as framed by the District Judge is not in accordance with the pleadings, that will be a matter for argument and adjudication in the Courts below. The application, is therefore, dismissed with costs.

S. D. *Application dismissed.*

(1) 4 Ind Cas. 878; 12 O. C. 405.
(2) 47 Ind. Cas. 676; 5 O. L. J. 430.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT NO. 1764 OF 1921.

April 27th, 1923.

Present :—Mr. Justice Page.

VALLY MAHOMED HAJI GUNNY—PLAINTIFF

versus

NEDERLAND S. NAVIGATION CO. AND OTHERS—DEFENDANTS.

Limitation Act (IX of 1908), Sch. I, Art. 31, applicability of—Suit by consignor against carrier—Limitation applicable.

Article 31 of Sch. I to the Limitation Act applies equally to a suit by a consignor as well as by a consignee. A suit, therefore, by a consignor of goods against a common carrier to recover damages for non-delivery must be brought within the period prescribed by that article. [p. 614, cols. 1 & 2.]

VALLY MAHOMED v. NEDERLAND S. NAVIGATION CO.

Messrs. *N. C. Sen* and *P. K. Chakrabarti*, for the Plaintiff.

Messrs. *A. A. Avetoom* and *B. C. Ghosh*, for the Defendants.

JUDGMENT.—This is a suit which is brought by the plaintiff against the defendants for damages for failure to deliver 1879 baskets of hard molasses which the Defendants as common carriers had accepted for carriage, and had agreed to carry for the plaintiff from Saurabya in Java to be delivered to the plaintiff at Calcutta. The goods were shipped under a bill of lading on the *S. S.* "Manada," and the steamship arrived in Calcutta on the 25th January 1920. Notice was given by letter by the defendants to the plaintiff on the 26th January 1920 that the goods were ready to be discharged. On the 26th the ship discharged certain goods on one of the quays at Calcutta. On the 27th she put out into the river, and her cargo was discharged there into lighters. The exact time which it took her to discharge the whole of her cargo is uncertain, but it was admittedly completed some considerable time before the 20th February 1920 when she left Calcutta.

The plaintiff issued his plaint on the 7th June 1921, which is more than a year after the time by which the goods ought to have been delivered which was about the 27th to 30th January 1920. The plaintiff framed his claim exclusively on contract being for damages for failure to deliver the goods. I refer to one or two paragraphs in the plaint:—

"Para. 2.—In or about the month of January 1920 the plaintiff shipped 6936 crates and 2747 baskets of hard molasses on board the defendant Company's steamship "Manada" at Saurabya in Java.

"Para. 3.—The master of the said steamship received the said goods to be carried to Calcutta and there to be delivered to the plaintiff. Freight for the said goods was paid by the plaintiff.

"Para. 4.—On arrival of the said steamship at Calcutta aforesaid the defendant Company delivered to the plaintiff 6936 crates and 1868 baskets of molasses, but did not deliver to him 879 baskets of molasses.

"Para. 5.—The plaintiff has demanded delivery of the said 879 baskets but the defendant Company have failed and neglected to deliver the same.

"Para. 6.—By reason of the defendant Company's wrongful failure to deliver the said 879 baskets as aforesaid, the plaintiff claims as damages from the defendant Company a sum of Rs. 8,264-12-0 being the price of the said 879 baskets as also another sum of Rs. 1,239-9-7 as interest thereon calculated at the rate of 12 per cent. per annum from the 20th February 1920 to 20th May 1921.

"Para. 8.—The Plaintiff's cause of action arose not earlier than the 31st day of January 1920 in Calcutta.

"The plaintiff, therefore, prays for, (*a*) such leave as aforesaid, (*b*) a decree for the said sum of Rs. 9, 503-9-6 with interest, and (*c*) for costs."

Counsel for the plaintiff, in the course of the hearing, admitted that under the circumstances of this case the only issue which could be determined was whether or not the cause of action was barred by limitation on the ground that if that issue was decided against him (and which should be first considered), all other issues which might be raised would become immaterial, and the time spent upon considering them would be wasted. Accordingly, a representative of the defendants was called, and he stated in evidence the facts as to the arrival of the vessel at Calcutta, and the time during which she was discharging, and the date of her subsequent departure from Calcutta, which I have already referred to. Thereupon, the only question which it became incumbent upon me to determine was whether or not the cause of action for damages for non-delivery of the 879 baskets was barred by reason of the provisions of the Limitation Act.

The determination of that question, in my view, depends upon whether or not the cause of action comes within Art. 31 of the first schedule to the Limitation Act. The schedule reads as follows:—

"31.—Against a carrier for compensation for non-delivery of or delay in delivering goods, one year from the time when the goods ought to have been delivered."

The goods ought to have been delivered sometime between the 27th January and the 20th February, and probably sometime between the 27th January and the 30th January 1920. As the plaint was filed on the 7th

June 1921, more than a year later, if Art. 31 applies, the cause of action is barred by limitation. Counsel, who have strenuously argued on behalf of the plaintiff, contended that Art. 31 did not apply for this reason that Art. 31 only applies to a claim against a carrier which is made by the consignee of the goods for non-delivery of the goods to him. In support of his contention he cited the case of *Radhasham Basak* v. *The Secretary of State for India in Council.* (1). In that case M. Justice Chatterjee at page 795 stated it to be his opinion that "Art. 31 applies to suits against a carrier for compensation for non-delivery of, or delay in, delivering goods, and the time for suit is one year from the time when the goods ought to have been delivered. I think this article has no application. In the first place, this article seems to contemplate a suit by a party who is entitled to the delivery, namely, the consignee. In the second place, it would be for the Company to show when the goods ought to have been delivered, that fact being presumably within their knowledge, but there is no evidence on that point." Mr. Justice Beachcroft in giving judgment in the same case made this observation: "As regards the question of limitation, it is sufficient to say that I agree that Art. 30 does not apply, and if Art. 31 does there is no evidence when the goods ought to have been delivered." It might be contended that the decision in this case is to be supported on the ground that there was no evidence adduced as to the time when the goods ought to have been delivered. That would have been sufficient for the decision in the case. Mr. Justice Beachcroft did not affect to decide whether Art. 31 applied or not, and therefore one is left with the opinion expressed by Mr. Justice Chatterjee that Art. 31 seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee. Counsel for the plaintiff urged that the meaning of that observation is that it applies to a suit by the consignee only. If that is the meaning which is to be attached to the words of the learned Judge, a meaning which I think is not clear, then I am bound to say with all due deference that I am unable to follow the reasoning upon which it is based. The words of Art. 31 are wide enough to include suits brought by the consignor as well as by the consignee, and it may very well happen that the same person is both consignor and consignee. I am unable to see why any distinction should be drawn between a cause of action for compensation for non-delivery by a consignor and one by a consignee, and the view which I hold is also found in the judgment of Mr. Justice Banerjee in the case of *Mutsaddi Lal* v. *The Bombay, Baroda and Central India Railway Co.* (2). At page 393 the learned Judge makes these observations :—

"That Art. 31 applies to a case of this kind appears from the ruling of this Court in the case of *Great Indian Peninsula Railway Co.* v. *Ganpat Rai* (3). The same view was taken by the Bombay High Court in the case of *Haji Ajam Goolam Hossein* v. *Bombay and Persia Steam Navigation Co.* (4). It has been urged that Art. 31 applies to a suit by the consignee and not, as in this case, by the consignor. This contention is, in my opinion, untenable. The article is wide enough to include a suit brought by the consignor also. It provides for a suit for compensation for non-delivery, that is, a suit by a person who by reason of non-delivery has sustained loss. There may be cases in which it is not the consignee who sustains loss but the consignor. In such cases it would be a suit by the consignor for compensation for non-delivery."

It is open to doubt whether the ruling of Mr. Justice Chatterjee was necessary for the decision in the case in which it was given, but I am at liberty to form my own view of the matter having regard to the decision of the Calcutta High Court in *Indian General Navigation Co., Ltd.* v. *Nandalal Banik* (5). Mr. Justice Chitty and Mr. Justice Vincent in giving judgment in this case, which was a case on all fours with the present case, expressly decided that a cause of action such as the cause of action in the present case comes within Art. 31 of the first schedule of the Limitation Act. At page 852 the learned Judges in their judgment lay down these propositions :—

"The question is whether Art. 31 or Art. 115 of second schedule of the Limitation Act

(1) 84 Ind. Cas. 180 ; 20 C. W. N. 790 ; 44 C. 16 ; 23 C. L. J. 547.

(2) 58 Ind. Cas. 547 ; 42 A. 390; 18 A. L. J. 377 ; 2 U. P. L. R. (A) 84.
(3) 10 Ind. Cas. 122 ; 33 A. 544 ; 8 A. L. J. 543.
(4) 26 B 562 ; 4 Bom. L. R. 447.
(5) 3 Ind. Cas. 469; 13 C. W. N. 851.

applies to this case. There were decisions regarding Arts. 30 and 31 which held that these articles applied only to questions of tort and Art. 31 as originally worded applied only to a suit for compensation for delay in delivering goods. Subsequently, however, by section 3 of Act X of 1899. Art. 31 was amended and took its present form. It has been argued for the Opposite-Party that the former decisions must still be held to apply but we cannot accede to such a contention. It has frequently been said that statutes must be interpreted according to the ordinary meaning of their language and the present wording of Art. 31 clearly covers such a claim as is put forward in the plaintiff's present suit. It is a suit for damages for failure to deliver, or non-delivery of goods. If it be so read, it is plain that Art. 31 must govern the present case and not Art. 115, which deals with the case of suits for compensation for the breach of contracts not specially, provided for. It is not contended that the defendants in this case are not carriers, or that the suit does not fall within the description in Art. 31. This view of the article has been taken by the Bombay High Court in the case of *Haji Ajam Goolam Hossein* v. *Bombay and Persia Steam Navigation Co.* (4). It was on a reference from the Court of Small Causes in Bombay, and with that opinion, we entirely agree. Under the circumstances, we must hold that the suit having been brought more than one year after the date when the goods should have been delivered is barred by limitation."

I respectfully agree with that decision which is on all fours in its facts with the present case, and, in my opinion, the claim of the plaintiff in this suit as framed comes within Art. 31, and is barred by limitation. No question has been raised in this case as to whether there was an acknowledgment of liability, and no other fact has been relied upon which could prevent the statute of limitation applying. Therefore, as the suit is framed, it discloses a cause of action which is barred by limitation, and must be dismissed.

W. C. A. *Suit dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 67 OF 1923 AND CIVIL REVISION PETITION NO. 206 OF 1923.

January 31, 1924.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

SETU IYER—APPELLANT
versus
SUNDARAM PILLAI AND ANOTHER—RESPONDENTS.

Religious Endowments—Temple Committee-Vacancy in trusteeship not filled up—application to Court—Notice to committee, nature and sufficiency of—Order whether appealable.

A Temple Committee having failed to fill up a vacancy in the trusteeship in accordance with the scheme framed for the temple, an application was made to the Court by certain of the worshippers to fill up the vacancy in accordance with the scheme and notice of the application was given to the members of the Committee. Objection was taken to the validity of the notice on the ground that it omitted to state specifically the consequence of non-compliance with the notice.

Held, that notice of application before the Court and the action contemplated under the scheme was sufficient and valid notice to the Committee. [p. 617, col. 1.]

Quaere, whether an order passed on such an application is appealable. [p. 617, col. 1.]

Runganatha Thathachariar v. *Krishnaswami Thathachariar*, 75 Ind. Cas. 189: 18 L. W. 237; (1923) M. W. N. 664; 47 M. 139; (1924) A .I. R. (M) 869, referred to.

Appeal against the Order of the Court of the Subordinate Judge, Coimbatore, in O. P. No. 6 of 1922, dated the 6th December 1922 and the petition under section 115 of Act V of 1908 and section 107 of the Government of India Act to revise the said Order of the Court of the Subordinate Judge, Coimbatore, in O. P. No. 6 of 1922.

Mr. *T. M. Krishnaswami Iyer*, for the Appellant.

Messers. *K. V. Krishnaswami Iyer*, and *M. Krishna Bharathi*, for the Respondents.

SETU IYER *v.* SUNDARAM PILLAI

JUDGMENT.—In this case a vacancy occurred in the trusteeship of the Perur temple on the 29th of August 1921 and a petition was filed on the 7th of April 1922 alleging that the Devastanam Committee had not filled up the vacancy in accordance with the scheme framed for the temple and asking the Court to fill up that vacancy.

There are two questions that arise here; firstly, was the vacancy filled up by the Devastanam Committee? and secondly, is the order of the Court calling for nominations to the vacancy a legal order in view of the allegation that the notice sent to the Committee under Clause 4 (*b*) of the scheme was not proper?

On the first question we have the various resolutions of the Committee. On the 19th of September 1921 the committee were of opinion that one Subbaraya Goundan should be appointed trustee and it was resolved that he be requested to report his willingness to the committee. Subbaraya Goundan replied to that resolution on the 4th of october 1921 stating.

> "I learn that the members of the committee are unanimously of opinion that I should be appointed *dharmakarta* of the Perur Devastanam: if all the members resolve unanimously like that, I consent to accept the office and do the work."

It is clear that this is not a complete acceptance, but one conditional on all the members being unanimously in favour of his appointment. At the meeting at which he was nominated there were only five members of the committee present. After he received this letter, it appears that the Committee held meetings in March, April, May and July 1922, and at all these meetings one of the subjects for discussion was the appointment of a permanent trustee for the Perur Devastanam. In view of this prolonged consideration of the matter and the failure to send a reply to Mr. Subbaraya Goundan stating that the members were unanimous, it cannot be held that he was definitely appointed. His acceptance was subject to a condition which apparently was not fulfilled. He was finally given another notice of appointment on the 18th of September 1922 which he accepted on the 19th of September 1922, but by this time more than two months had elapsed since the date of the vacancy and the present petition for the appointment of trustee by Court was pending. It is quite clear that at the time the petition was filed the vacancy had not been filled up.

The further question arises as to whether inadequate notice was sent to the Devastanam Committee under Clause 4 (*b*) of the scheme. It is not disputed that notices of the petition were served on the members of the committee and one notice was affixed to the temple itself; but it is argued that under clause 4 (*b*), the notice should have specifically stated that, unless the committee made the appointment within one month from the date of service, the Court would proceed to fill up the vacancy. The important portion of the Clause reads as follows:"

> "If the vacancy is not filled up as aforesaid within two months after it has occurred, the Court may, at the instance of two or more worshippers, appoint a trustee and fill up the vacancy, if after notice to the Committee, the vacancy is not filled up within one month from the date of service of notice...."

The language is somewhat ambiguous, for it does not specifically state who is to serve the notice, or at what precise time the Court is to take action. It would, however, appear from the very general terms used that a notice might be given by the Court or by two or more worshippers for the condition is merely that notice shall go to the Commitee, the notice bringing to their Knowledge that the Court was asked to perform its functions under the provisions of cl. 4 (*b*) of the scheme, one of these provisions being that the Committee is given a *locus penitentiae*, *i. e.*, to appoint a trustee, within one month of the receipt of notice. Two notices, as a matter of fact, were sent, the more definite one being that in I. A. No. 284 of 1922 which runs as follows:

> "whereas the petitioners abovenamed have made application to this Court that a trustee should be appointed in accordance with the scheme decree therein, you are warned to appear....."

The only clause in the scheme which relates to the appointment of a trustee by the Court is 4 (*b*), and a reference to the petition itself of which this was a notice shows that the petitioners prayed.

" to issue notice to respondents Nos. 1 and 2 that an application has been made to this Court to fill up the vacancy of the Perur trustee office, under the terms of the scheme in O. S. No. 1 of 1916."

This clearly puts the Committee members upon notice that they had committed default and that the Court would, in accordance with clause 4 (*b*), proceed to take action. The suggestion that the notice must be more specific is rebutted by the very general language of the clause, the words being merely "after notice to the Committee." We think that all that is meant is that the Committee must have substantial notice that the provisions of clause 4 (*b*) were sought to be enforced in consequence of their default, and we think that the notices issued in this case do give such substantial notice.

This suffices to dispose of this appeal and we are of opinion that the Subordinate Judge's order is right and dismiss this appeal with costs.

A preliminary objection was taken that no appeal lies in this case and there is direct authority for that proposition in *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar* (1). While we are inclined to agree with that decision, we think it is unnecessary to express an opinion, as the appeal has been argued and decided on its merits. A revision petition has also been filed as a precautionary measure. The revision petition also is dismissed but without costs.

S. D. *Appeal and revision dismissed.*

(1) 75 Ind. Cas. 189; 18 L. W. 237; (1923) M.W.N. 664; 47 M. 139; (1924) A. I. R. (M.) 369.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 9 OF 1924.

February 7, 1924.

Present :—Mr. Kendall, A. J. C.

BHARAT—PLAINTIFF—APPLICANT

versus

BASANT AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time — Sufficient cause — Appeal admitted — Civil Procedure Code (Act V of 1908), s. 115—Revision.

Where a Court after hearing only the appellant admitted an appeal, filed beyond time, for sufficient cause under section 5 of the Limitation Act, and the respondent did not press the question of limitation in the course of hearing of the appeal :—

Held, that there was no reason for interference under section 115 of the Civil Procedure Code. [p. 618, col. 1.]

Revision under section 115, Civil Procedure Code, against the decree of the Sub-Judge, Unao, dated the 8th October 1923, in an appeal preferred against the decree of the Hony. Munsif Bench, Safipur, dated the 7th April 1923.

Mr. *M. L. Tiwari*, for the Applicant.

Mr. *Puttu Lal*, for the Opposite Party.

ORDER.—This is an application under section 115, Civil Procedure Code for the revision of an appellate order of the Subordinate Judge of Unao. The application is based solely on the ground of limitation. The facts are that the judgment of the first Court was delivered on 17th April 1923, and the defendant applied for a copy of the judgment on 20th April 1923 but the copy was not actually delivered to him until 31st May 1923, for the reason that there was some deficiency in the application. The appeal was filed on 31st May 1923, and the office reported that it was beyond time, on which the Sub-Judge passed an order on the back of the memorandum of appeal, dated 1st June 1923 that the applicant should show the appeal to be within time. Later, on 11th August 1923, the Court after hearing the appellant passed an order that the appeal was *prima facie* within time and thereafter proceeded to dispose of the appeal. It is urged

in support of the present application that the appeal was barred after 17th May 1923, *i.e.*, one month from the date of the judgment of the first Court, and that the real date of the application was 29th May 1923, namely, the date on which the appellant made his final application for copy, on which the copy was issued. It is stated that the question of limitation was not decided after hearing the present applicant, but was settled in an *ex parte* order. In passing his order of 11th August 1923, the learned Sub-Judge apparently intended to apply the provisions of section 5 of the Indian Limitation Act, though he does not expressly say so. He appears to have been satisfied on the facts that there was sufficient cause for the appeal not having been presented within one month from the date of the judgment. If the present applicant was not aware of this and if he did not press the question of limitation in the course of the hearing of the appeal, that is his own look-out. The position is that the Sub-Judge after considering the facts decided that section 5 of the Limitation Act applied to this case and, therefore, admitted the appeal, and I am not satisfied that there is any reason for interfering under section 115, Civil Procedure Code with that order.

The application is, therefore, rejected with costs.

S. D. *Application rejected.*

MADRAS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL NO. 13 OF 1922.

November 6, 1923.

Present :—Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

A. RATHNASABHAPATHY CHETTY—APPELLANT

versus

LAKSHMA AMMAL AND OTHERS—RESPONDENTS.

Construction of Document—Gift in favour of wife—Gift over to another—Nature of interest created.

A person executed a deed of gift in favour of his wife in order that she "may enjoy his self-acquired property." Provision was made for payment of a small sum to a temple for performing *pooja* and the remainder was to be utilised for her maintenance. There was a final clause in the following terms :—"After your lifetime, you shall leave the said property and documents relating thereto to my brother's daughter. That lady shall also do what is done by you. The rest of my heirs shall have no right, title or interest in the property,"

Held, that there was a clear gift over to R. absolutely on the termination of the life interest of the wife. [p. 619, col. 1.]

Appeal from the judgment and decree of the Chief Justice, dated the 12th December 1921, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 295 of 1921.

Mr. *P. Venkatramana Rao*, for the Appellant.

Messrs. *T. R. Venkatrama Sastry* and *A. Suryanarayaniah*, for the Respondents.

JUDGMENT.

Coutts Trotter, J.—This is a hopeless appeal arising on the construction of a deed of gift, dated the 16th of January 1888. By that the testator, one Tiruvanmiyur Murugappa Chetty, made a disposition of his properties as follows :—He executes a deed of gift in favour of his wife Lakshmi Ammal and later on in the second clause, after setting out that it is his self-acquired property, he says that he brought a deed of gift into existence "in order that you may enjoy my self-acquired property as you are my wife and as you have no male issue." Later on he once more recites that he has gifted away this house worth Rs. 1,000 and provides that out of the rent she is to pay Rs. 5 every month to the *Dharmakartha* of Tiruvanmiyur temple for performing *pooja* and utilise the remainder for her maintenance. Then comes the clause which is sought to be made the basis of the argument. "After your life-time, you shall leave the said *manai*, house and the document relating thereto to Rajammal, the eldest daughter of my second brother Samarapuri Chetty. That lady shall also do exactly what is done by the said Lakshmu Ammal. The rest of my heirs shall have no right, title or interest in the said property which you shall hold and enjoy from this day getting certificate, etc., for the property, in your name. That appears

to be as clear a gift over to Rajammal absolutely on the termination of the life interest of Lakshmu Ammal, as it seems possible to frame. The argument apparently is that, because there are the words "you shall leave the house to Rajammal," that amounts to nothing more than a power. I have never heard of a power which can and must only be exercised in one way and in favour of one donee. It is obvious that the language is merely accidental and that what was intended was that Rajammal could become the absolute owner after the expiration of the life interest of Lakshmu Ammal. That lady shall also do exactly what is done by Lakshmi Ammal" is merely a limitation of the estate, because it is perfectly obvious that it means nothing more than that she should continue to pay Rs. 5 towards the *pooja* in the temple. If there were any doubt or ambiguity about the deed so far it would be entirely removed by the fact of the express exclusion from any interest in this property of the very person who now comes before us as the plaintiff and asks us to say that it really belongs to him. It is a hopeless appeal and must be dismissed with costs.

Ramesam, J.—I agree and will only add that the death of Rajammal before Lakshmi Ammal has no bearing in the case as, according to the proper construction of the deed, what was given to Rajammal was a vested remainder and not a remainder contingent on her surviving Lakshmi Ammal.

S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 89 OF 1923.

July 28, 1924.

Present :—Mr. Wazir Hasan, J. C.

CHHOTEY LAL—PLAINTIFF—APPELLANT
versus
HANOMAN SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Adverse possession—Proof—Adverse possession between co-sharers—Release by one co-sharer in favour of other co-sharers, effect of.

Where one of 2 co-sharers, equally entitled to the property, is in actual possession of a part of it and the other co-sharer is in constructive possession of the same and is also in actual possession of the rest, the circumstances do not establish a title by adverse possession by one co-sharer against the other.

Indarpal Singh v. *Thakur Din Singh*, 78 Ind. Cas. 695; 10 O. L. J. 646, referred to. [p. 620, col. 2.]

A deed of release executed by a co-sharer setting forth an existing title in the subject-matter of the release and accepted by other co-sharers wipes off the adverseness of possession of the latter, if any. [p. 620, col. 2.]

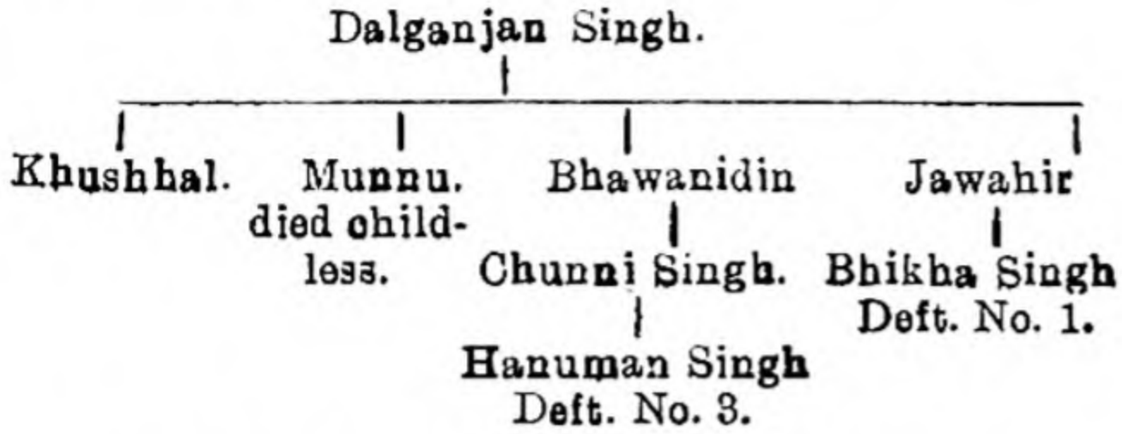
Appeal from the decree of the District Judge, Lucknow, dated the 22nd November 1922, in an appeal preferred against the decree of the Munsif, (North) Lucknow, dated the 10th May 1924.

Messrs. *Ali Zaheer* and *Makund Behari*, for the Appellant.

Mr. *J. K. Tandon*, for the Respondents.

JUDGMENT.--This is the plaintiff's appeal from the decree of the District Judge of Lucknow, dated the 22nd November 1922, confirming the decree of the Munsif (North), Lucknow, dated the 10th May 1921. The suit out of which this appeal arises was one for sale of a 1 *bigha* 10 *biswas* 5 *biswansis* share situate in village Utter Dhanna, District Lucknow, on the basis of a mortgage-deed, dated the 9th August 1913, executed by the defendant No. 1, Bhikha Singh, in favour of Tulsi Ram, the predecessor-in interest of the present plaintiff. The defendant No. 1 admitted the claim except in respect of the compound interest. The defendants Nos. 2, 4 and 6 also made an admission that the plaintiff's claim be decreed. The only contesting defendants were, therefore, Hanoman Singh No. 3 and Sheo Narain Singh No. 5. The Court of first instance passed a simple money-decree in favour of the plaintiff as against defendants Nos. 1, 2, 4 and 6 and dismissed the suit altogether as against Nos. 3 and 5. The plaintiffs appealed from the decree of the Munsif to the District Judge of Lucknow. His appeal was dismissed. The only ground on which the suit of the plaintiff has been dismissed by the Courts below as against the defendants Nos. 3 and 5 is, that it is barred by limitation on account of the adverse possession of the defendants. The other pleas in defence have been decided against the defendants and in favour of the plaintiff,

It is necessary to give a short pedigree at the outset.



The share in suit belonged to Munnu Singh. On his death he was succeeded by his widow, *Mt.* Sadha. This lady died in the year 1900. On her death, title to the property devolved according to the pedigree mentioned above on Bhikha Singh and Chunni Singh in equal shares. One of the pleas in defence was that Chunni Singh was adopted by Munnu Singh. This plea has been decided against the defendants by both the Courts below. The result of this decision is that the title to this property rested all along where it did rest at the inception according to the pedigree stated above. It was pleaded, however, and the plea has been accepted by the Courts below that Bhikha Singh's title was exstinguished by the adverse possession of his share by Chunni Singh and his son, Hanuman Singh. I have to decide whether the view taken by the Courts below is correct.

Now the facts found are these. In 1906 when Munnu Singh's widow died, Chunni Singh's name was recorded in the revenue papers in place of the deceased widow in the right of inheritance. In that year Bhikha Singh was only 13 years old. He attained majority in 1911. Over part of the property in suit Bhikha Singh was in actual possession though the nature of his possession was recorded in the papers to be that of a tenant of Chunni Singh. Chunni Singh sued him for arrears of rent and obtained a decree on the 29th July 1913. Soon after on the 9th August 1913, Bhikha Singh executed the deed of mortgage now in suit. Subsequent to this, Bhikha Singh brought a suit for possession of his share in Munnu Singh's estate. This suit ended in a compromise under which Bhikha Singh executed a deed of release in respect of his share on the 3rd March 1914 in favour of some of the defendants. The result of these facts might be summed up in a few words. Bhikha Singh was in actual possession of part of the property in suit. Chunni Singh was in constructive possession of that portion of the property and he was also in possession of the rest. But all this falls too short of establishing a title by adverse possession by one co-sharer against another. The law on the subject was examined with some detail in a recent decision of this Court in the case of *Indarpal Singh* v. *Thakur Din Singh* (1) and it will serve no useful purpose to reproduce it here. Further, whatever might have been the nature of possession of the defendants before the date of the deed of release, that deed wipes off all the adverseness of the possession of the defendants. It is a transfer for consideration and in unequivocal language sets forth an existing title of Bhikha Singh, in the subject-matter of the release. This release the defendants have accepted from Bhikha Singh. I am, therefore, of opinion that the plea of adverse possession fails.

The Munsif was obviously in error in not granting a decree for sale to the plaintiff.

I allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's suit as against all the defendants. A preliminary decree for sale in the usual form will be prepared and the defendants will be allowed three months' time. The plaintiff will get his costs throughout.

S. D. *Appeal allowed.*

(1) 78 Ind. Cas. 895 ; 10 O. L. J. 646.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEALS NOS. 46 AND 47 OF 1921.

March 25, 1924.

Present :—Mr. Justice Krishnan and Mr. Justice Odgers.

VENKATANARAYANA CHETTY AND ANOTHER—PETITIONERS—APPELLANTS

versus

SEVUGAN CHETTY AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 39, Cl. 4, (a)—Final dividend, notice of, to creditors—Form of notice—Madras rule—Creditor's right to prove debt.

VENKATANARAYANA CHETTY *v.* SEVUGAN CHETTY

Under section 39, clause 4 (*a*) of the Provincial Insolvency Act, a particular form of notice to creditors, whose claims have been notified but not proved, is prescribed whenever a final dividend is to be declared. In Madras, the rules under the Insolvency Act require a separate registered letter addressed to each creditor, and when a notice of that sort is prescribed by the rules made under the statute, a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed. [p. 621, col. 2.]

Where a final dividend has been declared, without giving the required notice to a creditor, the right of proof is not affected by mere laches on his part in not furnishing proof earlier, and he should be allowed to reopen the matter and given an opportunity of proving his debt within a time to be fixed by the Court. [p. 621, col. 2.]

Appeals against the orders of the District Court, Salem, in I. A. No. 71 of 1919 and I. A. No. 72 of 1919 in I. P. No. 3 of 1922, dated the 17th April 1920.

Mr. *S. T. Srinivasa Gopalachariar*, for the Appellant.

Mr. *K. Bashyam Iyengar*, for the Respondents.

JUDGMENT.—This is an appeal in an insolvency proceeding which began in 1912. The appeal is by one of the creditors. He claimed to be entitled to a dividend from the assets realised from the insolvent's estate. His application was dismissed by the learned District Judge on the ground that the final dividend had been declared before his application was filed and that the distribution of the dividends so ordered could not be revised so as to include his share, as he knew that such dividend was going to be declared and took no steps in time. The learned Judge points out that he appeared in Court in person when it was claimed by the Official Receiver that a property transferred to him by the insolvent was not validly transferred; it was a case of a fraudulent preference and the Receiver applied to have the alienation set aside and it was set aside. The learned Judge holds that he should have kept in touch with the proceedings in Court; and as he had tendered no proof of his claim in time he was rightly refused his share in the dividend. Now the difficulty in adopting this view is that under section 39, clause 4 (*a*) of the Provincial Insolvency Act of 1907 a particular form of notice to creditors whose claims have been notified but not proved is prescribed whenever a final dividend is to be declared. It appears that in this case such a notice had not been given to the creditor. Under rule (*b*) of the Rules framed by this Court under the Insolvency Act it is prescribed that the notice under section 39 (4) should be in the form of a separate registered letter addressed to each creditor. Section 39 (4) says that also the creditor should have express notice that the Receiver is proceeding to make a final dividend and that he would do so without regard to the claims of the creditor if he does not take care to prove his debt in time. When a notice of that sort is prescribed by the rules made under the statute a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed.

We have not been referred to anything to show that the appellant has proved his claim up to date or that his proof has been accepted. But as the Court did not send the necessary notice as required by the section we think that the creditor should be allowed to reopen the matter and that he should be given an opportunity of proving his debt within a time to be fixed by the lower Court. We are saying all this on the footing that the final dividend has been declared in this case. The learned Judge says that there was only one dividend and that was the final dividend in the case. If, however, the dividend that has been declared is not the final dividend in the case of course the creditor will have to share in it for none of these remarks made above will apply to the case. That is a matter that should be considered and decided by the lower Court; it must see whether the dividend declared was the final dividend or whether any further assets are available for payment of another dividend. The order of the lower Court is set aside and the case will go back to the lower Court for disposal in the light of the observations made by us. As regards the costs of this appeal we think we would not be justified in giving any costs to the appellants as all the delay and difficulty has arisen from the fact that he delayed the tendering of proof of his debt. We direct each party to bear costs in this appeal.

C. M. A. No. 47 will follow C. M. A. No. 46 of 1921 and the same order will be passed in it.

S. D. *Case sent back.*

BADRI NATH *v.* RADHABALLARAJJI IDOL

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 217 OF 1923.

July 29, 1924.

Present :—Mr. Pullan, A. J. C.

BADRI NATH—PLAINTIFF—APPELLANT
versus
Thakur RADHABALLARAJJI IDOL through RANI ITRAJ KUNWAR—DEFENDANT—RESPONDENT.

Hindu Law—Joint family property—Ancestral property sold in decree against grandfather—Immoral purpose—Burden of proof—Decree absolute—Auction sale.

Where ancestral property has been sold in execution of a decree against the grandfather, it is for the grandson to prove that the transfer was for an immoral purpose [p. 622, col. 2.]

Primarily the burden of proof is on the purchaser but in the case of an auction sale the burden is transferred to the contester. [p. 622, col. 2.]

Gurnarain v. *Gulzari Lal*, 25 Ind. Cas. 917 ; 17 O. C. 318 ; 1 O. L. J. 503, referred to.

The decree absolute for foreclosure is closely akin to an auction sale. [p. 622, col. 2.]

Appeal against the decree of the Additional Sub-Judge, Gonda, dated the 6th March 1923, in an appeal preferred against the decree of the Munsif, Gonda, dated the 29th November 1921.

Mr. *Ali Mohammad*, for the Appellant.

Mr. *Aditya Pershad*, for the Respondent.

JUDGMENT.—This second appeal arises from a speculative suit brought by the grandson of one Mahabir for possession of a so-called occupancy holding mortgaged by Mahabir in the year 1915, and sold in 1920 to Rani Itraj Kuar who has endowed the property in the name of Thakur Radhaballabhrajji. It was for the plaintiff to prove that this property was ancestral and that it was an occupancy tenure. The only evidence which he gave that the property was ancestral has been disbelieved by the lower Appellate Court, and there is no presumption, failing that evidence, that the property is ancestral. All that can be said is that Mahabir mortgaged property both ancestral and self-acquired and that there is nothing to show to which class the property in suit belongs. As to the property being an occupancy tenure, Mahabir himself sold it as being *Sir* and *Khudkasht* and if it be held that the property is not ancestral, the plaintiff as an heir of Mahabir would be estopped from claiming that it is an occupancy holding; even if the property were shown to be ancestral and an occupancy holding, there is authority for the view that the plaintiff would have to prove that the transfer was for an immoral purpose. No doubt in such cases the burden of proof is primarily laid on the purchaser but where there has been a case of auction sale the burden is admittedly transferred to the son. The decree absolute for foreclosure is closely akin to an auction sale, and a Bench of this Court held in *Gur Narain* v. *Gulzari Lal* (1) that even where there has been no sale in a case of this kind, the burden of proof is on the sons. Even if this is considered to be an extreme view I have no hesitation in saying that in the present case the plaintiff had to prove something to substantiate his claim, whereas he has merely brought a wild suit without any basis in equity and without any proof of the facts he alleges, in order to recover a property which ceased to be the occupancy holding of his family for at least 27 years. I dismiss the appeal with costs.

S. D. *Appeal dismissed.*

(1) 25 Ind. Cas. 917; 17 O. C. 318 ; 1 O. L. J. 503.

INJAD ALI *v.* MOHINI CHANDRA ADHIKARI

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2214 OF 1920.

July 23, 1923.

Present :—Sir Lancelot Sanderson, Chief Justice, and Mr. Justice Richardson.

INJAD ALI AND OTHERS—PLAINTIFFS —APPELLANTS

versus

MOHINI CHANDRA ADHIKARI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Arts.* 62, 116—*Transfer of Property Act (IV of* 1882), *s.* 55 (*a*)—*Registered sale-deed.. Failure of seller to pass good title—Suit for refund of purchase-money—Limitation.*

A suit by the plaintiff to recover possession of property sold to him by the defendant and, in the alternative, for a refund of the purchase-money, on the footing that at the date of the sale the defendant had no title to convey is, where the sale-deed has been registered, governed by Article 116 and not by Article 62 of Schedule I to the Limitation Act. [p. 624, col. 2.]

Per *Richardson, J.*:—Under section. 55 (2) of the Transfer of Property Act, the conveyance itself imports a covenant of title in the absence of an express covenant, and a suit for refund of purchase-money, where the seller is unable to pass good title, may be regarded as a suit for damages for breach of this covenant. The limitation for such a suit, where the conveyance is a registered one, is that prescribed by Article 116 of Schedule I to the Limitation Act. [p. 624, col. 2.]

Appeal from the decision of the Additional District Judge, Sylhet, dated the 25th May 1920, confirming that of the Subordinate Judge, Sylhet, dated the 13th November 1919.

Babus *Girish Chandra Pal* and *Nany Lal Dey*, for the Appellants.

Babu *Hemendra Kumar Das*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal from the judgment of the learned Additional District Judge of Sylhet by the plaintiffs in the suit. The suit was dismissed on the ground that it was barred by the Act of Limitation. The learned Additional District Judge applied Article 62 of the Limitation Act to the case holding that this was a "suit for money payable by the defendant to the plaintiffs for money received by the defendant for the plaintiff's use." The learned Vakil who appeared for the plaintiffs argued that that article was not applicable, but that Article 116 applied. The suit was for establishment of title to and recovery of possession of two annas share in the property described in the schedule to the plaint, it being alleged that the plaintiffs purchased such share from defendant No. 1. There was an alternative prayer that in case it was found that the plaintiffs were not entitled to possession, a decree for the refund by the defendant No. 1 of the consideration paid with interest thereon be passed. In the course of this litigation it was established that, at the time of the plaintiffs' purchase from defendant No. 1, he had no interest in the property in as much as the property had passed to the other defendants by reason of a previous sale : and, on remand, the learned Subordinate Judge had to deal only with the question of the recovery of the consideration paid by the plaintiffs. Both the Courts treated the case as one in which the consideration had entirely failed and, therefore, it was a suit for money received by the defendant No. 1 to the plaintiffs' use. In order to see what the nature of the suit was, the learned Vakil for the plaintiffs referred us to some portions of the plaint and to the prayer. In one of the paragraphs (para 3) the plaintiffs alleged that they were entitled to possession of the property or in the alternative the defendants or one of them were bound in equity, law and justice to pay back to the plaintiffs the purchase-money with interest as compensation: and, the prayer was that if the suit could not be decreed in respect of the land in suit then a decree might be passed against defendant No. 1 directing him to pay Rs. 450 with interest from the date therein mentioned. Having regard to the plaint and the prayer and the form of the suit, in my judgment, this is not a case to which Article 62 applies : and, I am of opinion that the learned Vakil for plaintiffs is right in his contention that this is a case to which Article 116 of the Limitation Act applies. According to that article, in suits for compensation for the breach of a contract in writing registered, the period of limitation is six years from the time when the period of limitation would begin to run against a suit on a similar contract not registered. It is agreed that if Article 116 ap-

plies the suit is within time : and consequently in my judgment, this appeal ought to be allowed.

Richardson, J.—I agree. The plaintiffs brought this suit in the first place to recover possession of two annas share of certain land to which they made a title under a conveyance executed in their favour by the defendant No. 1 on the 21st *Pous* 1318 (6th January 1912). In the alternative the plaintiffs claimed a refund of purchase-money on the footing that at the date of sale the defendant No. 1 had no title to convey. In the Trial Court the learned Subordinate Judge found that during the minority of the defendant No. 1 his mother had sold the land in question to the defendants Nos. 2 to 37 and that this prior sale by the mother was justified by legal necessity. This finding does not appear to have been since questioned. By this decree the Subordinate Judge dismissed the suit as against the defendants Nos. 2 to 37 but condemned the defendant No. 1 to repay the purchase-money with interest at 12 per cent. per annum. The appeal of the defendant No. 1 to the District Court was heard by the then Additional District Judge Mr. Roy. The point was then taken for the first time that the suit was barred by Article 62 of the Schedule to the Limitation Act. The article applies to a suit "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiffs' use" and the period of limitation is three years from the time when the money is received. In this case the money was received in 1912 and the suit was not brought till 1917. The learned Additional Judge considered that this was a material point, as no doubt it was, but he did not decide it. He remanded it to the trial Court with a direction that that Court should come to a distinct finding upon it and decide the case after taking such evidence as the parties might adduce. On the remand it was held by the trial Court that Article 62 applied and that the suit was time-barred. The Subordinate Judge, therefore, dismissed the suit and his decree was affirmed by the Additional Judge, Mr. Banerjee, from whose judgment the present appeal has been taken. As there was no appeal from the order of remand, it became final and cannot now be attacked. But I take this opportunity to observe that in my opinion it was a bad order from every point of view. The learned Additional Judge who made it entirely misapprehended his powers and liabilities as a Court of Appeal. In the first place the Code makes no provision for a remand in such circumstances. In the second place no reason appears why the point raised which was a point of law should involve the investigation of any facts which had not already been investigated at the trial. The liberty given to the parties to adduce additional evidence was, therefore, wholly unnecessary. Issues had been settled ; the case had been fully tried and it is difficult to conceive what materials the parties could supply for the decision of the point of limitation other than those then on the record. On the remand no additional evidence was in fact offered by the parties. If an investigation of new facts had been involved the Additional Judge might well have refused to allow a point of this kind to be raised for the first time in appeal; or he might have proceeded under O. XLI, r. 25. If the materials on the record were sufficient for arriving at a decision, as it appears they were, it was the learned Additional Judge's plain duty to undertake the responsibility of deciding the point himself. If he had directed his attention to relevant provisions of the Code he would have gathered for himself that it was not competent for him to remand the point for decision by the trial Court. The question to be decided on this appeal is whether on the remand the Courts below have rightly held that the present case is governed by Article 62. In my opinion the answer should be in the negative. If no covenant of title was expressed in the conveyance to the plaintiffs, nevertheless, under section 55, cl. (2) of the Transfer of Property Act, "the seller shall be deemed to contract with the buyer that the interest which the seller proposes to transfer to the buyer subsists and that he has power to transfer the same." It follows that the conveyance itself imports a covenant of title [*Basaraddi Sheikh* v. *Enajaddi Maleah* (1)] and the suit as a suit for the refund of the purchase-money may be regarded as a suit for damages for breach of this covenant. The article applicable to such a suit, where, as here, the conveyance is registered, is, in my opinion, Article 116. In

(1) 25 C. 298; 2 C. W. N. 222; 13 Ind. Dec.(N.S.) 200.

INJAD ALI v. MOHINI CHANDRA ADHIKARI

Jagannath Marwari v. *Giridhari Singha* (2), cited in the judgment appealed from, the attention of the learned Judges was not directed to the possibility of applying Article 116. But if there is no precedent in this Court the question in the form in which it is now presented has been fully discussed by the Madras High Court in *Arunachala Aiyar* v. *Ramaswami Aiyar* (3) and I desire to concur in the reasoning of the learned Judge. It was ingeniously suggested for the defendant No. 1 that inasmuch as Article 115 speaks of the breach of any contract, "express or implied, not in writing registered," Article 116, of the breach of contract in writing registered omitting any reference to implied covenant or title. The suggestion is in my opinion unavailing. In suits within Article 115 the contract may be not only not registered but also not in writing, and the words "express or implied" were inserted to embrace all unregistered contracts in whatever way they may have been made. Article 116 on the other hand applies to the particular case of contracts in writing registered. It appears to me that the implied and the express covenants cannot be separated in the manner suggested. If "a contract" in the sense of the article is in writing, the writing represents the implied as well as the express covenants. Whereas in the case of a conveyance, the law imports or reads into the writing such covenants as a covenant of title, the writing becomes the repository of the whole contract including the implied covenants. In the language of the learned Judges in Madras, the covenant of title is attached to the conveyance. It is a question of the construction of the writing. Similarly when the writing is registered the registration will be effective for the purpose of all covenants which the written words properly construed express or imply. The reasoning covers, I think, not only covenants implied by law but all implied terms, collected from the language used by any legitimate process of construction or interpretation. It cannot have been intended that the express terms of a written and registered contract should be governed by one article and the implied term by another. I may add that it has been held in England that when the terms of an expired lease as to repairs are implied in a written agreement for a new tenancy, the terms are "contained in" the writing within the meaning of the Conveyance Act, 1881 [*Cole* v. *Kelley* (4)]. I concur therefore in allowing the appeal and in the order which the learned Chief Justice has proposed.

Sanderson, C. J.—We think it desirable to record our opinion to the effect that we see no reasons to differ from the finding of the trial Court contained in the learned Subordinate Judge's judgment of the 3rd of October 1917 that the first sale was a valid sale, with the result that the plaintiffs should not recover possession of the property. We also agree that the whole amount of the purchase-money should be paid to the plaintiffs by defendant No. 1.

The result of our judgment is to restore the decree made by the learned Subordinate Judge on the 3rd October 1917. A decree therefore will be made in favour of the plaintiffs against the defendant No. 1 for Rs. 713-4 annas and such sum will carry interest at the rate of six per cent. per annum from the date of that decree (the 3rd October 1917) until realization. The remainder of that decree as regards the other defendants will stand. The plaintiffs are entitled to their costs against the defendant No. 1 in this Court and in the lower Court both before and after remand. I desire to add that I entirely agree with what my learned brother said about the impropriety of the order of remand which was made by the learned Additional Judge on the 13th of February 1919. I will only add that the improper order resulted in a delay of something like fifteen months.

N. H. *Appeal allowed.*

(2) 29 Ind. Cas. 429 ; 19 C. W. N. 102.
(3) 25 Ind. Cas. 618 ; 38 M. 1171 ; 1 L. W. 849 ; 27 M. L. J. 517 ; 16 M. L. T. 397.
(4) (1920) 2 K. B. 106 ; 89 L. J. K. B. 819 ; 123 L. T. 105 ; 36 T. L. R. 262.

GANGARAM *v.* KANHAILAL

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 478 OF 1921.

July 31, 1923.

Present :—Mr. Hallifax, A. J. C.

GANGARAM AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

KANHAILAL AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Same person both prior and puisne mortgagee—Decree obtained by him as prior mortgagee also against him as puisne mortgagee—Objection by him against sale of property in execution of later decree, nature of—Remand order erroneous—Party not appealing against such order, whether can question it again.

P. mortgaged his property twice to *K.* and then to *G.* and to *K.* again. *K.* sued *P.* and *G.* on his two earlier mortgages and obtained a final decree. During the pendency of *K's* suit *G.* sued *P.* and *K* on his mortgage and obtained an *ex parte* final decree. On *G's* application for execution of his decree, *K.* lodged an objection on the ground that he was the owner of the property on a title prior in time to *G's* mortgage :

Held, that *K's* objection was not under section 47, Civil Procedure Code, by a party to the decree but under O. XXI, r. 58 by a stranger and that it was a direct attack on *G's* decree for the sale of property. [p. 626, col. 2.]

A party who accepts an erroneous order of remand and does not appeal against it cannot be allowed to challenge it again. [p. 626, col. 2.]

Appeal from the decree of the District Judge, Nagpur, in Court Appeal No. 42 of 1921, dated the 25th June 1921.

Mr. *M. R. Bobde*, for the Appellants.

Messrs. *V. Bose* and *B. R. Pendharkar*, for the Respondents.

JUDGMENT.—It will be convenient to call each party to the various transactions in this case by the name of its first member only. Pandurang the original owner of the property in dispute mortgaged it on 9-1-08 for Rs. 5,975 and again on 18-8-14 for Rs. 3,300 to the respondent Kanhailal. On 6-8-15 he mortgaged it for Rs. 400 to the appellant Gangaram, and then on 6-7-16 he again mortgaged it to Kanhailal. Kanhailal sued both Pandurang and Gangaram for foreclosure on his two earlier mortgages and was given a preliminary decree on 31-3-19 and a final decree on 29-1-20. During that suit Gangaram sued for sale on his mortgage of 1915 against Pandurang and Kanhailal, impleading the latter on the strength of his mortgage of 1916, and he obtained an *ex parte* preliminary decree on 4-12-18 and a final decree on 2-8-19. On his application for execution of that decree by sale of the property Kanhailal lodged an objection on the ground that he was the owner of the property on a title prior in time to Gangaram's mortgage.

The learned Munsif who heard the case held that Kanhailal's objection was not an application under section 47 of the Civil Procedure Code, as in respect of his two prior mortgages on which he relied he was no party to the suit in which the decree was passed. He held accordingly that the objection was taken by a stranger to the decree under r. 58 of O. XXI, following *Sunoo Modi* v. *Latkari* (1) that no such objection could be taken in respect of a decree for sale on a mortgage. The objection was accordingly dismissed. In appeal by Kanhailal the learned District Judge expressed the opinion that "the question whether the house should be sold or not is a question which relates to the execution of the decree and the objection made by the appellants falls within the purview of section 47, Civil Procedure Code and not under O. XXI, r. 58, Civil Procedure Code as wrongly held by the Court below." The case was accordingly "remanded for disposal of the objection on the merits."

No appeal was filed against this order of remand and on full enquiry it has now been held by both the Courts below that Kanhailal's objection must prevail and the property cannot be sold in execution of Gangaram's decree. I am distinctly inclined to the opinion that the original decision of the Munsiff was correct and that the objection was one filed by a stranger to the decree and not by a party to it, although another person bearing the same name and having the same body as that stranger was a party to it. Also the question whether the house should be sold or not is a question which was decided in the mortgage

(1) 1 N. L. R. 142.

suit itself, and the objection to its being sold appears to me clearly to be an attack on the decree itself. But the appellant Gangaram accepted the contrary view as stated by the learned District Judge in his order of remand by not appealing against it, and, however mistaken that view may be, he cannot now be heard to say so. The appeal will accordingly be dismissed and the appellants must pay all the costs. The pleader's fee will be Rs. 20.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 99 OF 1923.

April 30, 1924.

Present :—Mr. Walsh, Acting Chief Justice, and Mr. Justice Neave.

Lala MAKHAN LAL—PLAINTIFF—APPELLANT
versus
Lala BIHARI LAL—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art. 35 (ii) — Failure to return property borrowed—Borrower, whether guilty of breach of trust —Suit of recovery of ornaments or price thereof—Jurisdiction.

A borrower who merely detains property lent to him beyond the period within which he was expected to return it, is not guilty of the offence of criminal breach of trust. [p. 627, col. 2.]

A suit for the recovery of ornaments lent or for the price thereof is not, therefore, excluded from the jurisdiction of the Court of Small Causes. [p. 627, col. 2.]

Appeal from an order of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Agra, dated the 16th February 1923.

Mr. *G. Agarwala*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Agra setting aside a decree passed by the Munsif of Agra, and returning the plaint for presentation to the proper Court. The facts alleged in the plaint were that the defendant, who is the brother-in-law of the plaintiff, had borrowed from him ornaments to the value of Rs. 500, on the occasion of his son's marriage, for the purpose of presentation and show, and had promised to return them two months after the marriage. This promise was not kept, and the plaintiff brought this suit asking that the defendant might be made to return the ornaments or to pay Rs. 500.

The plaint was filed in the Court of the Munsif. One of the issues framed was whether the suit was cognisable by that Court. The Munsif held that it was, on the ground that the facts disclosed an offence of breach of trust committed by the defendant. In appeal the learned Subordinate Judge has dissented from this finding. In our opinion his view is the correct one. The only possible reason for holding that the suit was excluded from the jurisdiction of the Court of Small Causes, is that given by the learned Counsel for the appellant, that it is a suit which comes within the definition of Article 35, sub-section (ii) of the Second Schedule of Act IX of 1887, that is, that the act complained of is an offence punishable under Chapter XVII of the Indian Penal Code. The sections of the Indian Penal Code under which the learned Counsel seeks to bring it are sections 403 and 405. He has himself scarcely attempted to argue that it comes under the former of these sections. With regard to the latter, it is to be observed that the plaintiff himself has not suggested that his brother-in-law has actually made away with the ornaments in question. He goes no further than to say that he has failed to return them. We are not prepared to hold that a borrower, who merely detains property lent to him beyond the period within which he was expected to return it, is guilty of the offence of criminal breach of trust. In these circumstances it would appear that the case is not one which is excluded from the jurisdiction of the Court of Small Causes. The plaint should, therefore, have been filed in that Court, and the present appeal must fail. Having regard, however, to the broad facts of the case, and the alleged conduct of the defendant,

we make no order as to costs, but direct that the costs in this Court and in the Courts below abide the result.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 103 OF 1924.

July 10, 1924.

Present :—Mr. Wazir Hasan, J. C.

GAJADHAR LAL—DEFENDANT—APPLICANT
versus
REOTI RAMMAN AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Res judicata pleaded—Court refusing to try the plea before entering into merits—Revision.

If a Court refuses to try the plea of *res judicata* before entering into the merits of the case the matter does not fall within the purview of section 115, Civil Procedure Code inasmuch as no case is decided and no question of jurisdiction is involved in the action of the Court. [p. 628, col. 1.]

Application for revision from the order of the Sub-Judge, Mohan Lalganj, dated the 26th April 1924.

ORDER.—This an application under section 115 of the Code of Civil Procedure and relates to a suit pending in the Court of the Subordinate Judge of Mohanlalganj. The grievance of the applicant is that with respect to a plea of *res judicata* raised by him in defence to the suit mentioned above the learned Subordinate Judge should have tried that plea before entering into the merits of the case but the learned Subordinate Judge has not done so. Obviously this matter does not fall within the purview of section 115 of the Code for two reasons:—(1) That there has been no case so far decided by the learned Subordinate Judge and (2) that there was no question of jurisdiction involved in the action of the learned Subordinate Judge. I cannot help observing, however, that the applicant's request was manifestly a reasonable one and it would conduce to justice if the learned Subordinate Judge adopted the course desired by the applicant to be taken in the matter of the defence of *res judicata*. As it is the application is rejected.

S. D. *Application rejected.*

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 330 AND 392 OF 1920.

August 14, 1920.

Present :—Mr. Justice Mookerjee and Mr. Justice Rankin.

TARAKESWAR PAL CHOWDHURY—PLAINTIFF—APPELLANT
versus
SRISH CHANDRA GHOSH MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Deed of grant—Proof of execution—Possession of grantee for generations—Requisite authority—Burden of proof—Hindu Law—Grant for excavating tank—Grant in perpetuity—Putra poutradikrame, meaning of.

The application of section 90 of the Evidence Act does not justify the inference that a deed of grant which is established to be genuine was in fact executed by a person possessed of requisite authority. It is, however, not necessary for the grantee of the document or his successor in interest to establish by direct evidence that the executant had the requisite authority. It may, in the case of a grant which has been in operation for a long series of years, be impossible to adduce direct evidence of authority, in which case it would be open to the Court to draw an inference from all the surrounding circumstances of the case. [p. 630, col. 1.]

Where a rent free grantee of land and his successors-in-interest, from generation to generation, have been in possession for more than seventy years, the burden is upon the landlord who sues to recover possession of the land to prove that he is entitled to do so and where no evidence is forthcoming from his side it is open to the Courts to draw the inference that the grant must have been made by persons who possessed the requisite authority. [p. 630, col. 1.]

According to Hindu religious notions a grant of land for digging a tank is supremely meritorious, and where the terms of the grant are explicit that the grantee is to hold from generation

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putra poutradikrame there can be no doubt that the grant was made in perpetuity and was not of a temporary character or resumable by the landlord, and that the interest created was transferable. [p 631, col. 1.]

Appeals against the order of the Additional Subordinate Judge, 2nd Court, of Zillah Khulna, dated the 21st August 1920, reversing the order of the Munsif, 3rd Court, Satkhira, dated the 31st March 1919.

Dr. *Dwarka Nath Mitter*, Babus *Prokas Chandra Pakrasi*, *Hemendra Chandra Sen* and *Pramatha Nath Banerjee*, for the Appellant.

Babus *Surendra Chandra Sen* and *Dwijendra Krishna Dutta*, for the Respondents.

JUDGMENT.—These two appeals are directed against an order of remand made by the Subordinate Judge in a suit for recovery of possession of immoveable property on establishment of title. The subject-matter of the litigation is a tank with its banks, situated within the property of the plaintiff. The defendants purchased the tank under two conveyances, dated the 4th and 11th November 1906 from persons who claimed to hold under two grants made in favour of their predecessors on the 6th October 1836 and 16th July 1849. The plaintiff alleged that as the vendors of the defendants had no transferable right, they were liable to be ejected as trespassers. The primary Court held that the defendants had acquired a valid title by their purchase and dismissed the claim for ejectment, subject to a declaration in favour of plaintiff in respect of his title as the superior landlord. The Subordinate Judge has remanded the case for further investigation. The plaintiff as also the defendants are dissatisfied with this order. They are agreed that further enquiry is not needed, but while the plaintiff contends that the suit should have been decreed on the facts found, the defendants maintain that the suit should have been dismissed. On the present appeals two questions have been raised, first—whether the grants made by the predecessors of the plaintiff on the 6th October 1836 and the 16th July 1849 are operative against him, and secondly, whether the defendants have acquired a valid title by their purchase.

As regards the first point the plaintiff has contended that the document should not have been received in evidence, on the authority of the cases of *Ubilack Rai* v. *Dallial Rai* (1) and *Uggra Kanta Chowdhury* v. *Harro Chandra Shickdar* (2).

We are of opinion that the decisions mentioned do not assist the contention of the plaintiff. There are really two questions for consideration, namely, first, whether the documents were genuine, and, secondly, if genuine, whether they were executed by persons who had authority to bind the predecessors of the plaintiff. The solution of the first question depends upon section 90 of the Indian Evidence Act; *Shafiq-un-nessa* v. *Shaban Ali Khan* (3). The Courts below, as we understand their judgments, have found that those instruments might be treated as ancient documents and that they were in fact executed by the persons whose signatures they bear. The second question is whether these documents were executed by persons who had the necessary authority. The first grant was made by one Biswanath Bhattacharja who describes himself as the *ijaradar*, in other words, as a temporary farmer or tenure-holder. The document recites that the grantee Sonatan Ghose had made an application to the superior landlord for the grant of 8 *bighas* of land for the purpose of excavation of a tank, that the landlord had sanctioned the application and had directed the *ijaradar* to grant a *sanad*. The *ijaradar* accordingly made the grant in favour of Sonatan Ghose, to be held from generation to generation, in order that a tank might be excavated. The second document purports to have been granted by one Umesh Chandra Pal Chowdhury through the pen of Guru Prosad Banerjee, who describes himself as a superintendent. This document recites the previous grant and states that as on measurement the tank had been found to extend over 14 *bighas* of land, it was necessary to make a supplementary grant of 6 *bighas* so that the grantee might remain in possession of the tank from generation to generation. Both the documents stated explicitly that no rent would ever be paid. The plaintiff contends that the burden lies upon the defendants to establish that in respect of the first document the *ijaradar* and in respect of the second document

(1) 8 C. 557; 1 Ind. Dec. (N.S.) 939.
(2) 6 C. 209; 3 Ind. Dec. (N.S.) 137.
(3) 26 A. 561; 3 C. W. N. 105; 6 Bom. L. R. 75; 7 C. C. 110; 31 I. A. 217; 8 Sar. P. C. J. 674 (P. C.).

the superintendent had the requisite authority to make a grant which would be operative against the *zemindar*. It is not disputed and cannot be disputed that the application of section 90 of the Indian Evidence Act does not justify the inference that the documents, which are established to be genuine, were in fact executed by persons possessed of the requisite authority. That is an entirely different question; and the correctness of the decision in *Ubilack Rai* v. *Dallial Rai* (1), and *Uggra Kanta Chowdhury* v. *Harro Chandra Shickdar* (2), which were followed in *Mohoram Sheikh Chaprasi* v. *Telamuddin Khan* (4) cannot be questioned. Indeed, a similar view was adopted in *In re Airey, Airey* v. *Stapleton* (5). In that case, where a deed purported to be an appointment under a special power and to be executed by the attorney of the donee of the power, it was ruled that presumption only arose as regards the execution of the deed but not with regard to the authority of the solicitor to execute the power. It does not follow, however, that it is necessary for the grantee of the document or his successor-in-interest to establish by direct evidence that the executant had the requisite authority. When a grant has been in operation for a long series of years, as in this case, it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances. In the present case, the grantee and his successors in interest from generation to generation have been in possession for more than 70 years. If the grants were unauthorised the *zemindar* might have been expected to take steps long before this to eject the grantees; *Naina Pillai* v. *Ramanathan Chettiar* (6). The burden thus shifts upon the *zemindar* to prove how he came to acquiesce in the long possession of the grantee and his successors. Besides, it is the *zemindar* who is aware of the scope and extent of the authority conferred by him upon his lessee, or upon the superintendent of his estate. No evidence, however, is forthcoming, from his side, *Sudaman Jamadar* v. *Behari Mahton* (7). In these circumstances, it was open to the Courts below to draw the inference that the grants must have been made by persons who possessed the requisite authority. We are of opinion that the plaintiff cannot now successfully urge that the grantee and his successors have held for 70 years without a lawful origin of their title and possession.

As regards the second point, the question for consideration is, whether the interest of the grantee was transferable. It has been rightly held by the Courts below that the effect of the grant cannot be determined by a reference to the provisions either of the Transfer of Property Act or of the Bengal Tenancy Act. The point for determination is, whether, in 1836 and 1849, interest in land created by a grant of this description was or was not transferable by custom or by contract; *Sulin Mohan* v. *Raj Krishna* (8). No evidence of custom has been produced. The terms of the grant, however, leave no room for doubt that the grant was made in perpetuity. The grant stated explicitly that the grantee was to hold from generation to generation. The expression used is *putra-poutradikrame*. The plaintiff has urged that there is no evidence to show that this expression, now so familiar, had in 1836 and 1849, the same meaning as is at present attributed to it. In this connection reference has been made to the decision of the Judicial Committee in *Ram Narayan Singh* v. *Ramsaran Lal* (9), which reversed the decision of this Court in *Ramsaran Lal* v. *Ram Narayan Singh* (10). There, however, the expression was used in relation to a very special type of grant, namely, *jaigir*, which possessed well-known incidents. Here, on the other hand, we have a grant of land made for the excavation of a tank. The evidence recited in the judgment of the Trial Court shows that there was scarcity of water in the village and that Sonatan Ghose whose daughter had been married in that village, undertook to remove the difficulty felt by the villagers, if land were granted to him in perpetuity, so that he might excavate a tank at

(4) 18 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567.
(5) (1897) 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286.
(6) 41 Ind. Cas. 788; 33 M. L. J. 84.
(7) 10 Ind. Cas. 456; 15 C. W. N. 953.
(8) 60 Ind. Cas. 826; 25 C. W. N. 420; 43 C. L. J. 193.
(9) 50 Ind. Cas. 1; 40 C. 682; 29 C. L. J. 332; 36 M. L. J. 244; 17 A. L. J. 398; 21 Bom. L. R. 597; 28 C. W. N. 866; (1919) M. W. N. 518; 26 M. L. T. 207; 46 I. A. 88 (P. C.).
(10) 28 Ind. Cas. 610; 42 C. 805; 19 C. W. N. 466.

considerable expense of money. The grant was made accordingly and the tank was excavated for public benefit. As pointed out by Chatterjea, J., in *Birendra Krishna* v. *Akram Ali* (11), according to Hindu religious notions, such grant of land for digging tank was supremely meritorious. In these circumstances, it is inconceivable that the grant could have been of a temporary character or that the landlord could ever have intended to resume the grant. We feel, no doubt, that the grant comprised in the documents of the 6th October 1836 and the 6th July 1849 was a perpetual grant; and if it was a perpetual grant there can be no room for controversy that the interest created was transferable. In our opinion, the decree made by the Trial Court was correct and should not have been set aside by the Subordinate Judge.

The result is that the appeal preferred by the defendants (M. A. 392 of 1920) is allowed and that preferred by the plaintiff is dismissed. The order of the Subordinate Judge is set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of the Subordinate Judge. There will be no separate order for costs in M. A. 330 of 1920.

S. D. *Suit dismissed.*

(11) 13 Ind. Cas. 513; 34 C. 439; 16 C. W. N. 304; 15 C. L. J. 194.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 27 OF 1924.

July 24, 1924.

Present:—Mr. Wazir Hasan, J. C.

RAM LAL—APPLICANT—APPELLANT

versus

BHOOP AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Application by alleged assignee to be made party to appeal—Assignment denied by assignor and appellant—Duty of appellate Court to inquiry into genuineness of assignment.

An application, by an alleged assignee of property—the subject-matter of an appeal—to be made a party to the appeal, cannot be rejected on the ground that the assignor and the appellant deny the assignment. It is the duty of the Court to enquire into the genuineness of the alleged assignment, and to decide the assignee's application according to the result of that inquiry. [p. 631, col. 2.]

Appeal against the order of the Subordinate Judge, Hardoi, dated the 15th May 1924.

Mr. *Bisheshar Nath*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This is an appeal under O. XLIII, r. 1 (1), of the Code of Civil Procedure from the order of the learned Subordinate Judge of Hardoi, dated the 15th May 1924. The appellant applied to be made a party respondent in Appeal No. 20|140 of 1923 pending in the Court of the Subordinate Judge mentioned above on the ground that one of the respondents in the appeal had made a mortgage of the property which was the subject-matter of the appeal to him during the pendency of the appeal. Such an application was obviously sanctioned by the provisions of r. 10 of O. XXII of the Code of Civil Procedure. The act of the appellant in applying for the purpose mentioned in the application was, therefore, in accordance with law. The appellant in the appeal, however, denied the execution of the mortgage in favour of the present appellant and the mortgagor also denied the alleged mortgage. On that ground alone the learned Subordinate Judge rejected the appellant's application.

I am satisfied that the ground on which the order is based is wholly inadequate. In view of the attitude taken by the mortgagor the clear duty of the Court was to inquire into the genuineness of the alleged assignment and to decide the application according to the result of that inquiry. If it were otherwise, the fate of the application will entirely be at the mercy of the parties to the appeal. If they choose to admit the assignment it will be given effect to. If, on the other hand, they choose to deny it, it will be rejected. This obviously is not the intention of the law.

I, therefore, allow the appeal, set aside the order of the learned Subordinate Judge mentioned above and return the case to his file

for being disposed of according to law. The costs incurred by the appellant in this Court and in the Court below in connection with his application will be paid to him by the respondents. Costs hereafter will abide the event.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION
APPEAL NO. 7 OF 1923.

May 11, 1923.

Present :—Mr. Justice Mookerjee and Mr. Justice Rankin.

MESSRS. SADASOOK RAMPROTAP—APPELLANTS
versus
HOARE MILLER & Co.—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 130, 131—Transfer of actionable claim—Defective notice to debtor—Debtor, whether bound—Waiver.

In order that the debtor may be bound by the transfer of an actionable claim under the exception mentioned in the proviso to section 130 of the Transfer of Property Act there must be a strict compliance with the requirements of section 131 of the Act. [p. 633, col. 1.]

Hunsraj Mararji v. *Nathoo Gangaram*, 9 Bom. L. R. 838, followed.

The mere fact that a person to whom a notice of transfer of an actionable claim under section 130 of the Transfer of Property Act is given, omits to take exception to the validity of the notice, would not disentitle him to insist upon strict compliance with the requirements of section 131 of the Act. [p. 633, col. 2.]

Appeal against the Judgment of Mr. Justice Buckland.

Sir *B. C. Mitter*, Mr. *S. R. Bannerjee* and Mr. *J. C. Hazra*, for the Appellants.

Mr. *Pugh* and Mr. *Ameer Ali*, for the Respondents.

JUDGMENT.

Mookerjee, J.—This is an appeal from the judgment of Mr. Justice Buckland in a suit for damages for breach of contract. On the 4th May 1921, and 9th June 1921, the defendants entered into two contracts with a firm of the name of Balfour & Co., for the sale of cornsacks. On the 15th July 1921, Balfour & Co. assigned their interest in the contract to the plaintiffs, Sadasook Ramprotap, a firm carrying on business as commission agents and bankers. On the 11th November 1921, the plaintiffs instituted this suit as assignees of the contracts to enforce their rights thereunder. Mr. Justice Buckland has dismissed the suit on the ground that the plaintiffs had not complied with the terms of section 131 of the Transfer of Property Act. No oral evidence has been adduced in the case ; and it appears to have been taken as common ground before Mr. Justice Buckland that if notice was not given under section 131, though the transfer might have been valid, the suit against the defendant Company must fail. In these circumstances, Mr. Justice Buckland proceeded with the trial on the footing that if the plaintiffs failed on this point, nothing else would require consideration. He decided this point first, and adopted that course with the concurrence of Counsel on both sides.

Section 130 of the Transfer of Property Act provides that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing, signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer, as is hereinafter provided, be given or not : Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer. The provision as to notice is contained in section 131 which is in these terms : "Every notice of transfer of an actionable claim shall be in writing signed by the transferor or his agent duly authorised in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent and shall state the name and address of the transferee."

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In the present case a notice of transfer in writing was given ; but it has subsequently been discovered that the notice, while stating the name of the transferee, did not specify the address of the transferee. Consequently the position is that the notice contemplated by the statute has not been given : in other words, the exception mentioned in the proviso to section 130 has not come into operation ; for the debtor has not received express notice of the transfer as prescribed in section 131. On these facts, Mr. Justice Buckland has held that such dealing with the debt by the debtor as has taken place between the debtor and the original creditor is valid as against the transferee. In support of this proposition, reference has been made to the decision of Sir Lawrence Jenkins, C. J., in *Hunsraj Mararji* v. *Nathoo Gangaram* (1), where it was ruled that in order that the exception mentioned in the proviso to section 130 may be operative, there must be a strict compliance with the requirements of section 131. This view was also adopted by Sir Charles Fox, C. J., in *Basant Singh* v. *Burmah Railways Co., Ltd.* (2). I am in agreement with the opinion expressed by Sir Lawrence Jenkins and by Sir Charles Fox and I do not consider it right to whittle away the unambiguous provisions of the statute. In this connection, reference may be made to the observations of Lord Moulten in *Mulraj* v. *Viswanath Prabhuram Vaidya* (3), where an attempt was made to modify the effect of sections 130 and 131 of the Transfer of Property Act by reference to general principles of law. The Judicial Committee reversed the decision of the Bombay High Court as erroneous because the Judges had failed to appreciate that the positive language of the section precluded the application in India of the principles of the English law on which they based their judgment.

I may incidentally mention that the appellants urged that the requirements of section 131 were substantially fulfilled because the address of the attorney of the transferee was given. The contention is futile. The section requires the name and address of the transferee, and the name and address of the solicitor of the transferee manifestly cannot be taken as a substitute therefor. It has further been urged that the omission of the defendants to take exception to the validity of the notice operates as a bar to the maintenance of the objection. There is clearly no foundation for this argument. There was no duty imposed on the debtor to speak or to rectify the error. It is further immaterial that the debtor asserted that he would deal with no third party. This also does not disentitle him to insist upon strict compliance with the requirements of section 131.

We observe that Mr. Justice Buckland has ruled that the provisions of section 131 could not be waived under any circumstance. Sir Benode Mitter has controverted this view, which I am not prepared to accept as well-founded. Our attention has been drawn to the cases of *Asutosh Sikdar* v. *Beharilal Kirtunia* (4), *Manindra Chandra Nandi* v. *Secretary of State for India* (5) and *Bholanath Ray* v. *Secretary of State for India* (6), to establish the position that even though a statutory provision may be expressed in a mandatory form, non-compliance therewith does not necessarily invalidate a transaction. This position is incontestable, and the answer to the question whether it is permissible to waive a particular provision depends upon its true nature. If the object of the Legislature is to protect or benefit an individual litigant, it is open to him to waive the positive provisions of the statute. On the other hand, if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of section 131 fall, in my judgment, within the latter category, but I am not prepared to maintain, as an abstract proposition of law, that under no conceiveable circumstance can the provisions of section 131 be waived by the debtor. This harmonises with the view adopted in *Venkata Subbiah Chetty* v. *Subba Naidu* (7), as to the applicability of the principles of estoppel and

(1) 9 Bom. L. R. 838.
(2) 30 Ind. Cas. 278 ; 8 Bur. L. T. 266 ; 8 L. B. R. 288.
(3) 17 Ind. Cas. 627; 40 I. A. 24; 17 C. W. N. 209; (1912) M. W. N. 1247; 12 M. L. T. 652 ; 11 A. L. J. 7; 24 M. L. J. 60 ; 15 Bom. L. R. 9 ; 17 C. L. J. 162 ; 37 B. 198 (P. C.).
(4) 35 C. 61 ; 11 C. W. N. 1011 ; 6 C. L. J. 320. (F. B.).
(5) 34 C. 257 ; 5. C. L. J. 148.
(6) 16 Ind. Cas. 849 ; 40 C. 503 ; 17 C. W. N. 64.
(7) 31 Ind. Cas. 152 ; 18 M. L. T. 533 ; (1915) M. W. N. 822 ; 2 L. W. 977.

waiver to assignments of actionable claims under sections 130 and 131 of the Transfer of Property Act. Reference may be made to the decisions in *Griffin* v. *Weatherby* (8), *Walker* v. *Rostron* (9), *Macfarlane* v. *Lister* (10) and *Liversidge* v. *Broadbent* (11) : see also *Gopalakrishna Iyer* v. *Gopalakrishna Iyer* (12).

The real difficulty of the appellants is that no foundation was laid for a case of waiver or estoppel in the trial Court. The pleadings do not state facts which might justify a plea of waiver. The question also does not appear to have been raised in the issues. The correspondence makes it abundantly clear that there is no foundation for the plea of waiver. Even in this Court Sir Benode Mitter has not been able to furnish the slightest indication that there are facts capable of proof which may support a plea of waiver. In such circumstances, I shall not explore the attractive problem, whether a plea of waiver may not be analysed and distributed into one or other of the four heads, election, estoppel, contract and release. To my mind, the course which the trial took before Mr. Justice Buckland has in no way prejudiced the plaintiffs who have no enforceable claim as against the defendants. The decree made by Mr. Justice Buckland must be affirmed, although I am not prepared to accept all the reasons assigned by him for his decision. The appeal is dismissed with costs.

Rankin, J.—I also think that this appeal fails and that it would be vain and unreasonable to direct a remand. In view of the issues, the learned Judge, with the consent of the Counsel, was very reasonably desirous of settling first the question whether due notice of assignment had been given to the debtor. It is plain from the facts, from the judgment, and even from the memorandum of appeal that if the defendant Company were entitled to deal with their original contractee, then the plaintiffs' suit must fail. The case, however, illustrates the difficulty and danger of short cuts because, while it was reasonable and proper to dispose first of the question of the notice, it was also very necessary to dispose of that question as a whole. On the question of notice it was not disputed that sections 130 and 131 of the Transfer of Property Act governed the case. The plaintiffs by their Counsel appear to have contended first that the address of the attorney was sufficient under section 131 and also that the mention of any address was not imperatively required by the section. In my opinion, the word "shall" in the section means the same thing in each of the two places where it occurs and the attorney's address is not the address of the transferee any more than the attorney's name is the name of the transferee for purposes of the section. Whether because the learned Judge showed that the plaintiffs on this point were not persuading him or because some further matter occurred to learned Counsel in the course of his argument, it seems that, on this point, the plaintiff's Counsel had recourse, during the argument to a suggestion of which there is no mention in the issues previously settled—a suggestion that the statute left it open to them to make a case of waiver—what case of waiver and waiver of what, being at that stage none too clear. If the plaintiffs had any such case they would have acted more intelligibly if they had refused to assent to the question of notice being tried as a preliminary point on the correspondence. If they had asked to have an issue framed and for leave to adduce evidence thereon if they had such evidence, I think for the reasons to be stated in a moment that the learned Judge at this stage might very well have told the plaintiffs' Counsel that, while he was prepared on the face of the issues settled to deal with the question of notice as a preliminary point, he was not prepared so to deal with it if the plaintiffs were to introduce a new issue as to waiver. In this Court learned Counsel for the plaintiffs was asked to indicate what was the case of waiver he desired to have an opportunity to raise. He informed us quite frankly that he was not able to say whether it was a case to be raised by oral evidence, but that, in any case, he would contend on the correspondence and pleadings that as the defendant Company repudiated the assignment altogether and made no point at all as to the absence of the plaintiffs' address from

(8) (1868) 9 B. and S. 726 ; 37 L. J. Q. B. 230 ; 3 Q. B. 753 ; 18 L. T. 881 ; 17 W. R. 8.

(9) (1842) 9 M. L. W. 411 ; 60 R. R. 770 ; 11 L. J. Ex. 178 ; 152 E. R. 174 ; 60 R. R. 770.

(10) (1887) 37 Ch. D. 88 ; 57 L. J. Ch. 92 ; 58 L. T. 201.

(11) (1859) 4 H. and. N. 603 ; 28 L. J. Ex. 232 ; 7 W. R. 615 ; 118 R. R. 648 ; 157 E. R. 978.

(12) 4 Ind. Cas. 420 ; 33 M. 123 ; 7 M. L. T. 97.

the written notice, their conduct amounted to a waiver of this requirement of section 131. Apart from this last mentioned contention on the correspondence which is before us and which we can deal with, I do not collect any further fact save that the plaintiffs are willing to make a further case of waiver if they can find one. It would be quite impossible, on the materials before us, even to frame an issue at this late stage except as regards questions on the correspondence. In my opinion, the fact that the defendant Company from the first refused to recognise any assignment or to deal with any third party is no waiver of any defect in the notice, and the fact that the defendant Company at no time tutored the plaintiffs as to the proper form of the notice or took express objection to anything in particular in the notice is no waiver either. I do not doubt that a debtor may by parol or by conduct represent that he will be responsible to an assignee whose notice is defective and that the statute would in such a case be no answer to a claim based on or re-inforced by contract or estoppel. Again, if it were suggested that the assignor had offered to let a debtor have the transferee's address in writing and that the debtor had replied that there was no need to trouble as he would make no point of the omission that would raise a different case. I am not prepared to hold that such a case as that properly pleaded and proved would not succeed. It might amount to a conditional promise to the assignee. The truth is that the statute is not concerned to prevent any one who is willing to incur a liability from so doing. It merely states the conditions on which the law imposes liability under an assignment. Nevertheless, I incline to think that the plaintiffs' case, if not within the statute, is demurrable unless it has an independent basis. In construing sections 130 and 131 of the Transfer of Property Act, it has to be remembered that they contain a very special scheme which must be regarded as a whole in itself. At common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian Legislature in 1900 has composed a new scheme which has some of the features of both, and, as I read section 130 it says this that the law, while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with his original creditor unless and until he has received in writing a particular kind of notice. If, therefore, the plaintiff's claim is entirely on the basis of an assignment and if this claim is wholly without any other juristic basis, it seems to me that the section which enacts certain conditions must be rigidly complied with. I do not assent to all the learned Judge has said with regard to the general impossibility of making any case of waiver. It is difficult to distinguish between waiver and estoppel. Under the name of waiver, it may be said that liability or responsibility to an assignee has been incurred by a debtor independently of section 130 by conduct or by representation. In this case, however, there is no reality at all in that suggestion. I do not complain that no such case was pleaded, but no issue as to such a case was taken; and, even at this stage, it does not appear that there is anything capable of being stated apart from the argument on the first point. For these reasons, it seems to me that it is impossible to direct a remand and that the present appeal fails and must be dismissed.

S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 40 OF 1923.

July 22, 1924.

Present:—Mr. Hallifax, A. J. C.

LAXMI PRASAD—PLAINTIFF—APPELLANT

versus

AHMAD KACHI AND ANOTHER —DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (Abadi)—*Non-agriculturist's right to occupy houses, whether transferable.*

In the absence of an agreement to the contrary, the right to occupy a house and site held by a non-agriculturist is not transferable without the consent of the *malguzar*. [p. 636, col. 2.].

Obiter.—A tenant or other person entitled to a site of a house can transfer his right only to occupy the site and that too within narrow bounds.

LAXMI PRASAD *v.* AHMAD KACHI

Appeal against the decree of the Additional District Judge, Bilaspur, dated the 14th October 1922, in Civil Appeal No. 83 of 1922.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *M. Y. Sharif*, for the Respondents.

JUDGMENT.—The dispute is over a house in the *abadi* of Rahaud which belongs to the plaintiff-appellant and is at present occupied by the defendants, two Kachi brothers who seem to be petty shop-keepers. The facts found are these. In 1910 the house was occupied with the permission of the *malguzar* by one Mithulal or Mithu Rao Bhat, who was not an agriculturist but was the official Bard to the Koshta caste which is numerous in that village. In 1912 Mithulal and his wife Punia Bai left the village, severing all connection with it, and went to live at Dhamda, a village 40 *Kos* away and in another District. Mithulal died soon after and in 1914 his widow Punia Bai, who was still at Dhamda, gave a monthly or yearly lease of the house to Sukhnandan Halwai, a sweetmeat seller. Sukhnandan occupied it as her tenant till November 1918 when he moved into another house in the village given to him rent free by the *malguzar*. It was in or before 1918 that Punia Bai moved from Dhamda to Pondi which is only 25 miles from Rahaud. Later the two defendants went into the house on a lease granted to them by Punia Bai. In the plaint it was stated that they did so in May 1920, but they themselves said it was in the year 1976 *Sambat* which began in May 1919.

The learned Additional District Judge held that Mithulal and Punia Bai continued in possession of the house through tenants from the time they left Rahaud in 1912 and, therefore, had not abandoned it so as to give the landlord a right of re-entry. The fact that there was a gap of about two years between 1912 and 1914 and another of at least six months between November 1918 and May 1919, when the house was lying vacant, appears to have been over-looked. Of the fact that Sukhnadan lived in the house as Punia Bai's tenant there is no evidence but a *Kabuliat* executed by him on the 5th of November 1918 when Punia Bai had just come to Pondi-within a reasonable distance of Rahaud. He himself denies it, and the finding involves the following somewhat improbable consequences.

Sukhnandan agreed to pay rent to a woman who had left the village two years before and was then living 40 *Kos* away, and continued to pay rent to her for four years, when he could have got a house rent free from the *malguzar* for the asking. When at the end of four years he thought of asking the *malguzar* for such a house and got it at once, it was considered necessary to execute a *kabuliat*, though none had been thought necessary till then. I am unable to understand how the learned Additional District Judge brought himself to believe such a story.

These findings, however, make no difference, as the decision based on them is wrong anyhow. If it were correct it would be an easy and profitable occupation to go to a village, get permission to live in a house from the *malguzar*, live in it for a few weeks, let it to a tenant if one could be found foolish enough to take it as Sukhnandan is supposed to have done, continuing to draw the rent in perpetuity as a heritable right, and then repeat the same process in another village in the following month. That would result in the acquisition of rent-free leases in perpetuity of a considerable number of houses and the sites on which they stand in a fairly short time. It is worse than idle to suggest that the ordinary license granted by a *malguzar* to occupy a house in a village *abadi* rent free is such a lease.

The words of the *wajib-ul-arz* make the matter if possible even clearer. Even a tenant or other person entitled to a site of a house may transfer no more than the right to occupy it, and that within narrow bounds. But in the absence of an agreement to the contrary, which certainly did not exist here, even "the right to occupy a house and site held by a non-agriculturist is not transferable without the consent of the *malguzar*." There are many other reasons for holding that the decision of this case is entirely wrong, but more than enough have already been stated. The decree of the lower Appellate Court will be set aside and that of the first Court granting the plaintiff possession of his property will be restored. The defendants will pay all the costs in all three Courts.

G. R. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 1534 OF 1922.

June 15, 1923.

Present :—Mr. Justice Greaves and
Mr. Justice Buckland.

GIRIDHARILAL HANUMANBUX—
PLAINTIFFS
versus
EAGLE STAR & BRITISH DOMINIONS
INSURANCE CO., LTD.—DEFENDANTS.

Contract Act (IX of 1872) ss. 23, 28—Policy of Insurance—Condition of forfeiture on failure to sue within certain time, legality of.

A provision in a policy of insurance that all benefit thereunder shall be forfeited if a suit is not commenced within a certain time, which falls short of the time allowed by law for the institution of such a suit, does not infringe the provisions of either section 23 or section 28 of the Contract Act. [p. 638, col. 2.]

Section 28 of the Contract Act aims only at covenants not to sue at any time, or for a limited time, and is not aimed at a provision extinguishing the right to sue in certain events. [p. 638, col. 1.]

Messrs. *H. D. Bose* and *S. K. Gupta*, for the Plaintiffs.

Messrs. *L. P. E. Pugh* and *Page*, for the Defendants.

JUDGMENT.

Greaves, J.—The plaintiffs insured with the defendant Company under two policies, dated the 4th November 1920 and the 28th February 1921 loose jute at Kissengunge in the District of Purneah.

The insurances were effected subject to the terms and conditions endorsed or otherwise expressed on the policies.

Both policies contained a condition (No. 13) which so far as is material is to this effect :—

" If the claim be made and rejected and an action or suit be not commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited." For the purpose of these proceedings the following facts are admitted as correct by both parties to the suit. The jute insured under the policies was destroyed by fire on the 7th June 1921, the plaintiffs submitted their claims under the policies on the 14th June 1921, the claims were rejected by the defendant Company on the 30th July 1921, and this suit was commenced on the 5th May 1922. The following issue of law arises in the suit :—

" Have the plaintiffs by reason of their failure to commence this suit within three months of the rejection of their claim forfeited, under the provisions of condition No. 13 of the policies, all benefits under the said policies and, if so, is the suit maintainable ?"

The Court being of opinion that the case may be disposed of on this issue of law only, it is agreed by the parties that this issue shall be tried first.

It is contended on behalf of the plaintiffs that condition 13, as set out above, is void under the provisions of sections 23 and 28 of the Indian Contract Act, 1872, as an attempt to curtail the period of limitation for a suit on the policies, namely, the period of three years prescribed under Article 86 of the Limitation Act.

Section 23 of the Indian Contract Act provides that the consideration or object of an agreement is lawful unless, amongst other things, it is of such a nature that, if permitted, it would defeat the provisions of any law. Section 28 provides, amongst other things, that every agreement which limits the time within which any party thereto may enforce his rights by the usual legal proceedings is void to that extent. The question for our decision is whether a provision in a policy of insurance that all benefit thereunder shall be forfeited if a suit is not commenced within a certain time, which falls short of the period allowed by law for the institution of such a suit, amounts to limiting the time within which a party may enforce his rights under a contract within Section 28 and defeats the provisions of Article 86 of the Limitation Act.

In *Hirabhai* v. *Manufacturers Life Insurance Company* (1), it was held that a provision in a policy which was said to amount in substance to an agreement that if no suit was brought within a year, neither party should have any rights as against the other and which was said to amount to a waiver of the rights of the respective parties if a suit was not brought within a year, did dot offend against the provisions of section 28 of the Contract Act.

In *Baroda Spinning and Weaving Company, Ltd.* v. *Satyanarayan Marine and Fire Insurance Company, Ltd.* (2), it was held that a provision in a policy of insurance identical with the provision in suit did not offend against section 28 which was aimed only at covenants not to sue at any time or for a limited time and was not aimed at a provision extinguishing rights in certain events. Batchelor, J., at p. 356 states: "As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he has any rights to enforce; and that appears to me to be a very different thing," and he refers to *South British Fire and Marine Insurance Co.* v. *Broja Nath Shaha* (3), where the policy in suit provided that no suit should be sustainable unless brought within six months but where this provision, although referred to, was not discussed.

It is stated in the 2nd Ed. of Sir Fdk. Pollock's book on the Indian Contract Act at p. 174 that section 28 merely affirms the common law. If this is correct, it is noticeable that a provision to the effect of the one in suit in insurance policies has been stated to be a reasonable provision. *Home Insurance Company of New York* v. *Victoria-Montreal Fire Insurance Company* (4).

In Porter's Laws of Insurance, 6th Ed., p. 195, it is stated that insurers may lawfully limit the time within which an action may be brought to a period less than that allowed by the statute of limitation and that the true ground on which the clause limiting the time of claim rests and is maintainable is that, by the contract of the parties, the right to indemnity in case of loss and the liability of the Company therefor do not become absolute unless the remedy is sought within the time fixed by the condition in the policy.

In view of the decisions referred to above with which I respectfully agree, I am not prepared to say that condition 13 in the policies in suit infringes the provisions of section 28 of the Indian Contract Act and if it does not infringe section 28, I do not think that it can be said to infringe section 23 of that Act.

I would accordingly answer the issue in the affirmative and hold that the suit is not maintainable.

I desire to say with all respect to the Chief Justice that I do not understand his order referring the matter to this Bench which he appointed to try the issue raised in paras. 16 and 17 of the written statement which is substantially the issue of law which we have tried. It is of course open to him to appoint a special Bench of two Judges to try a suit but having done so it is not, I think, open to him in any way to fetter the discretion of the Bench as to how the suit shall be tried. It is for the Bench and the Bench alone to decide how the suit is to be tried, that is to say, whether issues of fact and law are to be tried together or whether the issues of law shall be tried first. This is in accordance with the provisions of O. XIV, r. 2 of the Civil Procedure Code as I understand them and it is not suggested that the matter comes before us under r. 6 of that order. I have no doubt that the Chief Justice did not desire to fetter the discretion of the Bench in trying the suit but the manner in which the matter comes before us under his order is to say the least unfortunate.

The defendants will be entitled to their costs to be taxed as of a hearing under scale No. 2.

Buckland, J.—Though this Bench has been appointed to try an issue referred to in the petition praying for its appointment, at the hearing the whole case has been treated as being before us and we have been asked under O. XIV, r. 2, Civil Procedure Code, to settle and try an issue of law on which the case may be disposed of and to postpone settlement of issues of fact, and to this we have acceded.

(1) 16 Ind. Cas. 1001; 14 Bom. L. R. 741.
(2) 21 Ind. Cas. 694; 38 B. 344; 15 Bom. L. R. 948.
(3) 2 Ind. Cas. 573; 36 C. 516; 13 C. W N. 425.
(4) (1907) 4 A. C. 59; 95 L T. 627; 76 L. J. P. C. 1; 23 T. L. R. 29.

KARIM v. DOMA

As has already been pointed out, the decision in *Hirabhai* v. *Manufacturers Life Insurance Company* (1) is open to considerable doubt and the correct view was, I think, expressed by Batchelor, J., in *Baroda Spinning and Weaving Co., Ld.* v. *Satyanarayan Marine and Fire Insurance Company, Ld.* (2) in the passage which my learned brother has cited. The proposition advanced on behalf of the plaintiffs that the condition offends against the Indian Contract Act in that it curtails the period of limitation for a suit on the policy, and the argument addressed to us, exclude the proposition that what is affected by the condition are the rights of the plaintiffs if not enforced within the time which the condition prescribes. The contention may, therefore, fairly be tested by assuming that the condition provides that if its terms are not complied with, a part, let us say one-half, of the benefit under the policy shall be forfeited. To such a condition the learned Counsel was unable to apply his argument which fails to meet the general test of applicability to every degree of the circumstances in which it is put forward.

The point which we have to decide was referred to in *Atlantic Shipping and Trading Company* v. *Louis Dreyfus Company* (5). It arose in connection with the commencement of arbitration proceedings within a stipulated time. In his speech Lord Dunedin observed :—Now if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation—it is done, *e. g.*, every day in insurance policies—then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law ? " It has not been contended that the law in India though codified, differs from English law in this respect.

I agree that the suit is not maintainable and that it should be dismissed with costs on scale No. 2.

S. D. *Suit dismissed.*

(5) (1922) 1 A. C. 250 ; 91 L J. K. B. 513 ; 127 L. T. 411 ; 27 Com. Cas. 311 ; 66 S. J. 487 ; 38 T. L. R. 534.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 253 OF 1923.

July 28, 1924.

Present :—Mr. Baker, J. C.

HAJI KARIM—PLAINTIFF—APPELLANT

versus

DOMA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872) ss. 78, 80, 82, 92, 95-Goods ascertained—Test—Lien.

Section 78 of the Contract Act applies only to ascertained goods.

If under the terms of an agreement the defendants, who are brokers and not actual growers of *bidi* leaves have to deliver them after selecting and counting them from the stocks in hand or from the stocks with the actual growers, goods to be delivered are not ascertained goods and section 78 has no application. [p. 640, col. 2.]

Lien is the right of the seller to retain goods and in order that it may exist, it is necessary that goods should remain in the seller's possession, that the price should be wholly or partially unpaid and that a contrary intention should not appear from the contract. [p. 640, col. 2.]

Revision application against the decree of the Court of Small Causes, Bhandara, dated the 31st August 1923, in Civil Suit No. 80 of 1923.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *D. T. Mangalmoorthi*, for the Respondents.

ORDER.—This is an application for revision of the decree of the Court of Small Causes, Bhandara. The case is a small one but raises several points of law.

The defendants agreed to deliver to the plaintiff 1,25,000 bundles of *tembhurna* leaves (used for making *bidis*) at Rs. 7-8 per thousand by the end of Kartik and received Rs. 210 earnest money. Out of this amount the plaintiff received 35,000 bundles, while 13,000 had been counted but remained with defendants. The plaintiff paid Rs. 210 in all

to defendants. The defendants refused to allow the plaintiff to remove the remaining 13,000 bundles or to deliver the balance until the plaintiff paid the whole of the money. The plaintiff accordingly sued the defendants for damages for breach of contract.

The Small Cause Court Judge, Bhandara, dismissed the plaintiff's suit, holding that plaintiff does not prove that defendants obstructed his men from removing 13,000 bundles, and that as regards the remainder it is not proved that defendants refused to deliver. Plaintiff had taken delivery of 48,000 bundles worth Rs. 362-0-0 and had paid only Rs. 210-0-0 and as he did not pay the balance or offer to pay it, defendants were justified in withholding delivery.

Plaintiff applies in revision.

The agreement does not say anything about the time and place of payment and is in form of a receipt for Rs. 210/- earnest money.

It is contended on behalf of the plaintiff that the case is governed by section 78 of the Contract Act and by section 92. The clause relied on in section 78 is that "where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered." Section 92 states that "a delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder."

Section 78, Contract Act, applies only to ascertained goods.

Under the terms of the agreement the defendants were to count the leaves and deliver them at a certain village, and under section 80 of the Contract Act the sale could not be complete till this had been done. As the defendants did nothing with regard to the remainder of the bundles, I do not think the sale was complete as regard to them.

The case is also in my opinion covered by section 82 of the Contract Act which says: "Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of sale that the goods shall be ascertained. The illustration to that section is: "A agrees to sell to B 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B."

By the agreement the defendants were not only to account the leaves but to deliver good quality unblemished leaves suitable for plaintiff's cigarette manufactory.

The defendants it appears, are brokers and not growers of leaves, and they therefore had to select the leaves and count them from the stocks they had in hand, or from the stocks with the actual growers. In these circumstances I have not the least doubt that the goods were not ascertained and section 78 has no application.

So far as the 48,000 bundles ready for delivery are concerned they may be ascertained goods, but the price of them is in excess of what plaintiff has paid. Under section 95 of the Contract Act unless a contrary intention appears the seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid. Lien is the right of the seller to retain goods sold and in order that it may exist, it is necessary (1) that the goods should remain in the seller's possession; (2) that the price should be wholly or partially unpaid; and (3) that a contrary intention should not appear.

All the requirements are fulfilled in the present case, as the 13,000 bundles are in the seller's possession, the price is unpaid and no contrary intention appears in the contract which is silent on the question of payment. If the remaining 77,000 bundles are in the seller's possession, the same considerations will apply. If they are not yet selected and counted they are still unascertained and the property in them has not passed.

In either view the plaintiff is not entitled to damages and the decree of the Small Cause Court is correct, though I am not basing my view on the reasons given by the Judge.

The application is dismissed with costs.

G. R. D. *Application dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

January 29, 1924.

Present :—Lord Sumner, Lord Parmoor, Lord Carson, Sir John Edge and Mr. Ameer Ali.

WAMAN GANESH AND ANOTHER—APPELLANTS

versus

SARUBAI—RESPONDENT.

Will, proof of—Witnesses of no status, testimony of, value of.

Where a Will that is propounded is a natural Will and there is evidence that the deceased intended to make such a Will, the mere fact that the attesting witnesses are not men of any status is not sufficient to discredit the testimony of such witneses. [p. 642, col. 1].

JUDGMENT.—Gangadhar whose father was Ganpat, but who was given in adoption to the widow of one Gopal, died on the 9th December 1918, possessed of considerable property, of which he became owner through his adoption.

Waman, his brother before adoption, and Kesheo, his natural mother's sister's son who are the appellants in the present appeal, applied for letters of administration with a Will annexed, said to have been executed by the said Gangadhar on the 30th October, 1918. Under the said Will the appellants became joint universal legatees of the property left by the said Gangadhar. The respondent Sarubai, who was a cousin and the next heir in the adoptive family, opposed the application for administration, alleging that the Will had been forged by the appellants and Ganpat, the father of Gangadhar. She declined to admit that the signature in the Will was that of Gangadhar, and she further alleged (and this seems to have been eventually the main question to be determined) that as Gangadhar lived in Indore for the greater part of the year for his education, he used to leave a number of blank sheets bearing his signature with the appellant Waman and Ganpat his father, to facilitate the filing of civil suits, and for other purposes connected with the management of Gangadhar's estate, and it was strenuously contended that the Will had been written by Ganpat after the death of Gangadhar on one of the blank sheets bearing his signature.

On the 31st October, 1919, the Additional District Judge who tried the case, and who has very closely examined the evidence, delivered judgment in favour of the appellants and passed an order granting them Letters of Administration with the Will annexed. He held that the signature in the alleged Will was in Gangadhar's own handwriting (and that is not now disputed), that Gangadhar was in the habit of leaving blank sheets of paper bearing his signature, and that this was proof that Ganpat and the appellants could have in their possession such a paper. He held, however, that the attempt to show that the Will was forged after Gangadhar's death failed.

The respondent appealed from the order of the Additional District Judge to the Court of the Judicial Commissioner of the Central Provinces, and that Court, by their judgment of the 4th August, 1920, set aside the order of the lower Court and dismissed the application of the appellants for Letters of Administration with the said Will annexed with costs.

The Judicial Commissioners base their judgment mainly upon the facts that the Will propounded had the appearance of having been written on a paper which already bore the executant's signature, and that it was proved 'that Gangadhar left blank papers bearing his signature for filing plaints in his absence, and, further, that it was not improbable that Ganpat was in possession of some of these papers after Gangadhar's death. The Judicial Commissioners were of opinion that the doubt raised by these circumstances as to the genuinenes of the Will casts a burden on the applicants to prove that the document was executed by Gangadhar as his Will, and they were of opinion that the oral evidence on the record was not satisfactory or strong enough to prove the genuineness under the circumstances. They were of opinion

that none of the witnesses to the execution of the Will appeared to be men of any status, and they also criticised the fact that the father had himself drawn the Will.

Their Lordships, having carefully considered all the evidence in the case, cannot agree with the conclusion come to by the Judicial Commissioners. Assuming that a certain amount of suspicion is created by the appearance of the Will, and the spacing of the lines as if to fit the contents in before the signature of Gangadhar, which is the only remaining contention of the respondent, their Lordships are of opinion that the burden of proving the execution of the Will placed upon the applicants has been fully discharged. In the first place, the Will is a perfectly natural one, and it has been proved beyond doubt by the evidence of the doctor who attended the deceased that Gangadhar on being told that his case was hopeless, informed him that he would dispose of all his propetry in the name of his brother; and although Kesheo's name was afterwards included in the Will, as well as his brother, this statement, which is unchallenged and accepted by the appellate tribunal shows the intention of making a Will and of leaving the property to his immediate relatives by birth. Seven of the witnesses, of whom one was a scribe, called in to write the Will, but who found that it was being already written when he came, and five attesting witnesses, have all deposed to the due execution of the Will.

Their Lordships do not think that anything has been suggested in the course of cross-examination which is sufficient to discredit these witnesses, nor indeed were any questions put to them which challenged the accuracy of the accounts they gave. It may be true, as stated by the Judicial Commissioners, that the witnesses to the Will did not appear to be men of any status, the majority of them being cultivators, but their Lordships do not think that under the facts of this case, and having regard to the measure of suspicion hereinbefore indicated, that there is sufficient ground for disbelieving their evidence as regards the execution of the Will. Their Lordships are therefore of opinion that the decision of the Judicial Commissioners should be reversed with costs, and that the order of the Additional District Judge of the 31st October, 1919, should be restored, and that this appeal should be allowed with costs, and they will humbly advise His Majesty accordingly.

Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 29 OF 1923.

February 29, 1924.

Present:—Mr. Kennedy, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

R. B. SETH VISHINDAS NIHALCHAND—DEFENDANT—APPELLANT

versus

THAWERDAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 2 (d), 28—Civil Procedure Code (Act V of 1908), s. 60—Transfer of Property Act (IV of 1882), s. 6 (e),—Share in partnership assets whether attachable and saleable in execution—"Property" what is—Property liable to attachment and sale in execution whether alone vests in Receiver—Mere right to sue, what is—Assignment of share in partnership assets, value of.

A partner's share in the assets of a partnership concern is "property" and is liable to attachment and sale in execution of a decree. [p. 644, col. 2].

Deen Dayal Lal v. *Jugdeep Narainsing*, 4 I.A. 247; 3 C. 198; 1 C. L. R. 49; 3 Sar. P C. J. 730; 3 Suth P. C. J. 468; 1 Ind Jur. 604; 1 Ind. Dec (N S.) 715 (P. C.); *Parvatheesam* v. *Bapanna*, 18 M. 447 at p. 450; 4 Ind. Dec (N.S) 1028; *Jagat Chander Roy* v. *Ishvar Chander Roy*, 20 C. 693; 10 Ind. Dec (N.S.) 468, relied upon.

Syed Tuffuzzool Hussein Khan v. *Rughoonath Pershad*, 13 M I. A. 40, distinguished.

The definition of the word "property" in section 2, clause (*d*) of the Provincial Insolvency Act of 1920 is very comprehensive and includes any property over which or over the profits of which the insolvent has a disposing power which he may exercise for his own benefit All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of his debts including claims in the nature of damages, except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputa-

tion, are "property" which vests in the Official Receiver. [p. 644, col. 2].

***Drake* v. *Beckhan*, (1843) 60 R.R. 601; 12 L. J. Ex. 486 ; 7 Jur. 204; 152 E. R. 823, relied upon.**

Under section 28 of the Provincial Insolvency Act of 1920 it is the whole property of an insolvent that vests in the Receiver and not only that which can be attached and sold in execution of a decree. [p. 645, col. 1].

The assignment of a share in the assets of a firm is not the assignment of a mere or bare right to sue but of the share of the assets of the firm with the incidental right of recovering the same by the aid of the Court. It is for the Court in each particular case to decide whether in the view of the Court the assignment in dispute is property with an incidental remedy for its recovery or whether it is a bare right to bring an action within the meaning of section 6, clause (*e*) of the Transfer of Property Act [p. 645, col. 2].

***Jewan Ram* v. *Ratanchand*, 70 Ind. Cas. 498 ; 26 C. W. N. 285, relied upon.**

***Abu Mahomed* v. *S. C. Chander*, 1 Ind. Cas. 827; 36 C. 845; 13 C. W. N. 884; *Hirachand Amirchand Gujar* v. *Nemchand Fullchand*, 78 Ind. Cas. 465; 47 B. 719; 25 Bom. L. R. 445 ; (1923) A. I. R. (B.) 403 ; *Pansulari Vencatasawmi* v. *Ramchandra Raju*, 18 Ind. Cas. 520; 38 M. 133 ; 24 M. L. J. 298 ; 13 M. L. T. 218; (1913) M. W. N. 285, distinguished.**

Appeal against the preliminary judgment and decree of the Additional Judicial Commissioner, dated the 24th April 1923, in Suit No. 541 of 1918.

Mr. *Kimatrai Bhojraj*, for the Appellant.

Mr. *Suganlal H. Jeswani*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit filed by one Thanwerdas since declared insolvent for taking accounts of a dissolved partnership.

The Official Receiver in whom his property vested assigned the claim in suit to the second Respondent. Both the Official Receiver and the second Respondent were brought on the record as co-plaintiffs in place of the insolvent and a preliminary decree for rendition of accounts has been passed against the Defendants.

It is urged on behalf of the Defendants that the subject-matter of the suit is not "property" and does not vest in the Official Receiver that even if it is property it is not such as can be attached and sold in execution of a decree and therefore it is excluded from being vested in the Official Receiver under Section 28, clause (5) of the Provincial Insolvency Act, V of 1920, and lastly that it is a mere right to sue and could not be validly assigned by the Official Receiver.

The subject-matter of the suit is the assets of the partnership concern. The insolvent's case is that these are assets of the partnership whether acquired by the contribution of either capital or skill or labour of the partners which exceed its liabilities. He claims a share in such assets and seeks the aid of the Court as the Defendants have refused to hand over to him his share in such assets. The subject-matter of the suit is therefore property, such property has been held to be liable to attachment and sale in execution of a decree.

Even in the case of a going concern where one partner has no right to introduce a substitute on his behalf as a partner in the business without the consent of his co-partners it was remarked by their Lordships of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Sing* (1) that a purchaser in execution sale of the share of a partner can acquire the interest sold and realize its value. In that case the question was as to the rights of an execution creditor and of a purchaser at an execution sale in regard to the interest of an undivided co-parcener in a Hindu family and it was held that such interest was liable to be sold.

In the case of *Parvatheesam* v. *Bapanna*, I. L. R. 13 Mad. 447 relying on the ruling in Deendyal's case it was held that Plaintiff who had purchased at an execution sale the interest of the judgment-debtor in a partnership of which the undivided (deceased) father of the judgment-debtor was a partner could maintain a suit for partnership accounts and for the share of the judgment-debtor being paid to him. In *Jagat Chander Roy* v. *Ishwar Chander Roy* (2) the same view was taken and it was held that the share of a partner in a partnership business was saleable property.

The learned pleader for the Defendants has relied on the earlier ruling of the Privy Council in *Syed Tuffuzzool Hussian Khan* v.

(1) 4 I. A. 247; 3 C. 198 ; 1 C. L. R. 49 ; 3 Sar. P. C. J. 730 ; 3 Suth. P. C. J. 468 ; 1 Ind. Jur. 604 ; 1 Ind. Dec. (N. S.) 715 (P. C.).

(2) 20 C. 693 ; 10 Ind. Dec. (N. S.) 468.

Rughoonath Pershad (3) where it was held that the expectant claim under an inchoate award of a partner could not be attached and sold in execution of a decree under Section 205 of Act VIII of 1859. This decision turned on the peculiar circumstances of that case and on the mode in which the claim had been attached and sold. As pointed out by Muthuswami Ayyer, J., in *Parvatheesam* v. *Bapanna* (4). Their Lordships of the Privy Council observed that what was sold was not an unliquidated demand *ex contractu* nor an antecedent share of the existing assets but an uncertain future right which was to come in existence under a future award the terms of which depended on the extensive discretionary powers conferred on the arbitrators. It is further to be noted that their Lordships of the Privy Council did not purport to lay down that such a claim could not be attached or made available for the benefit of the judgment-creditors but that it could not be sold in the mode in which it had been done.

At page 52 their Lordships have observed as follows :

" They do not find in the Act which apparently regulates rather than extinguishes any prior right of a creditor any evidence of intention to exempt property from execution but they agree in the observation of the Judge that the Code of Procedure is a new starting point and must be construed on its own terms and worked in the mode which it prescribes. Sections 236, 241 and 243 of the Code provide sufficiently what debts due to the judgment-debtor may be received and applied in satisfaction of the judgment-debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied that there is nothing in that Code to authorize such a sale as has been professed to be made in this case and which would require for its justification words too plain to be mistaken and too inflexible to be controlled."

Sections 236, 241 and 243 of the old Code referred to attachment of debts and certain other property and the mode of realizing them by issue of a prohibitory order or the appointment of a Manager of such property to realize the same for the benefit of the judgment-creditor.

The provisions of section 205 of the old Code of 1859 have been greatly amplified in Section 266 of the Code of 1877 corresponding to Section 60 of the present Code which permit attachment and sale of all saleable property belonging to the judgment-debtor subject to certain exceptions which are specified in the proviso to the section. The subject matter of the suit no doubt falls within the purview of saleable property of a judgment-debtor and as such can be attached and sold in execution of a decree.

The Provincial Insolvency Act, however, does not only vest the property of the insolvent which can be attached and sold in execution of a decree but vests the whole of his property in the Receiver. The definition of "property" in Section 2 clause (*d*) of the Act which is adopted from Section 2 clause (*e*) of the Presidency Towns Insolvency Act is very comprehensive and is said to include any property over which or over the profits of which any person has a disposing power which he may exercise for his own benefit ". "Property" has been defined in Section 168 of the English Bankruptcy Act as follows :

" Property " includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in England or elsewhere also obligations, easements and every description of estate interest and profit, present or future, vested or contingent arising out of or incident to property as above defined." The object of the Insolvency law is to vest in the Receiver the whole of the property of the insolvent over which the insolvent has or may acquire a disposing power before the date of discharge subject, however, to certain well recognised exceptions.

All rights of action which relate directly to the Bankrupts' property and can be turned into assets for the payment of his debts including claims in the nature of damages except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation are property which vests in the Trustee in Bankruptcy under the English Bankruptcy Act.

(3) 14 M. I. A. 40 ; 7 B. L. R. 186; 2 Suth P. C. J. 434 ; 2 Sar. P. C. J. 656; 20 E. R. 701.

(4) 13 M. 447 ; at p. 450 ; 4 Ind. Dec. (N. S.) 1023.

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Halsbury Vol : II, para. 236, *Drake* v. *Beckhan* (5). The same would appear to be the law under the Presidency Towns Insolvency Act.

Section 28, clause (2) of the present Act also provides for the whole of the property of the insolvent vesting in the Official Receiver.

It is, however, urged that the operation of clause (2) is controlled by clause (5) which is as follows : "The property of the insolvent for the purposes of this section shall not include any property (not being books of account)which is exempted by the Code of Civil Procedure 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree."

This clause clearly refers to the particulars which are exempted from liability to attachment under the proviso to section 60 of the Civil Procedure Code and cannot be construed as meaning that it is not the whole property but only the property which is liable to attachment and to sale under the 1st clause of section 60 which vests in the Official Receiver. The first clause of section 60 Civil Procedure Code does not refer to property liable to attachment but liable to attachment and to sale. The construction which the learned pleader proposes to put upon this clause is repugnant to the objects of the Act, and would render the provisions of the section inconsistent with similar provisions in Acts *pari materia e.g.*, The English Bankruptcy Act and the Presidency Towns Insolvency Act and with the other provisions of this Act itself. There is no warrant for such a limited construction being put on section 28 of Act V of 1920.

Lastly it has been urged that even if the subject matter of the suit does vest in the Official Receiver it is a mere right to sue and cannot be validly assigned by him. Reliance has been placed on the rulings in *Abu Mahomed* v. *S. C. Chunder* (6), *Hirachand Amirchand Gujar* v. *Nemchand Fulchand* (7), and *Pansulari Venoataswami* v. *Ramichandra Raja* (8), which all refer to claims for damages and are, therefore, clearly distinguishable from the present case. Whether a claim for damages arising out of a breach of contract or in tort is a mere right to sue under section 6 of the Transfer of Property Act and as such it cannot be assigned is a question to be decided on the facts of each case.

As pointed out by Sanderson, C. J. in *Jewan Ram* v. *Ratan Chand* (9), it is for the Court in each particular case to decide whether in view of the Court the assignment in dispute is property with an incidential remedy for its recovery or whether it is a bare right to bring an action within the meaning of section 6 clause (*e*) of the Transfer of Property Act.

So far as the assignment of the claim in suit is concerned it is not an assignment of a mere or bare right to sue but of the share of the assets of the firm with the incidental right of continuing the suit and recovering the same by the aid of the Court. The assignment in favour of the 2nd Respondent is therefore valid.

We are of the opinion that the plaintiff and the 2nd respondent were rightly brought on the record and we dismiss this appeal with costs.

P. B. A. *Appeal dismissed.*

(5) (1843) 60 R. R. 601 ; 11 M. and W. 315 ; 12 L.. J. Ex 436 ; 7 Jur. 201 ; 152 E. R. 823.

(6) 1 Ind. Cas. 827 ; 36 C. 345 ; 13 C. W. N. 384.

(7) 73 Ind. Cas. 465 ; 47 B. 719 ; 25 Bom. L.R. 445 (1923) A. I. R. (B.) 403.

(8) 18 Ind. Cas. 520 ; 33 M. 138 ; 24 M. L. J. 298 ; 18 M. L. T. 218; (1913) M. W. N. 285.

(9) 70 Ind. Cas. 498 ; 26 C. W. N. 285.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

January 28, 1924.

Present :—Lord Shaw, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

MAHOMED RAZA—APPELLANT
versus
Syed YADGAR HUSSAIN AND OTHERS
—RESPONDENTS.

Muhammadan Law—Wakf, *constitution of—Intention—Grant by Hindu to Muhammadan Community, whether constitutes* wakf.

In order to constitute a *wakf* under the Muhammadan law, it is not necessary that the term '*wakf*' be

used in the grant, provided from the general nature of the grant itself that tenure can be inferred. [p. 646, col. 2].

Jewan Doss Sahoo v. *Kubeer-ood-deen*, 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206, referred to.

Quære.—Whether a grant by a Hindu to a Muhammadan Community is incompetent as the foundation of a *wakf*. [p. 648, col. 2].

Messrs. *De Gruyther* and *A. Majid*, for the Appellant.

JUDGMENT.—This is an appeal from a decree of the Court of the Judicial Commissioner of the Central Provinces dated 10th January, 1920, reversing a decree of the Court of the Additional District Judge of Nagpur dated 18th December, 1918. The case was argued before the Board *ex parte*.

The point of the appeal as presented was whether in the year 1840 Raja Raghoji Bhonsla, a Hindu ruler, created a *wakf* of three villages, namely, Goreware, Sokham and Nankapar, to Hakim Yadgar Hussain, the royal physician. The document so said to create a *wakf* is as follows:—

" From

" Raghoji Bhonsle, Sena Saheb Subba.

" The village of Mouza Gorewada in this *pergana* is given as *mokasa in the Arabic year* 1241|1840 (*Fasli year* 1250) to Hakim Yadgar Hossein for the Imambara of Pir Hussein, with all income of land Revenue, Pandhari extra income, *Kalali* and mango groves, for ever from the commencement of the current year. It is assessed to a rental of Rs. 401-12-0. You may, therefore, continue the *mokasa* from year to year and generation to generation. Don't expect a fresh *Sanad* every year. Keep a copy of this *Sanad* and return the original to the grantee, dated 16th *Jamadilawal*.

16th July, 1840.

The argument is that this grant constituted a *wakf* for the Imambara of Pir Hussain. It was maintained that the use of the words " for ever "—manifestly applicable to the income of land revenue, etc.—together with the further use of the words " you may, therefore, continue the *mokasa* from year to year and generation to generation," signifies the creation of a *wakf*, although a *wakf* was not stated by name, nor is there any nomination of the grantee as *mutwalli*. The case was supported in argument by various decisions, the leading one of which is *Jewan Doss Sahoo* v. *Kubeer-ood-deen* (1). It can hardly be denied that according to the Mahommedan Law it is not necessary, in order to constitute a *wakf*, that the term " *wakf* " be used. " if from the general nature of the grant itself that tenure can be inferred."

This state of the law makes the present case one of difficulty on the facts and history elicited in these proceedings. In all such cases the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant: while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration. The following narrative is accordingly given:—

The grantee Yadgar Hussain continued in possession of the temple until 1850, when he died. The *Mokasa* village was then resumed. On 15 May, 1852, a grant was continued in name of his son Hakim Bunyad Hussain.

In the view of the Board what happened in 1867 and the two preceding years, as aftermentioned, is important. It appears from the proceedings that on 25th February a revenue case was tried, and three orders, one applicable to each village, were signed by Mr. Ross, the Settlement Officer. They were headed :—

Claim to Proprietary right in *Mauza* Sonkham late Purganah Kotwal, Thuseelee Nagpur.

and it was narrated :—

" This village has been held in *Mokasa* tenure since 1840 A. D. and the *Mokasdar* has all along held it in his own management as appears from the entries in the old record as follows :—

1234 Fs.	to 1236	Amrun Gond.
1237	„ 1241	Amrun Gond.
1242	„	Prubalad Poree.
1243	„ 1260	Hukeem Yadgar Hussain.
1261	„ 1263	*Mokasa* „
1264	„	„ „

(1) 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206.

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1265	F. S. to	1267	*Mokasa* Meer Hussain Emambara through Hukeemjee.
1268	,,	1270	Peer Hussain thro. Boonyad Hussain.
1271	,,	1271	Meer Boonyad Husain.

"Yadgar Husain was the grantee and was succeeded by his son Boonyad Husain. The female members of the family have laid claim to share, but they have no title. Boonyad Hussain has a younger brother named Thoofeyl Hussain.

Proprietary right in *Mauza* Sonkham is hereby conferred on Boonyad Husain and Thoofeyl Husain."

On the 4th May of the same year (1867), however, an order was passed by the Settlement Officer of Nagpur, Mr. Ross, in these terms :—

Claim by Bunyad Hussain to hold in *Mokasa* village of Sonkham. This village together with the village of Gorewara, and Nankepar were granted by Takeed (issued in 1840 A. D.) to Yadgar Hussain Hakim (physician to the Royal Family) for expenses of the Imambara of Peer Hussain (Husan and Hussain) at Nagpur. The grant was made in perpetuity and inclusive of Abkaree, Pandhree, Sayer and demands of every other kind. The revised *jama* of these villages has been fixed respectively, at Rs. 300,500 and 120. Yadgar Hussain died in 1261 *Fasli* (1851 A. D.) and the grant was continued by a Takeed dated 24th, Rajab of that year to his son Bunyad Hussain.

"The expenses of the Imambara are defrayed by the holder during the Mohurram and Ramjan festivals. I recommend that the grant be continued while its object is maintained."

While on the 19th May the Chief Commissioner passed an order, the terms of which are of great importance. They are as follows:—

"The *Mouza* of Gorewara may remain revenue free as long as the Imambara is in existence, on this condition that the income arising from the *Maufi* is properly spent and a report submitted to Government for sanction."

The three orders, one applicable to each village, are in the same terms :—

It appears to their Lordships difficult to predicate that these transactions of 1867 establish that a *wakf* with Yadgar Hussain as its *mutawalli* is established as having been instituted or continued as such.

If a statement made by Hakim Bunyad Hussain in the Court of the Settlement Officer on the 27th October 1865 be referred to their difficulty grows greater. He is asked the question. "Have you got a co-sharer?" to which the answer is "There is no co-sharer. My real younger brother Syed Tufail Husain has got an equal share. We both live together." And in a further stage in his evidence he declares "I myself and my brother are in possession."

From a consideration of these documents and the evidence it appears to the Board to be fairly plain that Bunyad Hussain's own position was not that of an exclusive claim to the *mutwallishiip* of this property and endowment as a *wakf*, but an allegation of joint ownership and possession with his brother, subject, it may be, to respecting the conditions of the grant.

Hakim Bunyad Hussain died on 3rd April 1913, and the recent Settlement known as Mr. Dyer's Settlement was made. From the papers it appears that a careful examination of the history of the property and its ownership and possession was then made. The decision of the Settlement Officer was to enter the defendant No. 1's name with other defendants Nos. 2 and 4 as co-sharers along with the plaintiff of the remaining 8-annas share. This administrative action was also of course quite inconsistent with the idea of a *wakf* having been constituted or there being any right in the deceased to have nominated his successor as *mutwalli*.

Their Lordships have carefully considered all the relevant documents and evidence in this case and they are of opinion that the judgment reached by the Judicial Commissioner is correct.

There are one or two matters, however, which the Board wishes to make clear. In the first place, in their Lordships' judgment the nature of the grant in this case, whether that term be applied to the document issuing from the Raja in 1840 or to the orders and records issuing from the Settlement Officer in

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1867 was not a *wakf* but was a grant *sub conditione*. That condition was two-fold. In the first place, the expenses of the temple should be defrayed from the revenue. The grant was for that purpose express, namely, "that the income arising from the *maufi* is properly spent," and, secondly, that a report was to be submitted to the Government for sanction, or to use the language of the Chief Commissioner's order of 10th July 1867, with regard to Sonkham :—

"The village of *Mouza* Sonkham may remain revenue free for ever on this condition that the object for which it was given *maufi* should be properly maintained and the *Imambara* be kept in good repairs and a report submitted to Government for sanction.

In the next place the Board desires to make it clear that the interests of the *Imambara* are paramount and that no administration by the persons claiming either under the title of grantee, or of *mutawalli* or of manager could be legally sanctioned which was in violation or betrayal of the interests of the *Imambara* as safeguarded by the imposition of the condition which attached throughout to the grant.

The rights which would emerge or the course of procedure which would have to be followed in the event of such maladministration are not before the Board. The sole question arising is that defined by the plaint itself and is to the following effect :—

"That a decree be passed under section 83 of the Central Provinces Land Revenue Act for setting aside the decisions of the Settlement Officer aud cancelling the entries showing defendant No 1's name as an 8-annas co-sharer and those of defendants Nos. 2 to 4 as co-sharers along with plaintiff of the remaining 8-annas share in the Record of Rights and other papers relating to the new Settlement of the *mouzas*:—

1. Gorewara 2. Sonkham	More fully described in the schedule herewith attached and by substituting the name of plaintiff alone, as the full 16 annas *mokasdar* and *mutwalli* of the said villages"

The true point of the proceeding is that the plaintiff in the present case, Muhammad Raza, desires these entires to be deleted by substituting his name alone "as the full 16-annas *mokasdar* and *mutwalli*." His averment is that he

"In pursuance of the wishes of his father succeeded him in the office of *mutwalli* of the aforesaid *Imambara*, and has, since been managing the aforesaid *wakf* property exclusively in his own sole and exclusive right as such *mutwalli* and is in possession of the same in that capacity."

His object of course cannot be accomplished unless he can establish his positiion as *mutwalli*, and that position cannot be established unless the grant *sub conditione* as before described can be considered to be a *wakf*. An additional negative distinction must be made. The Board makes no pronouncement whatsoever on a question mooted, namely, whether a grant by a Hindu to a Muhammadan community was incompetent as the foundation of a *wakf*. The grant in the present instance has been dealt with on its own terms and conditions, and the issue has been settled against it being the constitution of a *wakf*. Further questions mooted only confuse that issue.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The petition for further documents will also be dismissed.

The appellant will pay to the first respondent such costs as he has incurred.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant—Messrs. *Frances* and *Harker*.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 150 OF 1922.

March 16, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

BAPUJI KRISHNA KARGUPPI—DEFENDANT—APPELLANT

versus

JANARDHAN GOVIND KARGUPPI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XXI, r. 90—Execution of decree—Sale, application to set aside—Auction-purchaser, whether necessary party.

GIRDHARI LAL *v.* ZORAWAR SINGH.

The auction-purchaser is a necessary party to an application to set aside a sale held in execution of a decree, and the application is not maintainable where he is not impleaded as a party.

Appeal against the decision of the First Class Judge, Belgaum, in *Dharkast* No. 64 of 1916.

Mr. *R. A. Jahagirdhar*, for the Appellant.

Mr. *D. R. Manerikar*, for the Respondent.

JUDGMENT.—The application by the third defendant in suit to set aside the sale in execution of the decree in suit No. 3 of 1902 was bad for various reasons. The sale took place in pursuance of the order passed by Mr. Koppiker on the 10th August 1918. Defendants No. 2 and 3 at that time were minors and were represented by their guardian. There was no appeal against that order. The second Defendant after he became major applied to the Court to set aside the sale and that application was refused. The third Defendant now makes a similar application. It seems to me that the auction-purcheser was a necessary party to such a proceeding. That is a fatal objection for an application of this kind. The appeal will be dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 164 OF 1923.

June 12, 1924.

Present :—Mr. Justice Walsh, Acting Chief Justice, and Mr. Justice Ryves.

Pandit GIRDHARI LAL—APPLICANT—APPELLANT

versus

ZORAWAR SINGH—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 8, scope of—Application for review—Dismissal for default—Order refusing to restore application—Appeal, whether lies.

O. XLVII, r. 8 of the Civil Procedure Code does not extend the right of the party who goes for a review. It merely defines the method by which the form shall be adopted and ascertained. [p. 649, col. 2.]

No appeal lies against an order refusing to restore an application for review. [p. 649, col. 2.]

Appeal from an order of the Subordinate Judge, Muttra, dated the 11th August 1923.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *Gopi Nath Kunzru*, for the Respondent.

VIDYA WANTI *v.* JAI DAYAL KAPUR.

JUDGMENT.—This is an appeal from a refusal to restore an application for review, the application to the lower Court to restore the application for review having been heard out on the merits. The disappointed party wants this Court to rehear in appeal the application, which has been heard in the Court below and refused to restore the application in review. A preliminary objection is taken by the respondent. Mr. N. P. Asthana for the appellant takes the only point which he can in defence of the right of appeal, and on the face of it, it looks like a good point. He approaches it in this way. Order XLIII, r. 1 sub-section (t) gives a right of appeal from an order made under r. 19 of O. XLI, which is the ordinary appellate order. He then refers to r. 3 of O. XLVII, which is the review order, and says that he gets into the appellate order by reference to it, namely by the provisions of r. 3 of O. XLVII, which provides that the provision as to the form of preferring appeals shall apply *mutatis mutandis* to applications for review. But on turning to r. 1 of O. XLI, it is quite clear that by the provisions contained in that rule, a specific form is required when a party decides to appeal. The marginal note to O. XLVII, r. 3 describes the rule as one really relating to the form of application, and the rule itself says that the provisions of the appellate rules shall apply to forms in applications for review. We do not think that that extends the right of the party who goes for a review. It merely defines the method by which the form shall be adopted and ascertained. It does not relate to the right of appeal. This appeal must be dismissed with costs.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 72 OF 1924.

April 4, 1924.

Present :—Mr. Justice Zafar Ali.

VIDYA WANTI—PETITIONER

versus

JAI DAYAL KAPUR AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1, proviso—Appeal by pauper, dismissal of—Procedure.

SURAJ MAL *v.* MOHAMMAD TAQI

The proviso to r. 1 of O. XLIV of the Civil Procedure Code does not come into play unless it should be found that the applicant is a pauper. [p. 650, col. 1.]

Petition under O. XLIV, r. 1, Civil Procedure Code, seeking permission to appeal as a pauper.

Dr. *Nand Lal*, for the Petitioner.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The learned Counsel for the respondents has filed objections to this application for leave to appeal as a pauper. Under O. XLIV, r. 2, Civil Procedure Code, I direct the Court from whose decision the appeal is preferred to make an enquiry into the alleged pauperism of the applicant in accordance with the provisions of O. XXXIII, Civil Procedure Code, relating to pauper suits, and to submit a report to this Court within 3 months.

Counsel for the respondents urges at this stage that the application is liable to dismissal under the proviso to O. XLIV, r. 1, but obviously the proviso is not applicable unless it should be found that the applicant is a pauper.

As regards certain other objections in writing raised by the Counsel, he states that he reserves his arguments thereon till the receipt of the report of the Court below.

Z. K. *Petition accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 5 OF 1923.

May 7, 1924.

Present :—Mr. Wazir Hasan, J. C.

SURAJ MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Khan Sahib Syed Mohammad Taqi AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction of Revenue Courts—Rent suit by recorded co-sharer—Adverse possession, plea of, whether can be entertained.

There is nothing to prevent a Revenue Court in Oudh from entertaining and deciding a plea of adverse possession as against the claim of a recorded co-sharer for recovery of rent. [p. 651, col. 1.]

Muazzam Ali Shah v. *Chunni Lal*, 11 Ind. Cas. 269; 33 A. 791; 8 A. L. J. 936, distinguished.

When such a plea is raised in a rent suit, the Rent Court must frame an issue in that behalf and give its decision thereon. [p. 651, col. 1.]

Sitla Baksh v. *Mt. UmedKuer*, 1 O C. 143, followed.

Appeal against the decree of the District Judge, Fyzabad, dated the 2nd November 1922 confirming the decree of the Assistant Collector, Sultanpur, dated the 15th December 1921.

Messrs *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a share of profits under clause 15 of section 108 of the Oudh Rent Act. The plaintiffs are the appellants. Their suit has failed in both Courts below. So far as the entries in the Khewat show, it appears that there is a *sub-khata* No. 6/2 within the larger *khata* No. 6 in village Isauli in the District of Sultanpur. The larger *khata* comprises an area of over 400 *bighas*. The smaller *khata*, that is, 6/2 is admittedly comprised of 11 plots measuring slightly above 99 *bighas* of land. In respect of the last mentioned *khata* the names of the plaintiffs stand recorded to the extent of 12 annas while the name of the defendant No. 1 is mentioned with regard to the remaining four annas. The plaintiffs claim that except in respect of a small area of 3 *bighas* the defendant made collections and has failed to pay to the plaintiffs their share of the profits. This simple suit was resisted by the defendant No. 1 on the ground that he held the entire sub-*khata* in proprietary possession to the exclusion of the plaintiffs. The origin of this proprietary possession is said to date back somewhere in the fifties but the present title is founded on prescription, both the Courts have upheld the plea raised by the defendant and dismissed the suit.

Two points were urged at the hearing of this appeal on behalf of the appellants. (1) That the Revenue Courts have no jurisdiction to entertain and decide the plea of adverse possession as against the claim of a recorded co-sharer, and (2) that the evidence on which the finding of the Courts below as to the adverse possession in favour of the defendant is based does not establish such possession.

The first ground was sought to be supported by a Full Bench ruling of the Allahabad High

BALLAR CHAND SEROJEE, *In re*

Court in the case of *Muazzam Ali Shah* v. *Chunni Lal* (1). As the argument on that point developed it was soon found that the ruling on which the learned Counsel for the appellants relied, was wholly inapplicable to the present case for the simple reason that the provisions of the Agra Tenancy Act, on which that ruling rests, are not to be found anywhere in the Rent Act or Revenue Act relating to the province of Oudh. At the best, we have got the provisions of section 44 of the Land Revenue Act (III of 1901) as our sole guide in this matter, but here again it is not shown that there was any decision between the parties which will have the effect of creating a bar against the inquiry into the plea of adverse possession. The first ground, therefore, fails.

In dealing with the second ground, I ought to be very careful in the statement of my own opinion on the merits of the plea of adverse possession because it is agreed that the decision in the present litigation will not be final and the Civil Court may be called upon to decide that question finally between the parties. That when such a plea is raised in a rent, suit the Rent Court must frame an issue in that behalf and give its decision thereon was decided by a Bench of two Judges of this Court so far back as the year 1892 in the case of *Sitla Bakhsh* v. *Mt. Umed Kuer* (2). The view expressed in that case has held ground so far. The Courts below have considered the evidence fully. In second appeal I need only say that there is ample evidence on the record to support the finding. It is true that the mere fact that the defendant No. 1 has been in actual possession to the exclusion of the plaintiffs of the lands in suit will not make his possession adverse as against the latter. But in the present case there is much more than that. The parties have frequently come face to face in Courts of law, the Civil, Revenue and Criminal, and on each occasion the defendant has to the knowledge of the plaintiffs or their predecessor-in-interest set up his hostile nature of possession as against the plaintiffs. The finding therefore must be upheld. The appeal therefore fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 11 Ind. Cas. 269 ; 33 A. 791 ; 8 A. L. J. 935.
(2) 1 O. C. 143.

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION
APPLICATION NO. 133 OF 1922.

August 8, 1922.

Present :—Mr. Justice Greaves.

BALLAR CHAND SEROJEE, *In re.*

Presidency Towns Insolvency Act (III of 1909), s. 41 —Adjudication order annulled—Second application on same facts whether maintainable.

Where, on the failure of an insolvent to apply for his discharge within the time provided by the Presidency Towns Insolvency Act, the order adjudicating him insolvent is annulled, he is not entitled to an order of adjudication upon a second application on the same facts and on the same materials. [p. 651, col. 2.]

Mal Chand v. *Gopal Chandra Ghosal*, 39 Ind. Cas. 199; 21 C. W. N. 298; 25 C. L. J. 83; 44 C. 899, relied on.

Chhatrapat Singh Durgan v. *Kharaj Singh Lachmiram*, 39 Ind Cas. 784; 21 C. W. N. 497; 21 M. L. T. 36; 15 A. L J 87; (1917) M. W. N. 100; 32 M. L. J. 1; 19 Bom. L. R. 174; 25 C. L. J. 215; 10 Bur. L. T. 25; 44 C. 535; 44 I. A. 11 (P. C.), distinguished.

Application by a creditor to set aside an adjudication order of insolvency, dated the 21st June 1922.

JUDGMENT.—This is an application by a creditor to annul the adjudication order, dated the 21st June 1922 made at the instance of the insolvent himself.

The facts are as follows:—On the 22nd February 1919 the insolvent was adjudicated on his own petition. On the 12th May 1919 he filed a schedule but failed to apply for his discharge within the time provided by the Act and his adjudication was annulled on the 9th May 1922.

As already stated his second adjudication took place some five or six weeks after, *viz.*, on the 21st June, on the same facts and on the same materials, so far as I can gather, upon which the order of adjudication had been made.

Under these circumstances it seems to me that I ought to annul the order of adjudication for the reasons stated in the case of *Mal Chand* v. *Gopal Chandra Ghosal* (1). It is suggested on behalf of the insolvent that this is not good law having regard to the subse-

(1) 39 Ind. Cas. 199 ; 21 C. W. N. 298 ; 25 C. L J. 83 ; 44 C, 899.

quent decision of the Judicial Committee in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (2), but so far as I can see that case was decided by the Judicial Committee on the ground that an order of adjudication was refused because of misconduct of the debtor which they point out should be dealt with at the time he applies for his discharge; but it seems to me that the facts of the present case and of the case of *Mal Chand* v. *Gopal Chandra* (1), to which I have just referred, stand on quite a different ground, and, in accordance with the decision in *Mal Chand* v. *Gopal Chandra* (1), I set aside the adjudication.

The applicant is entitled to the costs of the application.

W. C. A. *Application allowed.*

(2) 39 Ind. Cas. 788; 21 C. W. N. 497; 21 M. L. T. 36; 15 A. L. J. 87 (1917) M. W. N. 100; 32 M. L. J. 1; 19 Bom. L. R. 171; 25 C. L. J. 215; 10 Bur. L. T. 25; 44 C. 535; 44 I. A. 11. (P. C.).

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 15 OF 1923.

November 13, 1923.

Present:—Mr Justice Jwala Prasad and Mr. Justice Foster.

GOBIND SINGH AND OTHERS—JUGMENT-DEBTORS—APPELLANTS

versus

MAHARAJ KUMAR GOPAL SARAN SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XXI, r. 16—Execution of decree—Decree obtained by trustee—Trust, failure of—Owner of—Owner, whether can execute decree—Assignment, whether necessary—Rent decree—Owner, whether can execute decree as rent decree.

One *M* executed a deed of trust in respect of certain properties and conveyed the properties to a trustee. He also assigned to the trustee his right to recover arrears of rent of the properties. The trustee brought suits against the tenants of the trust properties for rent and obtained decrees for rent in respect of period prior and subsequent to the execution of the deed of trust. It was then discovered that the object of the trust could not be carried out and steps were taken to obtain a declaration that the trust was invalid. *M* again obtained possession of the properties and sought to execute the rent decrees obtained by the trustee;

Held, (1) that the trust having failed, the properties and their accessories, *viz.*, the rents and profits including the decrees in question must be held to have reverted to the original owner who was competent to execute the decrees without any express assignment from the trustee; (2) that the decrees having been obtained by the trustee as land-lord could be executed as rent decrees by *M* who was now the landlord of the properties. [p. 654, col. 1.].

Case-law discussed.

Messrs. *Brij Kishor Prasad*, *Janak Kishore* and *Sayed Noorul Hassan*, for the Appellants.

Messrs. *Syed Hassan Imam*, *Nawal Kishore Prasad* and *H. L. Nandkoolyar*, for the Respondent.

JUDGMENT.

Jwala Prasad, J.—These appeals arise out of execution proceedings. The judgment-debtors are the appellants before us. Their principal objection in the Court below was that the respondent Captain Maharaj Kumar Gopal Saran Narayan Singh was not entitled to execute the decrees, inasmuch as they were obtained by Sir Ali Imam as President of the Board of Trustees under a deed executed by the respondent on the 26th September 1917. The trust purported to be for some charitable purposes, and the properties covered by the trust were heavily incumbered. There were several trustees named in the deed, and Sir Ali Imam was constituted President of the Board of Trustees. The Maharaj Kumar delivered possession of the properties which comprised the 9 annas Tikari Raj to Sir Ali Imam in order to carry out the purposes of the trust. He also assigned to Sir Ali Imam the rents due to him from the tenants prior to the creation of the trust. As President of the Board of Trustees, Sir Ali Imam obtained the decrees in question with respect to the rents due from the judgment-debtors for years both prior and subsequent to the creation of the trust.

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The decrees specify the years for the rents whereof the suits were instituted and the amounts decreed against the judgment-debtor. About two and a half years later, the respondent took possession of the properties of the estate without the permission or sanction of the Trustees including the President of the Board, and subsequently got his name registered in the Collectorate registers by having the name of Sir Ali Imam removed therefrom. The Trustees found it impossible for some reasons to carry out the purposes of the trust, and instituted a suit in the Court of the Subordinate Judge of Patna for a declaration that the trust was incapable of being given effect to and for their being relieved of all responsibilities in respect of their dealings with the trust properties. The Maharaj Kumar, who was defendant No. 1 in the suit, filed a written statement stating *inter alia* that the trust created by him was invalid in law and that he was not competent to execute the trust deed. The suit was decreed, and it was declared that the trust deed was an invalid document and incapable of being given effect to.

On behalf of the appellants, it is contended that the respondent is not entitled to execute the decree without having obtained an assignment thereof from Sir Ali Imam, the holder of the decree, in view of the terms of O. XXI, r. 16. Mr. Hasan Imam on behalf of the respondent urges that the respondent is entitled to execute the decree, inasmuch as the interests of the decree-holder in the decrees devolved upon the respondent " by operation of law" and consequently no deed of assignment is required.

In support of his contention he has cited the following authorities : *Umasoondhury Dassy* v. *Brojonath Bhuttacharjee* (1) *Sethurayar* v. *Shanmugam* (2) *Miller* v. *Abinajech Chunder Dutt* (3) *Anand Mohan Roy* v. *Promotho Nath Ganguli* (4) and *Smailes* v. *Wright* (5).

On behalf of the appellants, reliance is placed upon the case of *Kesho Prasad Singh* v. *Lal Brij Mohan Lal* (6). The appellants' contention is mainly based upon the assumption that Sir Ali Imam was a trespasser *ab initio* with respect to the properties, inasmuch as the trust deed was invalid ; and that is the ground upon which the decision in the case of *Maharaja Kesho Prasad Singh* v. *Lal Brij Mohan Lal* (6) is founded. There it was held that Sri Newas Prasad Singh was a mere trespasser and the adoption set up by him was invalid. It was further held that he had taken possession of the Dumraon Raj forcibly under colour of a false title without the least permission or sanction of the Maharaja Bahadur of Dumraon who was ultimately held to be the real owner of the estate. In the present case, as stated at the outset, Sir Ali Imam got into possession of the properties under a deed executed by the owner thereof and with his consent in order to carry out the wishes of the owner thereof and consequently he cannot in any sense of the term be said to be a trespasser. His possession was lawful throughout and he parted with the possession or the possession ceased, simply because the object for which the trust was created could not be carried out. The trust, therefore, was defunct and the possession of Sir Ali Imam so long as it continued, became that of a simple trustee for the real owner of the properties, namely, the respondent. This is the principle enunciated in section 71, 77, 83 and 94 of the Indian Trusts Act. Illustration (*c*) to section 83 runs as follows :—

> *A* conveys land to *B* upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. *B* sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. *B* holds the first moiety and the part unapplied of the second moiety for the benefit of *A* or his legal representative. "

Similar is the Illustration (*b*) of section 94— " *A* by mistake assumes the character of a trustee for *B*, and under colour of the trust received certain money. *B* may compel him to account for such monies."

The Act is not applicable to this part of the country ; but the aforesaid provisions in the Act, notably the above sections, fully set out the principles that should govern a case like

(1) 16 C. 347; 8 Ind Dec. (N. S.) 228.
(2) 21 M. 358; 7 M. L. J. 279; 7 Ind. Dec. (N. S.) 605.
(3) 4 C. W. N. 785.
(4) 57 Ind. Cas. 874; 25 C. N. W. 868.
(5) (1815) 3 M. & S. 559; 105 E. R. 720.
(6) 38 Ind. Cas. 154; 2 P. L. J. 199 ; 1 P. L. W. 355.

the present one ; and we are bound to follow these principles inasmuch as they accord with equity and justice of the case. The decrees in the present cases were obtained with respect to the rents and profits of the properties which were the subject matter of the trust. The trust having failed, the properties and their accessories, namely, the rents and profits including the decrees in question must all be held to have reverted to the original owner. The respondent has taken possession of all the immoveable properties, and he must be deemed in law to be in possession of the rent decrees in question. There was, therefore, no necessity of any deed of assignment, inasmuch as the respondent, who was the rightful owner of the Raj, by operation of law, namely, the extinction of the trust deed, becomes the owner entitled to immediate possession not only of the immoveable properties but also of the rent decrees in question. It is not necessary to refer in detail to the cases referred to by the parties. They do not relate to an invalid trust or the consequences of a failure or extinction of a trust as in the present case. But the principle referred to above may be gathered from most of the authorities. The nearest apposite case is that of *Umasoondury Dasey* v. *Maharaja Brojonath Bhuttacharjee* (1). The case of *Keshoo Prasad Singh* v. *Lal Brij Mohan Lal* (6) rleied upon by the appellants is distinguishable from the present case as shown above. It is not necessary to discuss further this point. I am clearly of opinion that the view taken by the Court below is correct, and under O. XXI, r. 16 the respondent is the representative of Sir Ali Imam, the original decree-holder, by operation of law and is entitled to execute the decree in question.

Mr. Nurul Hassan appearing on behalf of the appellant in Miscellaneous Appeal No. 52 contends that the decree in question must be deemed to be a mere money decree, and not a rent decree. This is a new point not taken in the Court below and requires investigation into facts which we are not competent to do in this Court. Upon the face of it the decrees appear to be rent decrees, and it is not disputed that they were in respect of the rents due from the tenants. We are aware of the distinction between a decree obtained for rent by one who is not a landlord and a decree for rent obtained by a landlord. The rents of the period prior to the creation of the trust were assigned to Sir Ali Imam and that is the ground upon which it is urged that with respect to that portion of the rents covered by the decrees Sir Ali Imam was not a landlord. The assignment was made to him, and at the time when the suits for rent were brought he was a landlord and had his name registered in register *D* as such. Therefore, he must be deemed to be a landlord with respect to the rents for the years covered by the decrees in question ; and at the time the execution of the decrees has been levied the Maharaj Kumar is the landlord.

Mr. Nurul Hassan further contends that the respondent is not entitled to execute the decrees because he is one of the judgment-debtors named in the decrees. The facts are now well-known. He was a judgment debtor because he created the trust. Under O. XXXI, r. 1 of the Civil Procedure Code he was impleaded as a party. It is not said that he is a tenant of the land in question. The decrees in question were really against the tenants, the appellants in the present case. I do not see any force in this contention.

I, therefore, dismiss the appeals with costs.

Foster, J.—I concur.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Civil Revision No. 61 OF 1923.

July 30, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

BASANTA KUMAR CHAKRAVARTI—PETITIONER

versus

ASHUTOSH CHAKRAVARTI AND OTHERS—OPPOSITE PARTY.

Bengal Tenancy Act (VII of 1885), s. 93—Common Manager, appointment of.

The appointment of a common manager under section 93 of the Bengal Tenancy Act must be to the entire estate and not to a portion of it. [p. 655, col. 1].

MAHABIR PRASAD v. SHYAM BEHARI SINGH

Rai *Surendra Chandra Sen Bahadur* and Babu *Hemendra Chandra Sen*, for the Petitioner.

Babus *Dwarkanath Chakravarti* and *Gopal Chandra Chakravarti*, for the Opposite Party.

JUDGMENT.—This Rule has been granted on the application of Basanta Kumar Chakravarti who is a co-sharer in certain property and was formerly appointed common manager under section 93 of the Bengal Tenancy Act. The learned District Judge has on the objection of other co-sharers removed the Petitioner from the post of the common manager and appointed one Brojendra Lal Sen as the common manager of the estate.

The Rule was directed against three orders passed by the learned District Judge. At the hearing of this Rule the only point pressed is that the learned District Judge by his order of the 25th November 1922 rejected an application objecting to the appointment of the new common manager on the ground that he could not be appointed to the properties since some of the properties did not include the whole estate or tenure of which the Chakravartis were the co-sharers. We think that in dealing with this application the learned District Judge proceeded on a wrong principle. He appears to have held that as the former common manager had been appointed to these properties, no objeticon can be taken to the new common manager being appointed to the same properties. But if the original order was illegal in this respect, this would not validate the second order. The attention of the District Judge is drawn to the decisions of this Court in the cases of *Indu Bhusan Bose* v. *Annapurna Mitra* (1) and *Mohini Lal Pakrasi* v. *Nogendra Nath Pakrasi* (2) in which it was held that the appointment of a common manager must be to the entire estate and not to a portion thereof.

We set aside the order of the learned District Judge, dated 24th November 1922 so far as it rejects the petition, dated 24th October 1922 objecting to the appointment of the common manager on the ground that the common manager has not been appointed to the whole estate or estates or tenures and we direct that the learned District Judge do re-consider that application and pass orders thereon according to law.

We make no order as to costs in this Rule.

S. D. *Rule made absolute*; *Case remanded.*

(1) 6 C. L. J. 216.
(2) 58 Ind. Cas. 672; 50 C. L. J. 261.

PATNA HIGH COURT.

STAMP REFERENCE IN FIRST CIVIL APPEAL OF 1923.

April 2, 1924.

Present :—Sir Justice Jwala Prasad, Kt.

MAHABIR PRASAD AND OTHERS—APPELLANTS
versus
SHYAM BEHARI SINGH AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870) s. 7 (IV) (c), Sch. II, Art. 17 (III)—Declaration, suit for—Redundant relief, prayer for, effect of—Court-fee payable.

Where a mere declaration is sufficient to give the plaintiff full relief a further declaration will be deemed to be redundant, and the fact that the plaintiff has asked for a redundant relief will not alter the nature and scope of the suit and convert the suit into one for a declaration and consequential relief for purposes of Court-fees. [p. 658, col. 2.]

Plaintiff obtained a personal decree against Defendant No. 1. In execution of the decree plaintiff discovered that Defendant's share in certain joint family property had been diminished by means of certain fictitious and collusive transactions. Plaintiff thereupon brought a suit for a declaration that those transactions were void and of no effect and asked for a further declaration that he was entitled to realise his decree from the estate of Defendants Nos. 1 to 6, defendants Nos. 2 to 6 being the other members of Defendant's family:

Held, (1) That the first declaration was sufficient to give full relief to the Plaintiff and the prayer for the second declaration was a mere surplusage; [p. 658, col. 2.]

(2) That the suit fell within the purview of article 17 (III) of schedule II to the Court Fees Act and was not a suit for a declaration with consequential relief within the meaning of section 7 (IV) (*c*) of the Act. [p. 658, col. 2.]

(*Case-law discused*)

Stamp Refreence.

Mr. *Siveshwar Dayal*, for the Appellants.

MAHABIR PRASAD *v.* SHYAM BEHARI SINGH

JUDGMENT.—This is a reference to me as a Taxing Judge to determine the Court-fee payable upon the memorandum of appeal.

The Plaintiffs are the Appellants. The Defendant No. 1 had executed a mortgage bond in their favour on the 27th February 1914 hypothecating the properties of the joint family consisting of Defendants Nos. 1 to 6. Defendants Nos. 1 and 2 are brothers; Defendants Nos. 3 to 6 are sons of Defendant No. 2; Defendant No. 7 is the mother of defendants Nos. 1 and 2; Defendant Nos. 8 and 9 are wives of Defendants Nos. 1 and 2 respectively and the Defendant No. 10 is the father's sister's son of Defendants Nos. 1 and 2. On the 18th June 1918 the Plaintiffs commenced an action to enforce the mortgage, impleading Defendants Nos. 1 to 6 as parties to the suit.

The decree was, however passed only against Defendant No. 1 upon the ground that no legal necessity for the debt was established. The decree was a personal decree and was dated the 17th of June 1919. The Plaintiffs levied execution of the decree and sought to sell the right, title and interest of defendant No. 1 in the family properties. The execution was resisted by Defendants Nos. 3, 7, 8 and 10. The objections of defendants Nos. 3, 7 and 8 were founded upon a certain partition decree in Suit No. 84 1918 The suit was instituted by Defendant No. 3 alleging himself to be the adopted son of defendant No. 1. In the partition the shares of the different members of the family in the property were ascertained. Defendants Nos. 7, 8 and 9, the mother and wives of defendants Nos. 1 and 2 got certain shares in lieu of maintenance under the Hindu law. Defendant No. 3 also got a share out of what was alloted to Defendant No. 1 as his adopted son. Thus, the share of defendant No. 1 was considerably diminished. Even this diminished share was disposed of by a sale deed, dated the 30th January 1919, executed by him and Defendant No. 2 in favour of Defendant No. 10. The aforesaid distribution of the shares in the properties to the different members in the family and to Defendant No. 10 was before the plaintiffs' decree was put in execution. Defendant No. 10 put in an objection and the property sold to him was exempted from the sale under O. XXI, r. 58 of the Civil Procedure Code. Similarly, the shares allotted to Defendants Nos. 3, 7 and 8 were exempted from the liability of the Plaintiffs' decree in a proceeding instituted under section 47 of the Civil Procedure Code.

The Plaintiffs, therefore, instituted the present suit by presenting their plaint in the Court of the Subordinate Judge, Patna. In the plaint the following reliefs were claimed:—

It may be adjudicated and declared that the deed of absolute sale, dated the 30th January 1919 executed by Defendant Nos. 1 and 2 in favour of Defendant No. 10 is altogether a nominal and collusive document without consideration, that it has not at all been made operative up to this time, that Defendants Nos. 1 to 6 are still in joint possession of the properties covered by the sale deed and that the said sale deed is by no means a genuine document.

It may be further adjudicated that the partition suit No. 84 of 1918 filed on behalf of Defendant No. 3 was got filed by Defendant No. 1, that Defendant No. 3 is by no means the adopted son of defendant No. 1, that the partition has not at all been made operative up to this time, that the entire estate of Defendant No. 1 is still joint and that Defendant No. 1 is still in possession thereof jointly with Defendants Nos. 2 to 6.

It may also be adjudicated and declared that Defendant No. 1 fraudulently took the aforesaid measures after the decree in favour of the Plaintiffs was passed, with a view to diminish his share as also to evade payment of the decree amount payable to the Plaintiffs and that the Plaintiffs are not bound by the same".

On the adjudication of the above points, it may be declared that the plaintiff's are entitled to realize their decree from the estate of Defendants Nos. 1 to 6 by attachment and sale.

The plaint was filed on a stamp paper ofa the value of Rs. 10 under schedule II, article 1*1* of the Court Fees Act treating the suit as a declaratory one.

The peripatetic Stamp-Reporter objected to the Court-fee paid and reported that the suit was not only for a declaration but for a declaration and consequential relief, and consequently the Court-fee leviable was *ad valo-*

MAHABIR PRASAD v. SHYAM BEHARI SINGH

rem under Section 7, clause (4) (*c*) of the Act. The Subordinate Judge before whom the plaint was presented however, disagreed with the view of the Stamp-Reporter and held that the Court-fee paid was sufficient.

The preliminary issues were disposed of by the Subordinate Judge on the 14th May 1923, and the other issues were disposed of on the 11th June 1923. As a result of the final decision of the Subordinate Judge the P aintiffs' suit was decreed as against Defendant No. 1 and dismissed as regards Defendants 2 to 6 and 8 to 10.

The plaintiffs filed an appeal before the District Judge of Patna upon the ground that the suit was valued at Rs. 2,100 only. The District Judge held that the Court-fee paid was insufficient and that the fee payable was *ad valorem*. He accordingly ordered the Plaintiffs to value the property, to pay Court-fee upon the subject-matter of the suit and to make up the deficiency within a certain time. Assessing the value upon the principle laid down by the District Judge, the Plaintiffs valued the appeal at Rs. 5,100, which made the appeal incompetent in the Court of the District Judge and entertainable only by this Court. Accordingly, the memorandum of appeal was taken back from the Court of the District Judge, and has now been presented to this Court.

The Stamp-Reporter is of opinion that the Court-fee payable is *ad valorem* under Section 7, clause (4) (*c*). The Taxing Officer, however, is doubtful as to the view taken by the Stamp-Reporter and seems to be inclined to take the view that the Court-fee paid is sufficient treating the reliefs as being only declaratory.

It is remarkable that the Taxing Officer was the District Judge at the time when the memorandum of appeal was presented in the District Court and at that time he was of opinion that *ad valorem* Court-fee was levible. He says that upon further considerations and upon the law having been placed before him he has now changed his opinion.

The decision of the question depends upon the scope of the Plaintiff's suit and the reliefs claimed by them. The Plaintiffs want to have it declared that the properties in suit belong to defendant No. 1 and that the other Defendants have no interest therein. Accordingly, they pray for reliefs Nos. 1, 2 and 3. On account of the circumstances disclosed in the execution proceedings, the Plaintiffs had to set-forth those circumstances in their plaint and also in the reliefs. Those are the circumstances upon which Defendants Nos. 3, 7, 8 and 10 base their claim to the property; but the re-iteration of those facts and circumstances in the reliefs do not alter the real nature and scope of the reliefs. The Plaintiffs will be entitled to proceed against the properties in execution of their decree only when Defendant No. 1 has subsisting interest therein and the other defendants have no interest. It is conceded by the Stamp-Reporter as well as the learned Government Pleader that reliefs Nos. 1 to 3 are merely declaratory. It is, however, contended that relief No. 4 is in the nature of consequential relief. That relief has already been quoted above. The Plaintiffs want it to be declared that they are entitled to realise their dues from the estate of Defendants Nos. 1 to 6 by attachment and sale of the interest of Defendant No. 1 only; it was conceded before the Subordinate Judge that the Plaintiffs have no right in execution of the personal decree against defendant No. 1 to proceed against the share of Defendants Nos. 2 to 6 and that the relief is merely directed against Defendant No. 1 only. I will quote from the decision of the learned Subordinate Judge on this point:—

"The prayer No. 4 as it is worded means that the Plaintiff wants to proceed against the estate of all the Defendants jointlyt, as he does not say there that he may be declared to be entitled to proceed against the right, title and interest of Defendant No. 1 only in the joint estate. He cannot proceed against the shares of Defendants 2 to 6. The learned Pleader for the Plaintiff, however, states that this prayer means he wants to proceed against the right, title and interest of Defendant No. 1 only. Taking this to be so, let us see if he can bring into hotchpot the properties which have been released in favour of Defendant No. 10 or allowed in favour of Defendants 3 to 6."

Therefore that relief was confined in the Court below against Defendant No. 1 only. A number of authorities have been cited on both sides. It is not necessary to refer to all of them. The following only may be cited: *Kosavar Appu Ramakrishna Reddi* v. *Kotta Kata*

Reddi (1), *Harihar Prasad Singh* v. *Shyam Lal Singh* (2), *Bibi Phul Kumari* v. *Ghanshyam Misra* (3), *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (4), *Aisa Siddika* v. *Bidhu Sekhar Banerjee* (5), *Ganeshi Lal* v. *Beni Pershad* (6), and *Zinnatunnessa Khotun* v. *Girindra Nath Mukherjee* (7).

The other cases have all been referred to in these cases I have gone through the cases very carefully and I am of opinion that the principle laid down in *Harihar Prosad Singh* v. *Shyama Lal Singh* (2), would not apply to the present case. In that case the Plaintiff prayed for a declaration (1) that a decree amounting to Rs. 2, 794 and odd should be declared forged, illusory and unfit for execution ; and (2) that the family property valued at Rs. 7,000 was not liable to be sold in execution of the decree. It is conceded by the Stamp-Reporter that this is a converse case to the present one. In the present case the plaintiff has obtained a decree against the Defendant No. 1 on payment of full Court-fee and he would be entitled to sell the property if the Defendant no. 1 has got any right, title or interest therein. He need not in the present case seek any further relief such as has been claimed by him in relief No. 4 for a declaration that "they are entitled to realise their decree from the estate of Defendants Nos. 1 to 6 by attachment and sale."

In the case of *Zinnaturnessa Khotan* v. *Girindra Nath Mukherjee*, (7) it was considered sufficient that a suit in which the only prayer was to have it declared that a certain decree is ineffectual and inoperative against the plaintiff was held to be a sufficient prayer to give the plaintiff relief and the Plaintiff need not have prayed for a consequential relief.

The case of *Ganesh Lal* v. *Beni Pershad* (6), has reviewed all the authorities on the subject. It would seem that a consequential relief can be insisted upon only when the plaintiff will not get any redress by having merely a declaratory decree; for instance, when the property is in possession of the Defendant, the Plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as a consequential relief, and where a mere declaration is sufficient to give the Plaintiff full relief a further declaration will be deemed to be redundant; and the fact that the Plaintiff asked for a redundant relief will not alter the nature and scope of the suit and would make the suit one for a declaration with consequential relief. The present is a case where relief No. 4 in the plaint is a mere surplusage, for upon the declarations made under reliefs Nos. 1 to 3 the plaintiffs would be entitled to attach and sell the right, title and interest of Defendant No. 1 in the property in suit. On the other hand, the granting of relief No. 4 will not at all improve the position of the Plaintiffs for they would not be entitled to get the property unless Defendant No. 1 has interest therein. The decision of their Lordships in the case of *Bibi Phul Kumari* v. *Ghanshyam Misra* (3) is instructive.

I would, therefore, hold that the relief should be treated only as declaratory and the Court-fee should be charged under Schedule II Article 17 of the Court Fees Act. Hearing fee two gold mohurs.

Z. K. *Order accordingly.*

(1) 30 M. 96 ; 1 M. L. T. 311 ; 16 M. L. J. 458.
(2) 21 Ind. Cas. 404 ; 40 C. 615.
(3) 12 C. W. N. 169 ; 7 C. L. J. 36; 10 Bom. L. R. 1; 5 A. L. J. 10 ; 17 M. L. J. 618 ; 2 M. L. T. 506: 35 C. 202 ; 14 Bur L R. 41; 35 I. A. 22 (P.C.)
(4) 9 B 20 ; 5 Ind. Dec. (N. S.) 18.
(5) 18 Ind. Cas. 633 ; 17 C. L. J. 30.
(6) 9 Ind. Cas. 675; 1 P. R. 1911 ; 47 P. L. R. 1911 22 P. W. R. 1911.
(7) 30 C. 788.

MADRAS HIGH COURT.

CIVIL APPEALS NO. 25 AND 26 OF 1917.

March 6, 1924.

Present :—Mr. Justice Ramesam and Mr. Justice Jackson.

NARAYANAN CHETTY AND OTHERS—APPELLANTS
versus
MUTHIAH CHETTIAR AND OTHERS—RESPONDENTS.

Specific performance—Hindu Law—Joint Family—Contract by Manager—Decree, whether can be passed

NARAYANAN CHETTY v. MUTHIA CHETTIAR

against minors—Limitation Act (IX of 1908), Sch. I, Art. 113—Agreement to execute sale-deed on demand—Limitation, commencement of.

There is no general rule that a decree for specific performance cannot be passed against minors. [p. 660, col. 1].

Where a contract for the sale of immoveable property is entered into by a Manager on behalf of and for the benefit of a joint Hindu family and he dies before completion of the contract, the contract can be enforced against the surviving members of the family whether they are adults or minors. [p. 661, col. 1].

Krishna Aiyar v. *Shammanna* 17 Ind. Cas. 497; 23 M. L. J. 610; (1912) M. W. N. 1188; *Chodavarapu Narayana Row* v. *Chennu Venkatasubba Row*, 55 Ind. Cas. 377; 38 M. L. J. 77 at p. 79; (1920) M W N. 129; 27 M. L T. 264; *Venkateswara Aiyer* v. *Raman. Nambudri*, 33 Ind. Cas. 696; 3 L. W. 485; 19 M. L. T. 329, relied on.

Mir Sarwarjan v. *Fakshruddin Mahomed Chowdhari*, 13 Ind. Cas. 331; 39 C. 282; 16 C. W. N. 74; (1912)) M. W. N. 22; 9 A. L. J. 33; 15 C L. J. 69; 14 Bom L. R. 5; 21 M. L J. 1156; 11 M. L. T. 8; 39 I. A 1 (P. C.); *Bhagwan Bhan Indap* v. *Krishnaji Gnoji Indap*; 58 Ind. Cas. 335; 22 Bom. L. R. 997; 44 B. 967; *Bappu*, v. *Annamalai Chettiar* 72 Ind Cas. 42; 44 M. L. J. 226; (1923) M. W. N. 218; 17 L. W. 364; 32 M. L. T. 253; (1923) A. I. R. (M.) 313, distinguished.

Rangayya Reddy v. *Subramania Aiyer*, 40 Ind. Cas. 429; 40 M. 365; 32 M. L. J. 575; 5 L W. 797; 21 M. L. T. 385 (F B.); *Ramachandra Aiyer* v. *Sundaramurti Mudali*, 4 M. L. J. 9, referred to.

Where a contract for the sale of immoveable property provides for the execution of sale-deed on demand from the vendee the cause of action for a suit for specific performance arises only after request and refusal. [p. 661, col. 1].

Sathula Venkanna v. *Nambudri Venkatakrishnayya*, 41 Ind. Cas. 807; 41 M. 18; 33 M. L. J. 35; 6 L. W. 192, relied on.

Appeals against the decrees of the Court of the Subordinate Judge, Sivaganga, in O S. No. 84 of 1915 and 99 of 1914, dated the 14th September 1916.

Messrs. *A. Krishnaswamy Aiyar, T. V. Muthukrishna Aiyar, N. Muthuswamy Aiyar*, and *K. Balasubramania Aiyar*, for the Appellants.

Messrs. *S. Srinivasa Aiyengar, K. Rajah Aiyar*, and *R. Srinivasa Aiyengar*, for the Respondents.

JUDGMENT.

Ramesam, J.—APPEAL NO. 25 OF 1917. This appeal arises out of a suit for specific performance of an agreement to sell. The Subordinate Judge decreed the suit. The Defendants appeal.

Narayana Chetti, father of 4th defendant and his younger brother, Muthiah Chetti father of Defendants Nos. 1 to 3 were carrying on business at Rangoon under the style of M. P. M. Rm. In the course of business one Veerappa Chettiar of the P. R, M. Firm became indebted to the firm to the extent of Rs. 3,000, but was unable to pay the debt. The 2nd Plaintiff advised the agent (Alagappa) of the Defendants through P. W. 6 of the connected suit O. S. No. 90 of 1914 (examined on commission at Rangoon) to buy the suit site and that he (the 2nd Plaintiff) would "take it off him afterwards," so that Defendants' firm who are not in need of the site need not lose interest (Vide Ex. G 2). The Defendants' father purchased the site for Rs. 5,000 the consideration consisting partly of cash and partly of the debt due by Veerappa (Ex. A). Before it could be reconveyed to Plaintiffs it was found that out of Veerappa's two brothers, while one attested the sale-deed. the other Murugappa Chetty was disputing the validity of the sale. The Plaintiffs 'and Defendants' father discussed the best method of satisfying him and ultimately (vide Ex. G 1), the Plaintiffs paid Rs. 1,000 to buy him off and obtained a release deed Ex. D at Rangoon. Meanwhile before the payment and execution of Ex. D were known to the parties, the Defendants' father executed Ex. G in favour of plaintiffs. The document has been proved to be genuine. All the evidence oral and documentary supports it. The Plaintiffs agreed to pay Rs. 4,500 besides the Rs. 1,000 paid to Murugappa for executing Ex. D. They issued a Hundi (Ex. B) and it was cashed (Exs. F and K). The incorrect date in Ex. F (an account book of the Defendants) cannot affect the Plaintiffs' case.

Thus, the Plaintiffs have proved the suit agreement, the payment of consideration and that the transaction was beneficial to the defendants' firm who were anxious to part with the site to the Plaintiffs who, by offering to purchase, diminished the Defendants' loss. Assuming that the proper price of the site at

the time was Rs. 5,000 the Defendants if they wanted to keep the site, would have had to pay Rs. 1,000 to Murugappa. The plaintiffs by intervening and paying Rs. 5,500 (*i. e.*, Rs. 1,000 to Murugappa and Rs. 4,500 to the Defendants' firm) reduced the defendants' loss from Rs. 1,000 to Rs. 500. In this sense, it was beneficial to the family of the defendants who were a trading firm in need of money rather than the suit property which was not situate in the defendants' village.

The point strongly pressed by the Vakil for the appellants is that, the defendants Nos. 2 & 3 being minors, there can be no decree for specific performance against them. There is no general rule that no decree for specific performance can be passed against minors. For instance, in the simplest and obvious case where a contract is entered into by a Hindu in respect of property which is not joint family property and the property devolved by inheritance on heirs, some or all of whom are minors, it cannot be contended that no decree for specific performance can be made and this is conceded by the appellant. The next, case is where a Hindu, who is a member of a joint family, enters into a contract *to sell his own share* and dies and the property descends by survivorship to other members of the family some or all of whom may be minors. In *Bhagwan Bhan Indap* v. *Krishnaji Ganoji Indap* (1) it was held that it can be enforced against the undivided *sons of the* deceased. I think this decision is not in conflict with the opinions of Wallis, C. J., and Sadasiva Aiyar, J. in *Rangayya Reddy* v. *Subramania Aiyar* (2), nor with the actually decision in *Bappu* v. *Annamalai Chettiar* (3) which is not a case of a member contracting to *sell his own share*. If the point arises for decision, I would perhaps hold that the case in *Bhgwan Bh n Indap* v. *Krishnaji Ganoji Indap* (1) is correctly decided on grounds which need not be stated. The case when the contract is made on behalf of a minor or minors, is settled by the decision in *Mir Sariwarjan* v. *Fakhruddin Mohamed Chowdhuri* (4). Mr. Srinivasa Aiyengar contends that, all that the Judicial Committee decided was that such a contract cannot be specifically enforced only when it was not for purposes of necessity binding on the minors and the contract in that case which was one for the purchase of immoveable property was not for the benefit of the minors. I cannot agree with this narrow interpretation of the decision. Their Lordships say at p. 237

> "They are, however, of opinion that it is not within the competence of a guardian of a minors to bind the minor or the minor's estate by a contract for the purchase of immoveable property; "

There is no reference here to 'necessity' nor is any distinction drawn between a contract being merely 'advantageous' to a minor as opposed to its being for necessary purposes binding on the minor though, earlier in the judgment, their Lordships accept the assumption "that the purchase was an advantageous purchase for the minor." I think this decision also covers this case where a joint family consists of minors only and therefore has no manager and a guardian of all the minors who is, *ex hypothesi* not manager, not being a member of the family but is merely their guardian enters into a contract on behalf of some or all of the minors, whatever the nature of the contract may be.

The present case is where the contract is entered into by the manager of a family on behalf of the whole family for purposes binding on the family. The decision in *Bappu* v. *Annamalai Chettiar* (3) does not help the appellant for the contract in that case was not for purposes binding on the family and the remarks at p. 228 are against him. The remarks in *Krishna Aiyar* v. *Shamanna* (5) are against the appellant and in favour of the respondent. The observations in both these cases are *obiter*, not being necessary for the decisions. In *Narayana Row* v. *Venkatasubba Row* (6), Spencer, J. conceded that a

(1) 58 Ind. Cas. 335 ; 22 Bom. L. R. 997 ; 44 B. 967.

(2) 40 Ind. Cas. 429 ; 40 M. 365 ; 32 M. L. J. 575; 5 L. W. 757 ; 21 M. L. T. 385 ; (F. B).

(3) 72 Ind. Cas. 42 ; 44 M. L. J. 226 ; (1923) M. W. N. 218 ; 17 L. W. 364 ; 32 M. L.T. 263 ; (1923) A. I. R. (M.) 313.

(4) 18 Ind. Cas. 331 ; 39 C. 232 ; 16 C. W. N. 74 ; (1912) M. W. N. 22 ; 9 A. L. J. 33 ; 15 C. L. J. 69 ; 14 Bom. L. R. 5 ; 21 M. L. J. 1156 ; 11 M. L. T. 8 ; 39 I. A. 1 (P. C.).

(5) 17 Ind. Cas. 497 ; 23 M. L. J. 610 ; (1912) M. W. N. 1188.

(6) 55 Ind. Cas. 377 ; 38 M. L. J. 77 at p. 79 ; (1920) M. W. N. 129 ; 27 M. L. T. 264.

contract made by a manager on behalf of the family may be enforced against the manager and where it is for the benefit of the family, the completed contract will certainly bind the minor members. Should the accident of the death of the manager before completion in such a case make any difference? Where a contract is by a manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against survivors when they are all majors *Venkateswara Aiyar* v. *Raman Nambudri* (7). Should it make any difference that some of the survivors are minors, and does the case in *Mir Sarwarjan* v. *Fakhruddin Mahomad Chowdhuri* (4) support such a distinction? The matter is *res integra* and, I am inclined to answer the above queries in the negative. I agree with Phillips, J's remarks in *Bappu* v. *Annamalai Chettiar* (3), (second paragraph) where he refers with approval to *Ramachandra Aiyar* v. *Sundaramuthu Mudali* (8), and the *obiter dicta* in *Krishna Aiyar* v. *Shamanna* (5). The result is, we are of opinion that a decree for specific performance may be passed against the minor defendants Nos. 2 and 3. The pleadings and the allegations in I. S. No. 728 of 1914 (in O.S. No. 90 of 1914) show that 4th defendant is not divided from defendants Nos. 1 to 3 and no separate argument can be adduced for him.

The suit is not barred by limitation as it does not appear that the specific performance of the contract was refused more than three years prior to suit *Venkanna* v. *Venkatakrishnayya* (9). The words 'on demand' in Ex. C show, in a case like this, the cause of action arises only after request (See 19 Halsbury, S. 65, p. 43).

The result isthe appeal fails and is dismissed with costs. It is conceded that A S. No. 26 of 1917 follows. It is also dismissed with costs.

Jackson, J.—I agree.

Appeal dismissed.

V. N. V.
Z. K.

(7) 38 Ind. Cas. 696 ; 3 L. W. 485 ; 19 M. L. T. 329.
(8) 4 M. L. J. 9.
(9) 41 Ind. Cas 307 ; 41 M. 18 ; 33 M. L. J. 35 ; 6 L. W. 192.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 84 OF 1923.

May 1, 1924.

Present :—Mr. Walsh, Acting Chief Justice, and Mr. Justice Neave.

TIKA RAM—PLAINTIFF—APPELLANT
versus
DAULAT RAM—DEFENDANT—RESPONDENT.

Principal and agent—Rendition of accounts, where made—Suit to recover money due from agent, where lies—Jurisdiction.

Unless the contract clearly indicates the contrary, a commission agent carrying on independent business who becomes a factor entrusted with goods of his principal with wide powers, has no doubt eventually to account to his principal but the accounting must necessarily be due at the place where all the business is transacted [p 663, col. 1 & 2.]

Plaintiff who carried on business in the district of Badaun appointed Defendant who carried on business at Bombay, as his *pukka ashtia*. In the course of the dealings between the parties payments were made by the defendant by part and statements of account sent by post to Badaun. Default having been made in payment plaintiff filed a suit at Budaun to recover money alleged to be due from the Defendant Commission agent on account of profits on sales improperly retained by the latter ;

Held, that the Budaun Court had no jurisdiction to entertain the suit. [p. 663 col. 2.]

Moti Lal v. *Suraj Mal*, 30 B. 167 ; 6 Bom. L. R. 1038, not followed.

Robey v. *Snaefell Mining Co.*, (1888) 20 Q. B. D. 152; 57 L. J. Q. B. 184; 36 W. R. 224; *Kuthiranatham Appu Thamban* v. *Foulkes*, 54 Ind. Cas. 260; 10 L. W. 445, distinguished.

Saling Ram v. *Chubamal*, 11 Ind. Cas. 712; 8 A. L. J. 1160; 34 A. 49, referred to.

Appeal from the order of the Subordinate Judge, Badaun, dated the 20th January, 1923.

Dr. *K. N. Katju*, for the Appellant.

JUDGMENT.—This is an appeal from a judgment of the Subordinate Judge of Budaun, returning a plaint on the ground of want of jurisdiction. It illustrates the importance of

the questions of this character which arise, and it also illustrates the necessity of the Courts being somewhat careful in applying the law so as not to impose an unreasonable and unanticipated burden upon commercial men, of being dragged from their place of business to defend suits, 800 miles away in parts of the world with which they have no concern whatever. This inconvenience is illustrated by the misfortune that we have not had the advantage of hearing Counsel in this case on behalf of the Respondent who resides and carries on business in Bombay. Dr. Katju, however, on behalf of the appellant, has argued the matter very fully, and has really taken us over all the ground which is relevant. The suit arises out of a relationship of the following character :—

The Plaintiff carries on some sort of trade probably in grain, though he does not say so, at Bilsi, in the District of Buduan. The defendant works as a Commission agent, what is known as *pakka ashatia*, probably corresponding to what is known in England, as *del credere* agent, that is to say, an agent or factor, who, being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal but guaranteeing the insolvency of the sub-purchasers, and while entitled to charge against his principal his expenses, and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to the Plaintiff, his principal, the amount due after the accounts have been properly settled.

The main question is whether, in this suit which is brought by the Plaintiff to recover money alleged to be due from the Defendant Commission agent on account of profits on sales improperly retained by the Defendant the cause of action or any part of it arose within the jurisdiction of Buduan. It is clear from the plaint that the Plaintiff's legal adviser had some doubt about it, unless it could be established in fact, that the conversation resulting in the contract had taken place within the local limits of the jurisdiction of the Court, or unless some express agreement had been made between the parties that payment should be made by the Defendant to the Plaintiff at Bilsi, or unless in the alternative, some trade usage requiring payment to be made in that way, could be established. The Pleader went out of his way to allege all three. That part of the case has broken down. The learned Judge finds that this is not a case, in spite of two authorities to which he was referred, decided by the Bombay High Court, in which the agent had to render an account at the principal's place of business. He finds against the express agreement which was set up by the Plaintiff and also against the alleged trade custom which is always the desperate resort of anybody who knows that his case on the facts is going to break down. A litigant seldom alleges a custom for a particular practice unless he is satisfied that he has no other case to support it. The learned Judge is satisfied that the palpably false allegations which have been made in this case, have been made for the express purpose which unfortunately is too often the case of dragging the other party 800 miles from Bombay, and as a counter stroke to the suit of the Defendant in Bombay, which will necessitate the Plaintiff going there to defend it. Unfortunately, sitting in this Court, one has become too familiar with these false allegations, and palpably hollow suggestions of custom, and insidious suggestions of law, which are merely adopted for the dishonest purpose of suing a man who is in Bombay, and who the Plaintiff knows quite well, will be unable to appear in the United Provinces to defend the suit.

The learned Judge has dealt with the matter with considerable acumen, and in particular, we agree with the following passage :—

> "It is not to be supposed that even if there was an express agreement to pay at the *arhatia's* place of business, and also to settle accounts there, none the less, payment would not be made by post and a statement of account would not be sent by post."

In other words, the learned Judge rightly thinks that the mere fact that, payments have been made by post and statements of account sent by post to Budaun, is not conclusive on the question of where payment ought, under the contract, to be made. The ordinary maxim, that a debtor must find his creditor, and that if no express agreement is

made as to the place of payment, the debtor must pay the creditor where he can find him, while, of course, perfectly true if understood, is unfortunately frequently quoted, and sought to be applied to circumstances to which it has no relation at all. A little knowledge is a dangerous thing, and the capacity to know by heart and quote at random, legal maxims without reference to the circumstances to which they are applied, is in itself a danger and frequently leads to misunderstanding in the lower Courts. There is a great difference between three classes of contract in relation to which this maxim may be discussed. There is the oridinary case of purchaser and vendor to which of course it is in the main, generally applicable. If a purchaser in Allahabad, applies to a tradesman in Calcutta to sell him goods, the purchaser in Allahabad, must pay the vendor in Calcutta unless some other arrangement is made. The second class is a class of principal and agent which may also colloquially be described as master and servant. It frequently happens that a large establishment dealing say, in carpets at Mirzapore, or cotton in Agra or some other large commercial centre, has branch businesses presided over by managers who are in a sense, agents. They are agents to pledge their principal's credit; they are agents in many of the respects contemplated by the Contract Act, and they are frequently paid by commission on results. But in such cases as those, it may often be that the place at which the agent or branch manager is, by his contract or unwritten understanding with his principal, bound to account and bound to pay and discharge his liabilities, is the head place of business. But it is a very different matter in a case of this kind where the defendant is not a servant at all of the plaintiff, is totally independent of him, and is merely a contractor earning his living generally as a commission agent holding himself out to persons all over India, it may be, who are willing to seek and utilise his services in the markets of Bombay. In our view a totally different set of considerations applies to such persons. Unless the contract clearly indicates the contrary an agent of this kind who becomes a factor, entrusted with goods of his principal with wide powers has no doubt, under the appropriate section of the Contract Act, eventually to account to his principal, but the accounting must necessarily be done at the place where all the business is transacted. The Plaintiff is entitled to see the account, and if commercial men stood on strict technicalities which of course they never do, the Plaintiff might have to go to Bombay to see his agent's account. But he has only got to ask to see a copy and of course it would be sent to him by post. In the same way, the plaintiff can no doubt get payment of everything which is due to him by writing to the defendant, and asking him to provide for payment to be made at the plaintiff's place of business independently of whether the defendant is bound to make payment in that way or not. Persons who contract with agents 800 miles away and who wish to place their agents under an obligation to pay, or be sued in the foreign district, must, in our view, be careful to provide expressly for that in the contract. It is impossible to draw the inference that that was the intention of the agent, at any rate and as it takes two persons to make a contract, the law cannot draw an inference which cannot be reasonably attributed to both parties to the contract. Dr. Katju, in his very thorough argument on this point referred us to one or two authorities which, it may be, suggested and decided the contrary. There is one decision in particular of Mr. Justice Tyabji, in *Moti Lal* v. *Suraj Mal* (1), in which that learned Judge appears to consider that the mere fact that the instructions were sent by the Plaintiff, the principal in Bombay, from Bombay, was sufficient to give jurisdiction in Bombay. The learned Judge also relied upon the fact that accounts were rendered and the demand for payment was made from Bombay. Without going so far as to say that we should have decided the case the other way, we are bound to say that we are not entirely in accord with the decision. The first ground, namely, that instructions were issued from Bombay, would be fatal to every defence of this kind relating to jurisdiction, and we are satisfied that it has no justification in law. The other grounds on which he decided, appear to be based upon the authority of an English case (*Robey* v. *Snaefell Mining Co.* (2) which, although not

(1) 30 B. 167 ; 6 Bom. L. R. 1038.
(2)(1888) 20 Q. B. D. 152 ; 57 L. J. Q B 134 : 36 W. R. 224.

entirely without assistance in a discussion of this problem, had no application to the particular case which the learned Judge was deciding. That was a question of payment for the delivery, erection and sale of machinery by the plaintiffs to the Defendants. The latter were in the Isle of Man and the former were at Lincoln. Goods had been ordered by the Defendants in the Isle of Man, and as they had not stipulated any special place for payment, it was held that the ordinary rule must apply, that the debtor must find the creditor and that they ought to pay the plaintiff at Lincoln. That has no application to a case of the kind we have to consider with regard to transactions by an independent agent on commission.

The other case was in *Kuthiravattam Appu Thumban* v. *Foulkes* (3). There, the Madras High Court seem to have held that the final offer was a decisive point in deciding whether part of a cause of action arose within the jurisdiction. That question may have been relevant for the decision of the particular case, but the English cases which were cited in the judgment in support of that proposition, were decided on a totally different question and really do not bear out the principle for which they appear to have been cited in the Madras case It is sufficient to say, at any rate, that the point as to the final offer, if it is ever a decisive point at all has no bearing upon a contract of this kind the acceptance of which took place and execution of which was carried out wholly in the Province of Bombay.

So far as it goes, the authority to which our attention was drawn in *Salig Ram* v. *Chuba Mal* (4) appears to bear out our view.

We dismiss the appeal.

K. S. D. *Appeal dismissed.*

(3) 54 Ind. Cas. 260 ; 10 L. W. 445.
(4) 11 Ind. Cas. 712 ; 8 A. L. J. 1160 ; 34 A 49.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 808 AND 809 OF 19-2.

March 6, 1924.

Present :—Mr. Justice Jackson.

VENKATASUBBIAH CHETTIAR—PETITIONER

versus

SESHA AIYAR—RESPONDENT.

Madras District Municipalities Act (V of 1920) s. 303 (2) (b), rules framed under, r. 6—Civil Procedure Code (Act V of 1908) ss. 94, 151, O. XXXIX r. 2—Election petition—Civil Procedure Code, applicability of—Elected candidates, whether can act pending enquiry—Injunction, interim—Jurisdiction of Court to grant injunction—Inherent power of Court.

The application of the Civil Procedure Code to election enquires is definitely restricted in r. 6 of the Madras Municipal Elections Rules framed under section 303 (2) (*b*) of the Madras District Municipalities Act to the trial of suits. [p. 665 col. 2].

An interim injunction can only be within the jurisdiction of the Judge holding an inquiry into an election petition if that injunction is for the purposes of and in furtherance of the trial which he is conducting. If a Court cannot act under section 94 and O. XXXIX of the Civil Procedure Code, section 151 of the Code does not extend its powers. [p. 666, col. 1].

Under the Madras Municipal Election Rules framed in accordance with section 303 (2) (*b*) of the Madras District Municipalities Act of 1920, a Councillor whose election is impugned on account of alleged irregularities in the election is entitled to sit in Council till his election is set aside by the Judge on inquiry. [p. 666, col. 1].

Under r. 6 of the Madras Election Rules, a District Judge inquiring into an election petition has no jurisdiction to grant an interim injunction restraining an elected candidate from taking his seat pending the disposal of the election petition. [p. 666, col 2].

The expression " procedure applicable to the trial of suits" in r. 6 of the Madras Election Rules does not attract the provisions of section 94 or O. XXXIX of the Code of Civil Procedure to an election inquiry under the Act, nor has the Judge any inherent power to issue an injunction. [p. 665, col. 2 & 666, col. 1].

Aslatt v. *Southampton Corporation*, (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L T. 464; 29 W. R. 117; 45 J. P. 111; *Richardson* v. *Methly School Board*, (1893) 3 Ch. 510 ; 62 L. J. Ch. 943; 3 R. 701 ; 69 L. T. 308; 42 W. R. 27, and *Sarvothama Rao* v. *The*

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Chairman, Municipal Council, Saidapet, 73 Ind. Cas. 619; 45 M. L. J. 23; 17 L. W. 481; (1923) M. W. N. 266; 32 M. L. T. 179; (1923) A. I. R. (M) 474, referred to.

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the orders of the District Court, Trichinopoly, dated the 30th September 1922 and the 3rd November, 1922 in I. S. No. 625 of 1922 and I. A. No. 630 of 1922 respectively in O. P. No. 147 of 1922.

Dr. *S. Swaminadan*, for the Petitioner.

Messrs. *T. R. Venkatarama Sastry* and *K. S. Sankara Aiyar*, for the Respondent.

JUDGMENT.—This is a petition under section 115 of Act V of 1908, and section 107, Government of India Act.

Petitioner and respondent were the only two candidates at the election held on 22nd September, 1922 for the appointment of a Councillor to represent the 12th Ward of the Trichinopoly Municipality. The petitioner was declared duly elected, and respondent filed a petition before the District Judge of Trichinopoly under the rules framed in accordance with section 303 (2) (*b*), Madras Act V of 1920. While the inquiry into this petition was pending the respondent applied in I. A No. 625 of 1922 purporting to be under sections 94, 141, 151 and O. XXXIX r. 2 of the Civil Procedure Code that the present petitioner be restrained by a temporary injunction from taking his seat in the Municipal Council until the disposal of the petition. In his order on this application dated 30th October 1922, the District Judge restrained the petitioner by interim injunction from taking his seat in the Council. Hence this revision petition.

The question for determination is whether the District Judge had jurisdiction to pass such an injunction. Rule 1 of the Rules for the decision of disputes as to the validity of an election lays down that 'no election held under the Madras District Municipalities Act shall be called in question except by an election petition presented in accordance with these rules.' Under r. 6.

"Every election petition shall be inquired into by the Judge as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code 1908 to the trial of suits.

It is argued for the petitioner that 'procedure applicable to the trial of suits' cannot include the power to pass an interim injunction of the sort in question while on behalf of respondent it is contended that r. 6 does convey such power and in any case the District Judge has a residuary power which enables him to take such action under the Code as may seem proper during the course of the enquiry.

It is to be noted that the application of the Civil Procedure Code to the inquiries is definitely restricted in r. 6 to the trial of suits. Had the Government intended that the Judge in an election inquiry should have the same powers as he has in the exercise of his original jurisdiction, this presumably would have been stated in terms. In this connection r. 6 may be compared with section 5 of the Provincial Insolvency Act where full powers are conferred upon the Insolvency Court, although the differences in the wording of the respective clauses is significant. An interim injunction can only be within the jurisdiction of the Judge holding an inquiry into an election petition if that injunction is for the purposes of and in furtherance of the trial which he is conducting. But a temporary injunction under O. XXXIX, r. 2 is not necessarily for the purposes of the trial. Section 94, Civil Procedure Code out of which O. XXXIX, arises is framed generally 'in order to prevent the ends of justice from being defeated,' and then, under O. XXXIX, r. 2.

> "In any suit for restraining the defendant from committing . . . . an injury the plaintiff may apply to the Court for a temporary injunction to restrain the defendant from committing the injury."

An injunction restraining an elected candidate from taking his seat may be in the ends of justice assuming that there is *prima facie* ground for holding his election to have been so irregular that any act consequential upon that election is a fraud upon the defeated candidate, but such an injunction in no way affects the conduct of the trial. A Court which issues such an injunction is really proceeding as if it were seized of the case in the ordinary exercise of its civil jurisdiction and not as a Court inquiring under special rules into the validity of an election. And under r. 1 'an

election can only be called into question by a petition presented under the rules. When the party is specially prohibited from invoking the Civil Courts in the ordinary exercise of their judicial functions, I can see no warrant for a Court importing into the inquiry its ordinary Civil powers of its own motion. And, of course, if a Court cannot act under section 94 and O. XXXIX, section 151 does not extend its powers. The learned District Judge has justified his order in I. A. No. 630 of 1922 on the ground that it is better that a councillor whose qualifications for his office are questioned, does not take part in an election (*i. e.*, does not sit as councillor and vote for the election of (Chairman) as that may lead to questions about the validity of the election. Had the disqualification in question been one falling within the provisions of section 50, there could be no such difficulty because it is expressly provided in section 51, clause 3, that pending the decision of the District Judge after inquiry into the alleged disqualification, *the councillor shall be deemed to be qualified.* By parity of reasoning I think that the councillor whose election is impugned on account of alleged irregularities may also be deemed to be qualified pending the Judge's decision.

The rules under section 302 (2) (*b*) do not contain a provision similar to that in section 51, but in r. 13 it is laid down that where an election is declared void the seat of the returned candidate shall be deemed to be vacant from the date of the Judge's order, which implies that up to the date of the Judge's order the unseated councillor shall be deemed to have been qualified.

Therefore I find no reason to hold that Government must necessarily have intended that a power of granting interim injunctions should vest in the Judge inquiring under r. 6. The English decisions to which attention has been directed *Aslatt* v. *Southampton Corporation* (1), *Richardson* v. *Methly School Board* (2) establish that the Court of Chancery has exercised this power of granting injunctions, but I do not think it is decided that in the exercise of their ordinary judicial functions the Indian Courts acting under O. XXXIX, r. 2 can exercise this power cf. *Sarvothama Rao* v. *Chairman Municipal Council, Saidapet* (3). The question is whether this power has been carried into the special rules for election enquiries, and in this connection the English cases are valuable chiefly as showing that such powers should be exercised with the greatest discrimination. In *Aslatt* v. *Southampton Corporation* (1) the Corporation was restrained from declaring the office held by plaintiff void. (Here, it may be noted, the *status quo* was preserved by the interim order of the Court which is very different from temporarily unseating an elected candidate).

In the course of that ruling Jessel, M. R., observes at p. 148 that the mere fact that some proceeding was being taken to test a right to continue in an office was never considered a ground for interfering by injunction; because the old Court of Chancery never interfered if a legal right only was in question. The Judicature Act, 1873 conferred upon Courts the right of granting injunctions but as a general rule, the Court only interferes, when there is some question of property; though there may be interference even when personal status is the only thing in question.

This case is considered in *Richardson* v. *Methly School Board* (2), where certain doubts in respect of *Aslatt* v. *Southampton Corporation* (1) are discussed, but the Court concludes by granting a similar injunction. That the Court of Chancery has exercised this power is no warrant for assuming that it was meant to be included by Government within the provisions of r. 6, and it is not disputed that Indian Courts in the exercise of their ordinary functions under the Civil Procedure Code would have such power of granting injunction. I find that the District Judge acted without jurisdiction in granting an interim injunction by his order on I. A. No. 625 of 1922, dated 30th October 1923, and order that it be cancelled.

Respondent will pay the cost of the petitioner.

The District Judge after hearing the present petitioner reaffirmed the interim injunction in his order of 3rd November 1922 and that

(1) (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

(2) (1898) 3 Ch. 510; 62 L. J. Ch. 943; 3 R. 701; 69 L. T. 308; 42 W. R. 27.

(3) 73 Ind. Cas. 619; 45 M. L. J. 23; 17 L. W. 431; (1923) M. W. N. 266; 32 M. L. T. 178; (1923) A. I. R. (M). 475.

order is sought to be revised in C. R. P. No. 809 of 1922 which must also be allowed on the same grounds but without costs.

Z. K. *Revision allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL NO. 17 OF 1924.

August 1, 1924.

Present :—Mr. Kendall, A. J. C.

THAKUR NARINDAR BIKRAMJIT SINGH —JUDGMENT-DEBTOR—APPELLANT
versus
SETH SUKHKHAN LAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66 —Sale proclamation — Plan of property, whether necessary.

A sale proclamation is not necessarily vitiated by the fact that no plan of the house proposed to be sold was attached thereto as such a plan is not prescribed by law. [p. 667, col. 2.]

Appeal from the order of the Subordinate Judge, Sitapur, dated 27th February 1924.

Mr. *Ali Zaheer*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the learned Subordinate Judge of Sitapur rejecting the appellant's objection to the sale proclamation published by his Court. The appeal was made on the grounds that the Court should not have disallowed the request of the applicant to have a plan of the house attached to the proclamation, and it has also been stated in argument, though it is not mentioned in the grounds of appeal, that the Court refused to enquire into and make an estimate of the value of the house. It is argued that there are material irregularities which vitiate the sale proclamation. We have examined the proclamation and find that it specifies the boundaries of the house and the Municipal tax payable on it, and that it gives the judgment-debtor's estimate of the value. This appears to be all that O. XXI, r. 66, Sch. I of the Civil Procedure Code requires of a Court. The addition of a plan of the house does not appear to us to be likely to add very much to the information given to any intending purchaser and it is certainly not prescribed by law. It may be mentioned that the judgment-debtor made his first objection to the proclamation on 12th October 1923, and in this he said nothing about the plan though he mentioned the omission of an estimate of the value of the house. It was not until February 27, 1924, that he said anything about the plan and he then offered to have one prepared. It does not seem to us that there is anything in his objections beyond a desire to prolong the sale proceedings as much as possible. We therefore dismiss the appeal with costs.

G. H. *Appeal dismissed.*

PATNA HIGH COURT

CIVIL REVISION NO. 205 OF 1923.

May 9, 1924.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Foster.

MANI LAL AND OTHERS—PETITIONERS
versus
DURGA PRASAD AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Government of India Act (5 & 6 Ges. V. C. 61)s, 107—Fees Act (VII of 1870) s. 7 (IV), (V) Interlocuton. Court order when can be revised—Order demanding improper Court fee—High Court, whether will interfere in revision—Case decided, meaning of—Order to pay ar valorem Court fee—Court, whether can review his own order—Payment of additional fee whether operates as estoppel.

The principle is that ordinarily an interlocutory order is not capable of revision, particularly when there is another remedy available to the injured party; but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party an interlocutory order may be

revised under section 115 of the Civil Procedure Code read with section 15 of the Charter Act. (Section 107 of the Government of India Act) [p. 670, col. 1.]

Amjad Ali v. *Ali Hussain Johar*, 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519; *Chandramani Koer* v. *Basdeo Narain Singh*, 49 Ind. Cas. 442; 4 P. L. J. 57, relied on.

An order demanding an improper Court-fee involving jurisdiction of the Court to try or not to try the suit. though an interlocutory order fulfils the test referred to above and will, in my opinion, attract the revisional jurisdiction or the Court under section 115 of the Procedure Code and section 107 of the Government of India Act, the decision of matters relating to Court-fees will be decision of a "case" within the meaning of the word in section 115 of the Code. [p. 671, col. 1.]

Balakrishna Udayar v. *Vasudeva Ayer*, 40 Ind. Cas. 650; 44 I. A. 261; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 148, 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.), followed.

The Court has a right to determine an issue rightly or wrongly and a wrong decision initself will not attract the revisional jurisdiction of this Court: if on account of its wrong decision the Court refuses to exercise a jurisdiction vested in by law or exercise a jurisdiction not vested in law, the revisional jurisdiction of the High Court will come in. Thus if the Court wrongly decides the issue as to Court-fee holding that the suit comes under a particular clause of the Court Fees Act and asks the plaintiff to pay additional Court-fee before his suit can be entertained and the real issues can be tried, the Court refuses to try the case and exercise its jurisdiction unless the proper Court-fee is paid. Such an order will be capable of revision [p. 672, col. 1.]

Amir Hassan Khan v. *Sheo Baksk Singh*, 11 I. A. 237; 11 C. 6; 4 Sar. P. C. J. 559; *Rafique and Jackson's*, P. C. No 83: 5 Ind. Dec. (N. S.) 700 (P. C.), *Shew Prosad Bungshidhur* v. *Ramchunder Haribux*, 23 Ind. Cas. 977; 41 Cr. 928, referred to.

Plaintiffs sued to recover possession of the estate of one C upon the deed of his widow K on the ground that they were the nearest reversionary heirs of C. They paid Court-fee on ten times the Government revenue under section 7 clause (v) of the Court Fees Act, but the Court ordered payment of advalorem Court-fees under clause (iv) on Rs. 5,200 the valuation put by the plaintiffs. The additional court-fee was paid. Subsequently the Court assessed the value of the properties at Rs. 19,060 and fixing the value of the suit at that sum ordered the plaintiffs to pay the deficit Court-fee within 3 weeks. The plaintiffs thereupon put in an application for review of this order but the Court rejected this application. The plaintiffs filed a petition of revision in the High Court.

(1) that, the fact that the plaintiffs paid a small sum demanded by the Court in the first instance did not preclude them from disputing the subsequent decision of the Court demanding a very high sum on the ground that *ad velorem* Court fees was payable under section 7 clause (IV) of the Act; [p. 672, col. 2.]

(2) that the Court was competent to review its order and was wrong in holding that the application for review was not maintainable so long as the first order demanding ad *valorem* Court-fee was not sought to be reviewed; [p. 673, col. 2.]

Chandramani Koer v. *Basdes Narain Singh*, 49 Ind. Cas. 442; 4 P. L. J. 57, followed.

(3) that the High Court could interfere in revision with the order demanding additional Court-fees. [p. 672, col. 1.]

(4) that, however, the suit fell under s. 7, clause (IV) and not clause (V) of the Court-fees Act, and *advalorem* Court-fees were payable.

Revision from on order of Officiating Additional Subordinate Judge, Gaya, dated the 5th May, 1923.

Messrs. *Shiveshwar Dayal* and *Brij Kishore Prasad*, for the Petitioners.

Mr. *Anand Prasad*, for Mr. *Rai, Gurusaran Prasad*, for the Opposite Party.

JUDGMENT

Jwala Prasad, J.—This is an application in revision. The plaintiffs are the petitioners before us. They have instituted a suit in the Court of the 2nd Subordinate Judge of Gaya for recovery of possession of the estate of one Charanjivi Lal upon the death of his widow *Musammat* Kavilasi Kuer who diedo n the 14th March 1922, on the ground that they are the nearest reversionary heirs of Charanjivi Lal, They allege in the plaint that Charanjivi Lal died about 20 years ago, and his widow *Musammat* Kavalasi Kuer succeeded him and came into possession of his property. She died on the 14th March 1922, leaving her surviving the plaintiffs Nos. 1 to 6 who are the nearest reversioners, and as such they wanted to take possession of the property in dispute, but the defendants interfered with and themselves took possession of the property producing a deed of gift, dated the 10th February 1922, said to have been executed by *Musammat* Kavalasi Kuer in their favour. The plaintiffs deny the genuineness and validity of the deed of gift set up by the defendants and impugn it as being null, void and inoperative as against the plaintiffs' right as the next reversioners. They further say that on a perusal of the deed of gift it appears that the defendants have got false

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statements, as to their being *sapinda gotias* and reversionary heirs of Charanjivi Lal, inserted in the deed of gift; whereas the defendants have no concern with Charanjivi Lal's branch, nor are they *gotias*. Upon these allegations the plaintiffs claim the following relief:—

"That on adjudication of the title of the plaintiffs Nos. 1 to 6 to succession and of plaintiffs Nos. 7 to 9 by virtue of their purchase under the deed of sale, dated 26th June 1922, executed by the plaintiffs Nos. 1 to 6 in their favour, the plaintiffs should be given *seer* possession of the disputed property by ousting the defendants."

They also claim *mesne profits*.

The cause of action is said to have arisen on the 14th March 1922, the date of the death of the *Musammat*.

The plaintiffs valued the suit at Rs. 5,200 for the purpose of jurisdiction and paid Court-fee on ten times the Government Revenue under Section 7, clause (5) of the Court-fees Act. On the 20th July 1922, the Subordinate Judge passed the following order:—

"The Court-fee-paid under article 7, clause (5) is insufficient. The plaintiffs should file *ad valorem* Court-fee within a week."

On the 22nd July 1922 the plaintiffs paid the additional Court-fee of Rs. 273-12-0 making a total of Rs. 285. This was reported to be sufficient, and the plaint was registered on that very day.

On the 30th October 1922, the defendants filed their written statement wherein *inters alia* they pleaded that the property was undervalued and the Court-fee paid was insufficient.

On the 8th November 1922, amongst others, the following issues were framed.

3. Is the suit undervalued and the Court-fee paid insufficient?"

4. Are the plaintiffs Nos. 1 to 6 the nearest reversioners of Charanjivi Lal?"

6. Is the deed of gift, dated 10th February 1922, alleged to have been executed by *Musammat* Kavilasi Kuer a genuine and valid document and binding upon the plaintiffs?"

7. Are the plaintiffs entitled to recover possession of the properties in suit? If so, with what amount of *mesne profits* if any?"

On the 3rd April 1923 under orders of the District Judge the suit was transferred to the file of the Additional Subordinate Judge for disposal.

On the 23rd April 1923 the issue as to Court-fee was tried in the first instance, and upon the evidence adduced by the parties the Court assessed the value of the properties at Rs. 19,060, and fixing the value of the suit at that sum ordered the plaintiffs to pay the deficit Court-fee within 3 weeks.

On the 3rd of May 1923 the petitioners applied to the Court below for review of this order and for recalling the same under O. XLVII, r. 1, read with Section 151 of the Civil Procedure Code. The ground upon which the review was sought was that the plaintiffs' suit was only for recovery of possession and as such the Court-fee leviable was under Section 7, clause (v) (*a*) of the Court Fees Act upon ten times the Government Revenue, and not upon the value of the properties under Section 7, clause (iv) (*c*); and in support of their contention they relied upon the Special Bench case of *Ram Sumran Prasad* v. *Gobind Das* (1), which they cited in their petition of review.

On the 5th of May 1923, after hearing the parties the Court rejected the petition. Aggrieved by this order the plaintiffs have come to this Court and pray that the same be set aside.

It is urged as a preliminary objection on behalf of the defendants—opposite party that the order of the 23rd April is not capable of revision, inasmuch as it is an interlocutory order only and the plaintiffs ought to have waited until their plaint was rejected under O. VII, r. 11 of the Code and then appealed against the final order rejecting the plaint, which comes within the definition of "decree" in Section 2, clause (2) of the Code. In support of this contention reference has been made to the following cases:—

Sheopal Singh v. *Badri Singh* (2), *J. C. Guise* v. *Jaisraj* (3), *Gopal Das* v. *Alaf Khan* (4),

(1) 68 Ind. Cas 705; 3 P. L. T. 704; (1922) Pat. 291; 4 U. P. L. R. (Pat.) 75; (1922) A I. R. (Pat) 615; 1 P. L. R. 1; 2 Pat. 125 (S. B.)

(2) 38 Ind. Cas. 206.

(3) 15 A. 405; A. W. N. (1893) 172; 7 Ind. Dec. (N. S.) 979.

(4) 11 A. 383; A. W. N. (1889) 151; 6 Ind. Dec. (N. S.) 672.

Chattar Singh v. *Lekhraj Singh* (5), *Farid Ahmad* v. *Dulari Bibi* (6), *In re H. H. The Nizam of Hyderabad* (7), *Harumoozi* v. *Ayesha* (8), *and Chandi Ray* v. *Kripal Ray* (9).

These cases do not relate to Court-fee matter and immediate remedy by way of appeal was available to the injured party. As to whether an order demanding additional Court-fee is capable of revision there has been divergence of opinion. On the one hand, it has been held that an order demanding additional Court-fee is not capable of revision on the ground that the plaintiff could make default in the payment and have his plaint rejected and thus be able to question the order in appeal *vide Gobindul Das Nath* v. *Nitya Kali Dasi* (10),*Chuni Lal* v. *Roshan Lal* (11), *Lachmibati Kumari* v. *Nandkumar Singh* (12) and *Bhubneshwari Prasad* v. *Mohan Lal* (13).

A contrary view is taken in the cases of *Bankey Behari* v. *Ram Bahadur* (14), and *Nauratan Lal* v. *Wilford Joseph Stephenson* (15). In these cases it was held that the High Court can interfere at that stage of the case regarding the erroneous finding as to the Court-fee payable and thus save the parties from litigation, unnecessary expense and undue delay. There is, however, no conflict in the principle underlying these conflicting decisions. That principle is that ordinarily an interlocutory order is not capable of revision, particularly when there is another remedy available to the injured party ; but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party, an interlocutory order may be revised under section 115 of the Civil Procedure Code read with section 15 of the Charter Act (section 107 of the Government of India Act). These are the tests laid down on a review of authorities both English and Indian in the case of *Amjad Ali* v. *Ali Hussain Johar* (16), as also in the case of *Chandramani Koer* v. *Basdeo Narain Singh* (17), and would seem to have been now generally accepted.

The question whether an order directing additional Court-fee to be paid satisfies the aforesaid tests depends upon the circumstances of each case. If it is an order merely assessing valuation of the property and the only question involved is as to the amount upon which the Court-fee has to be paid, the decision of the Court of First Instance would appear to be final under section 12 of the Court Fees Act. That section has been enacted in the interest of revenue and is final so far as that Court is concerned. There will be no appeal or revision from that order. But the question may under certain circumstances be raised in an appeal from the final decree made in the suit. Where however, the question, is under what provision of the Court Fees Act the relief sought for in the plaint comes or under which category the suit falls, the decision of the First Court is not final : vide *Dada Bhau Kithur* v. *Nagesh Ramchandra* (18), *Studd* v. *Mati Mahto* (19), *Kanaran* v. *Komappan* (20), *Chunia* v. *Ramdial* (21) and other cases cited in Mr. Agarwala's *Vademecum*, volume I, edition 1917, pages 38 and 39 ; and where it involves the jurisdiction of the Court to try the suit the decision involves a question of jurisdiction, and a wrong decision on the point would amount to an assumption of the jurisdiction not vested in law, or a failure to exercise the jurisdiction vested in law. If the question of jurisdiction is thus involved it will be a fit case for revision in order to declare that the Court ought not to exercise the jurisdiction where it assumed the jurisdiction not vested in law or where it refused to exercise the jurisdiction, as the

(5) 5 A. 293; A. W. N. (1883) 39; 3 Ind. Dec. (N. S.) 281.
(6) 6 A. 238; A. W. N. (1884) 45; 3 Ind. Dec. (N. S.) 842.
(7) 9 M 256; 3 Ind. Dec. (N. S.) 575.
(8) 57 Ind. Cas. 421; 1 P. L. T. 296; 5 P. L. J. 415.
(9) 10 Ind Cas. 305: 15 C. W. N. 682.
(10) 51 Ind. Cas. 581;
(11) 53 Ind. Cas. 427; 120 P. R. 1919.
(12) 56 Ind. Cas. 649; 1 P. L. T. 268.
(13) 55 Ind. Cas. 786; 1 P. L. T. 5.
(14) 44 Ind. Cas. 891; (1918) Pat. 223; 4 P. L. J. 191; 4 P. L. W. 281.
(15) 50 Ind. Cas. 470; 4 P. L. J. 195.
(16) 6 Ind. Cas. 574; 15 C. W. N. 353 ; 12 C. L. J. 519.
(17) 49 Ind. Cas. 442; 4 P. L. J. 57.
(18) 23 B. 486; 12 Ind. Dec. (N. S.) 323.
(19) 28 C. 334.
(20) 14 M. 169; 5 Ind. Dec. (N. S.) 120.
(21) 1 A. 360; 1 Ind. Jur 85 1; 1 Ind. Dec. (N. S. 274.

case may be, on account of its wrong decision on the point. True, there is an appeal from the order rejecting the plaint upon failure of the plaintiff to pay the additional Court-fee, but that will be a subsequent event and will give rise to a separate cause of action. There is no appeal or any other remedy from the order itself demanding the additional Court-fee and the payment of proper Court-fee may be an irremediable injury and sometimes the plaintiff might not be able to pay the large sum demanded, as when a suit could properly be instituted on a Court-fee of Rs. 15, and *ad valorem* court-fee of many thousand rupees is demanded. Suppose the plaintiff pays the improper Court-fee demanded and the suit is ultimately decreed in his favour. The defendant does not appeal from the decree, and the plaintiff need not appeal. The wrong decision upon the Court-fee which has caused monetary loss to the plaintiff remains unredressed. The plaintiff will in such a case have no remedy to redress himself of the wrong and to have refund of the improper Court-fee paid by him. Therefore, in my view, it is wrong to say that the plaintiff ought to have waited till his plaint is dismissed and then pay another Court-fee for lodging an appeal against the final decree and thus ultimately get a redress which in many instances may not be sufficient. Again, an improper order demanding unjustifiable Court-fee amounts to telling the plaintiff that the Court will not proceed with the trial of the suit on merits although the plaintiff has, in fact, paid the Court-fee. This will be a refusal to exercise jurisdiction which upon the sufficiently stamped plaint the Court was bound to exercise. Thus, an order demanding an improper Court-fee involving jurisdiction of the Court to try or not to try the suit though an interlocutory order fulfills the tests referred to above and will, in my opinion, attract the revisional jurisdiction of the Court under section 115 of the Civil Procedure Code and section 107 of the Government of India Act. To deny the power of revision in the High Court in such cases would be to allow the Subordinate Courts to pass whimsical orders and thereby refuse to try the suit and exercise jurisdiction and there might be no remedy available to the plaintiff as was pointed by their Lordships of the Judicial Committee in the case of *Balkrishna Udayar* v. *Vasudeva Aiyar* (22), though in a case of different nature. As to whether interlocutory orders in such matters decide a case under Section 115 of the Code, their Lordships in that very case point out that the word "case" is not defined and in their opinion it cannot be confined to a litigation in which there is a plaintiff, who seeks to pray for a relief or damages or otherwise, against a defendant who is before the Court. Therefore, the decision of matters relating to Court-fees will be decisions of a case within the meaning of the word in section 115 of the Code.

In *Priya Sha* v. *Surajmal Marwari* (23), it was held that the determination of the question under what provision or section of the Court Fees Act the fee is chargeable may essentially relate to the jurisdiction of the Court to entertain the suit, and in *Sundermal Marwari* v. *Jessie Caroline Murray* (24), it was observed that such a question as to class and not merely valuation of a suit may give rise not only to a right of appeal but of revision under section 115 of the Civil Procedure Code and section 15 of the Charter Act.

It is then said on behalf of the opposite party that the question as to Court-fee was one of the issues in the case and the other issues have not yet been determined, and a revision of the decision upon that issue is not permissible as it would amount to a decision of the case piecemeal. It is true that a case should not be tried issue by issue and that the parties should not come to this Court until all the issues are determined and the case finally disposed of. This is upon the ground of convenience and does not bar the revisional jurisdiction of this Court when the determination of one of the issues in the case goes to the root of the jurisdiction of the Trial Court to determine the remaining issues. The issue as to Court-fee is a preliminary issue and unlike other issues in bar, such as issues of *res judicata* and limitation, does not immediately put an end to the suit. The Court has to determine whether sufficient Court-fee has been

(22) 40 Ind. Cas. 650; 44 I. A. 261; 15 A. L. J. 645; 2 P. L. W 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur, L. T. 48 (P. C.)

(23) 16 Ind. Cas. 575; 16 C. L. J. 371; 17 C. W. N. 503.

(24) 16 Ind. Cas. 963; 16 C. L. J. 375.

paid before it entertains a suit or receives a plaint, under section 4 of the Court Fees Act. Therefore unless proper Court-fee is paid the suit will not be deemed to have been at all instituted. O. VII, r. 11 therefore empowers the Court to reject a plaint where it finds that the relief is undervalued or the plaint is insufficiently stamped and the plaintiff on being called upon to make good the deficiency fails to do so. This the Court does either when the plaint is filed and the defendant has not appeared, or after the defendant raises an issue as to the insufficiency of the Court-fee. The moment the Court determines the issue as to Court-fee against the plaintiff it with holds its hands and considers the plaint as not having been properly filed at all. No doubt, the Court has a right to determine an issue rightly or wrongly and a wrong decision in itself will not attract the revisional jurisdiction of this Court; vide *Raja Amir Hassan Khan* v. *SheoBak sh Singh* (25), and *Shew Prasad Bungshidhur* v. *Ram Chunder Haribux* (26). But, if on account of its wrong decision the Court refuses to exercise a jurisdiction vested in law or exercises the jurisdiction not vested in law, the revfsional jurisdictou of the High Court will come in. Thus, if the Court wrongly decides the issue as to Court- fee holding that the suit comes under a particular olause of the Court Fees Act and asks the plaintiff to pay additional Court-fee before his suit can be entertained and the real issues can be tried, the Court refuses to try the case and exercise its jurisdiction unless the proper Court-fee is paid. Such an order will be capable of revision by this Court. Therefore the contention of the learned Vakil for the opposite party is overruled.

Next it is urged on behalf of the defendants-opposite party that the order of the 23rd April 1923 of the Court below was not capable of review so long as the order of the 20th July whereby the Court held that the Court-fee paid under section 7, clause (*v*) was insufficient and directed the plaintiffs to file *ad valorem* Court-fee which the plaintiffs did file, is set aside. This is the view taken by the learned Subordinate Judge, expressed as follows :—

> It is to be seen that the order of the 20th July has not been reviewed and there is no prayer for setting aside that order. So long as that order remains, the order of 23rd April stands correct and the latter order is not by itself wrong for it simply calls on the plaintiffs for a further compliance of the previous order which he has once partially complied with. It is too late at this stage to say that that order was wrong."

The plaintiffs had paid Court-fee originally under section 7, clause (*V*). The fact that they paid a small sum demanded by the Court on the 20th July does not preclude them from disputing the decision of the Court passed on the 23rd April demanding a very high sum on the ground that *ad valorem* Court-fee was payable under section 7, clause (*IV*) of the Act. With this view they asked the Court to review the order of the 23rd April asking them to pay additional Court-fee. The plaintiffs' case now is that their original view of the clause under which Court-fee was leviable was correct and that the order of the Court demanding *ad valorem* Court-fee passed on the 20th July 1922 is not correct, though the plaintiffs did not object to the small additional Court-fee then demanded. Therefore in asking the Court to review the order of the 23rd April 1923 the plaintiffs virtually asked the Court for a decision that the Court-fee payable by them should be under clause (*V*) and not under clause (*IV*) of section 7 of the Act. If the Court had granted the review asked and withdrawn its order of the 23rd April, the object of the plaintiffs would have been served. Thus the view taken by the Court below that the plaintiffs cannot get the order of the 23rd April 1923 reviewed so long as the order of the 20th July 1922 stands, does not seem to be sound; nor were the plaintiffs too late to ask for a review of the order. There is no estoppel in a matter of this kind, and the fact that the plaintiffs paid without demur the small *ad valorem* Court-fee in pursuance of the order of the 20th July 1922 does not debar them from questioning the validity or illegality of the Court demanding *ad valorem* Court-fee when subsequently the Court demanded a much larger fee. A fresh cause accrued to the plaintiffs on the 23rd April 1923 when additional Court-fee was demanded, and they were well within their rights to urge that *ad valorem* Court-fee should not be levied,

(25) 11 I. A. 237; 11 C. 6; 4 Sar. P. C. J. 559; Rafique and Jackons P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.)

(26) 23 Ind. Cas. 977; 41 C. 323.

There being no appeal from an order of the Court fixing the valuation or demanding additional Court-fee, the Court had ample power to review its decision for good and sufficient reason. Apart from O. XLVII, r. 1, the Court has inherent power under the new section 151 of the Civil Procedure Code of 1908 to make such orders as may be necessary for the ends of justice and thus to review its wrong orders or decisions passed previously. In the case of *Amjid Ali* v. *Muhammad Israil* (27), a Full Bench of the Allahabad High Court upheld the order of the court of first instance reviewing its former order demanding additional Court-fee and holding that the Court-fee originally paid was sufficient. In that case the Subordinate Judge on the 16th November held that the Court-fee paid on the plaint was insufficient and ordered the plaint to be represented within four days along with the deficit Court-fee. Subsequently the plaintiffs appeared and objected to the order and paid the additional Court-fee under protest. The plaint was then admitted and registered. The defendants at the hearing of the suit contested that the plaint as presented on the 16th November being insufficiently stamped was an invalid plaint and that as the deficit Court-fee was not paid till the following day, the suit was barred by limitation. The Court held that the Court-fee paid on the 16th November was sufficient and that the Court had acted erroneously in compelling the plaintiffs to pay a larger sum; and, therefore, the plaint as presented on the 16th November was a valid plaint. The suit was ultimately dismissed. On appeal the District Judge held that the plaint was insufficiently stamped on the 16th November and was therefore barred. On second appeal a Full Bench of the Allahabad High Court upheld the later order of the first Court by which it was held that the order of the 16th November was erroneous. Applying this case to the present one the first Court was competent to review the order of the 23rd April 1923 and to hold that the order demanding *ad valorem* Court-fee was wrong, and the plaint, when presented, was sufficiently stamped. The payment of the additional Court-fee in the present case, as in the Full Bench case referred to above, would not in any way stand in the way of the Court correcting its decision that *ad valorem* Court-fee was payable.

In the case of *Chandramani Koer* v. *Basdeo Narain Singh* (7), (Atkinson and Manuk, JJ.) the Court upon the objection of the defendant held that the Court-fee of Rs. 10 was insufficient and directed the plaintiff to pay *ad valorem* Court-fee. The plaintiff applied for review of that order. The review was granted and the order directing payment of *ad valorem* Court-fee was set aside and the suit was ordered to proceed without payment of additional Court-fee. Manuk, J. reviewing all the authorities on the subject deduced certain principles one of which was that before or after an order of demand fructifies by non-compliance into a recorded order of rejection, the Court contemplated in section 12 of the Court Fees Act may for good and sufficient reasons, review its own order of demand on application by the plaintiffs, or revise that order of its own motion.

I entirely agree with the view taken by Manuk, J. in that case and I accordingly hold that the Subordinate Judge in this case was wrong in holding that the application for review was not maintainable so long as the order demanding *ad valorem* Court-fee passed on the 20th July 1922 was not sought to be reviewed.

The last contention of the learned Vakil on behalf of the defendants appears to be substantial. The contention is that though the Court expressed its views that the application for revision was not maintainable, the Court actually did review its order and came to the conclusion that the plaint in the present case is distinguishable from that which was dealt with by the special Bench of this Court in the case of *Ram Sumran Prasad* v. *Gobind Dos* (1) inasmuch as in the present case the plaintiffs in their plaint alleged that the defendants had not only set up the deed of gift by the widow, but they also claimed to be the nearest reversionary heirs of the last holder of the estate. Thus it is said that the plaintiffs had had to prove their title as against the defendants, both claiming from the last male holder before they could eject the defendants, and hence the declaration of their title was essential which coupled with thie prayer for possession makes the suit a declaratory one with consequential relief. This no

(27) 20 A. 11; A. W. N. (1897) 157; 9 Ind. Dec. (N. S.) 867.

doubt is a feature that distinguishes the case relied upon by the petitioners, and the decision on the point is not free from difficulty and is such upon which opinions may vary. Therefore it will not be a sound discretion to decide the point in revision when the question may crop up again in appeal from the final decree made in the case.

I would therefore reject the application and would allow the plaintiffs to pay the additional Court-fee which had been demanded by the Court below, within three weeks from the date of communication of this order by the Court below to the plaintiffs. The application is accordingly rejected with costs; hearing fee one gold mohur.

Foster, J.—I agree that this application cannot be entertained.

K. S. D. *Application rejected.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 28 OF 1922.

October 25, 1923.

Present :—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

Mahant SARABJIT BHARTI—DEFENDANT—APPELLANT

versus

GAURI NATH KAKAJI DHARM KARIYA DHUREIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—mahant, whether trustee—Civil Court, whether can remove mahant—Worshippers of temple, whether can institute suit.

The *Mahant* of a temple is a trustee, and temple property is trust property within the meaning of section 92 of the Civil Procedure Code. [p. 676, col. 2.]

Ram Parkash Das v. *Anand Das*, 83 Ind. Cas. 583; 43 C. 707; (1916) 1 M. W. N. 406; 20 C. W. N. 802; 14 A. L. J. 621; 31 M. L. J. 1; 18 Bom. L. R. 490; 8 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.), followed.

Vidya Varuthi Thirthaswamigal v. *Balusami Aiyer*, 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), distinguished.

A Civil Court cannot interfere with the spiritual functions of a *mahant* but it can remove him from the control of and connection with a religious or charitable endowment, and prevent him from acting as mahant in future. [p. 677, col. 1.]

Shailajananda Dut Jha v. *Umashananda Dut Jha*, 2 C. L. J. 460; *Striman Sadagopa* v. *Krishna Tatachariyar*, 1 M. 301; *Manohar Ganesh Thambekar* v. *Lakshmiram Govindram*, 12 Bom. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 150; *Chota Lakshmiram* v. *Manohara Ganash Thambekar*, 24 B. 50; 2 Bom. L. R. 516; 4 C. W. N. 28; 26 I. A. 199; 7 Sar. P. C. J. 559; 12 Ind. Dec. (N. S.) 570 (P. C.), referred to.

The worshippers of a temple are the true beneficiaries of the endowment, and are competent to institute a suit under section 92 of the Civil Procedure Code, with respect to the temple properties. [p. 677, col. 2.]

Srinivasa Chariar v. *Evalappa Mudaliar*, 68 Ind. Cas. 1; 45 M. 565 at p. 584; 31 M. L. T. 1; 16 L. W. 247; 43 M. L. J. 536; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.); *Jawahra* v. *Akbar Husain*, 7 A. 178 at p. 184; A. W. N. (1884) 324; 2 Ind. Dec. (N. S.) 390 (F. B.), relied on.

Appeal against the judgment and decree of the District Judge, Fyzabad, dated 9th May 1922.

Messrs. *Niamat Ullah* and *Ali Zaheer*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal against an order under section 92 of the Civil Procedure Code, of the District Judge of Fyzabad granting to plaintiffs—respondents a decree for the removal of the appellant, *Mahant* Sarabjit Bharti, from the managership of the temple of Nagashwarnath at Ajudhia and the management of trust property and funds. The learned District Judge further drew up a scheme of management for the future administration of the temple property.

Four points have been taken in arguing this appeal.—

SARABJIT BHARTI *v.* GAURI NATH

(1) That the appellant is not a trustee and that the temple property does not constitute a trust within the meaning of section 92, Civil Procedure Code.

(2) That even if he is a trustee he is also a spiritual preceptor the two functions being indissolubly united, and the Court has no jurisdiction over the Mahant as a spiritual head of the religious institution.

(3) The plaintiffs are not entitled to sue as they have no interest in the trust.

(4) That the conduct of the appellant, though probably open to criticism, has not been such as to justify his removal.

Of these pleas the most important is the first and the learned Pleader for the appellant has devoted to it most of his attention. He relies particularly on a recent ruling in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* and others (1). He has indeed candidly admitted that without this ruling he could scarcely have ventured to support his client's case.

The gist of the ruling as far as it applies to the present case is given in the head-note "The endowments of a Hindu *mutt* are not "conveyed in trust" nor is the head of the *mutt* a "trustee" with regard to them, save as to any specific property proved to be vested in the head for a specific and definite object." At first sight this would appear to be a conclusive authority in favour of the appellant's contention. It is, however, to be observed that the suit which was in appeal before the Judicial Committee was not one under section 92, Civil Procedure Code. They were interpreting the words "trust" and "trustee" not as used in that section but as used in Article 134 of Schedule I of the Indian Limitation Act. They held at page 843 "The language of section 10 gives the clue to the meaning and applicability of Article 134. It clearly shows that the Article refers to cases of specific trust and relates to property "conveyed in trust." Neither under the Hindu Law nor in the Muhammadan system is any property "conveyed" to a *shebait* or a *Mutwalli*, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. He is certainly not a "trustee" as understood in the English "system." Although for the purposes of Article 134 of the Limitation Act their Lordships construed the words "trust and trustee" in a narrow and technical sense of the English Law, it is clear from their remarks in the judgment that they recognised that for other purposes a wider meaning might attach to them in connection with the heads of Indian religious institutions. At page 849 they speak of the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Muhammedan Law. Again at page 840 speaking of such a religious superior they say that "he is not a "trustee" in the English sense of the term but they add that "In view of the obligations and duties resting on him he is answerable as a trustee, in the general sense, for mal-administration. Once more on page 838 they remark that in the previous case they "used the term "trustee" in a general sense as in previous decisions of the Board, by way of a compendious expression to convey a general conception of the duties and obligations attached to the office of a superior."

Another passage from the same judgment is of great interest in this connection. It occurs at page 842 and runs as follows:—

"In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Muhammadan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted; a system of committees was devised to which were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents;" rules were enacted to ensure proper management and to empower the superior Court in the District to take cognizance of alle-

(1) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 846; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 8 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

gations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee", it uses indifferently and indiscriminately the terms "manager", trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management.

Now Act XX of 1863 provided only a few remedies for misfeasance or breach of trust. The Court could direct specific performance of any act and decree damages and costs against the trustee or manager who was also liable to removal but there was no provision for his replacement or for the control of its subsequent administration. These deficiencies were supplied by section 539 of the former Codes of Civil Procedure of 1877 and 1882 of which section 92 of the present Code is an amended form. The learned Pleader for the appellant argues that the legislature deliberately omitted the words "manager and superintendent" in drafting this section with the express intention of confining its operation to specific trusts in its English sense of the word. For this view, however, he is able to give no authority and it is contrary to all probability. The general current of opinion in all the Courts in this country has been that a *Mahant* is a trustee for the purposes of section 92, Civil Procedure Code and this view was supported by their Lordships of the Privy Council in *Ram Parkash Das* v. *Anand Das* (2). In a suit between two claimants to the office of a *Mahant* it was stated. "The nature of the ownership was an ownership in trust for the *mutt* or institution itself and although large administrative powers were no doubt vested in the reigning *mahant*, this trust does exist and must be respected."

In view of the remarks which have been quoted from the judgment in *Vidya Varuthi Tirtha* v. *Balusami Ayyar* (1) and the clear recognition therein of a distinction between a general trust for religious and charitable purposes and a specific trust in the English sense we are of opinion that the interpretation put in that judgment on the words "trust and trustee" is not intended to apply to those words as used in section 92, Civil Procedure Code.

It is in evidence that the temple of Nageshwarnath is an old foundation. It is indeed said to date back to the reign of the legendary King Vikramaditya from whom the Sambat era is said to have begun in 58 B. C. At Ajodhya it ranks second in sanctity to the temple known as Hanumangarhi and is a notable place of pilgrimage for the whole of India. It is not denied and the appellant has himself admitted in a compromise come to in a previous litigation (Exhibit 39), that he held the property in the capacity of a trustee of the temple. He has himself described it as *waqf* property and this word has been used in a similar loose fashion in both oral and documentary evidence in this case. It is of course not *waqf* property in the proper sense of the word which can only be applied to endowments created under the Muhammadan Law.

We hold that the appellant is a trustee and that the property of the temple of Nageshwarnath is trust property within the meaning of section 92, Civil Procedure Code. The next question whether section 92 applies to the spiritual office of *mahant* as well as to the property has been discussed by Mr. Justice Mukerjee in *Shailajanlanda Dat Jha* v. *Umeshnundu Dut Jha* (3). In dealing with this plea that the *mahant* cannot by a decree of Court be deprived of the spiritual headship of the foundation, he observes "Under the explanation to section 11, Civil Procedure Code. (section 9 of the present Code) a suit in which any right to property or office is contested is a suit of a Civil nature notwithstanding that such a right may depend entirely on the decision of questions as to religious rites and ceremonies. As was pointed out in a case of *Strimati Sadogapa* v. *Krishna Tatachariyar* (4), such offices may have in reality a similar character although religious duties are attached to them because the occupants are called upon to exercise business functions either as trustees or managers of the properties and funds of the temple or as overseers in the regulation of its affairs generally and having necessarily civil rights and consequently liabilities which may properly be made the sub-

(2) 33 Ind Cas. 583; 43 C. 707; (1916) 1 M W. N. 406; 20 C. W. N 802; 14 A. L. J. 621; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. J. 267; 48 I. A. 73 (P. C).

(3) 2 C. L. J. 460.

(4) 1 M. H. C. R. 301.

ject of a Civil suit." Again as was pointed out in the case of *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (5) which was subsequently affirmed by the Judicial Committee in *Chota Lakhmiram* v. *Manohar Ganesh Tambekar* (6). "Those who take charge of a gift made to a charitable or religious institution, whether such a gift consists of cash, jewels or land incur thereby a responsibility for their due application to the purposes of the institution. They are therefore answerable as trustees even though they had unconsciously accepted the trust and a remedy may be sought against them for maladministration by a suit open to any one interested."

The appellant's contention was that he could not as a *Mahant* be removed except under the rules and usages of his own order. He called other *Mahants* to prove what these were. According to some of these witnesses the only punishments which can be inflicted by his own brotherhood on a *Mahant* for misconduct are a fine or an order to go on pilgrimage or to supply a dinner to the members of the *Baradri*. They say that he cannot be removed. Two of these however, D. Ws. 7 and 24, stated that he can be removed by the Judge or the Sarkar. Two documents filed by the defendant himself Exhibits A-36 and A 37, show that even in the days before British Rule, the right of the Government to interfere in the appointment of a *Mahant* to the Nageshwarnath temple was recognised and that a dispute over the right to the office of *Mahant* of this temple was decided by the Royal Court of Oudh in 1845.

A Civil Court cannot of course interfere with the spiritual functions of the *Mahant*. He can continue to instruct disciples; but the Court can certainly remove him from the control of and connection with a religious or charitable endowment and prevent him from acting as *Mahant* of the temple in future.

All the four plaintiffs to this suit are Hindus. Two belong to Lucknow, and two to Fyzabad. The former are members of a Society known as the U. P. Dharm Rakshan Sabha whose object is alleged to be the protection of Hindu temples from maladministration. The latter live within five miles of the temple and within the same Municipal area and are alleged to visit it frequently for the purposes of worship. In *Srinivasa Chariar* v. *Ev.dappa Mudaliar* (7) their Lordships of the Privy Council spoke of the worshippers of the temple as the true beneficiaries in the endowment. In *Jawahra* v. *Akbar Husein* (8), it was similarly held "The persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it." A large number of rulings to the same effect have been quoted by the learned Counsel for the respondents, but the principle is so well established that it needs no further discussion here. There is evidence that two at least of the plaintiffs are regular worshippers at the temple of Nageshwarnath and their interest at least cannot be disputed. The only point that remains relates to the appellant's misconduct. As to this there is abundant evidence. It is not denied that celibacy is an essential qualification of a *Mahant*. It is proved that the appellant kept 3 mistresses before 1903 and that he still keeps a hill-woman named Padmawati by whom he has had several children. One of these is treated as his *chela* and is commonly spoken of as the *Chota Mahant*. The learned Judge has given a long list of alienations of the temple property made by the *mahant*. He has in several cases allowed the property belonging to the trust to be sold in execution of small personal decrees against himself. He has admittedly been declared an insolvent and convicted for gambling. His plea that the debts were incurred by his predecessor, *mahant*, Basant Bharti and that he himself has spent his time in trying to pay them off will not bear examination and his failure to enter the witness box and clear up the mysteries of his dealings with the temple funds tells very much against him.

As regards the scheme of management we have had the advantage of consulting with the learned Counsel of both the parties. The conclusion at which we have arrived is that the

(5) 12 B. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 650

(6) 24 Bom. 50; 2 Bom. L. R. 516; 4 C W. N. 23; 26 I. A. 193; 7 Sar. P. C. J. 559; 12 Ind. Dec. (N. S.) 570 (P. C.).

(7) 68 Ind. Cas. 1; 45 M. 535. at p 584; 31 M. L. T. 1; 16 L. W. 247; 43 M. L. J. 536; 24 Bom L R. 1214; (1942) A. I. R. (P. C.) 325; 36 C L J. 524; 27 C W N. 317; 21 A. L. J. 250. (P. C.)

(8) 7 A. 178 at p. 184; A. W. N. (1884) 324; Ind. Dec. (N. S.) 390. (F. B).

scheme of management prepared by the learned District Judge should be maintained subject to the following modifications :—

In the personnel of the Committee as is stated at the heading of the scheme and in paragraph 5 of it we substitute the name of *Mahant* Ram Manohar Prasad of *Bara Asthan*, *Ajodhia*, in place of Babu Nipendranath Dat, Vakil, Fyzabad. We strike off the name of Dr. Sukh Dayal, Assistant Surgeon, Ajudhia, from that Committee and direct that in his place will be substituted a *mahant* (other than the defendant) elected or chosen according to the custom applicable to the temple of Nageshwarnath for filling a vacancy in the office of the *Mahant* of that temple.

N.B. The Committee will make arrangements for the said election which shall be carried out within three months of the date of the Committee taking up the management. In the event of the community entitled to elect failing to comply with the requisition of the Committee the Committee shall be entitled to appoint a *Mahant* as a member thereof.

Substitute the following in place of clause (*d*) of paragraph 2 of the scheme :—

"To do other acts consistent with and in furtherance of the original purpose of the trust."

Subject to the modifications which we have made in the scheme of management this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 285 OF 1922 WITH RULE NO. 659 M OF 1922.

May 5, 1924.

Present :—Mr. Justice Pearson and Mr. Justice Graham.

DEBENDRA NARAIN SINGHA—PETITIONER—APPELLANT

versus

NARENDRA NARAIN SINGHA—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141 O XXI, r. 90—Sale in Execution—Application for setting aside sale, dismissal of—Order whether appeal able.

An appeal lies against an order dismissing for default an application under O. XXI, r. 90, Civil Procedure Code for setting aside an execution sale. [p. 678, col 2.]

Kali Kanta Chuckraburtty v. *Shaim Lal Basu*, 38 Ind. Cas. 598 ; 25 C. L. J. 163, followed,

Appeal against the order of the Sub-Judge, Nadia, dated the 6th May 1922.

Babu *Amarendra Nath Bose*, for the Appellant.

Dr. *Sarat Chandra Basaki*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Nadia dismissing for default an application under O. XXI, r. 90, Civil Procedure Code for setting aside an execution sale.

A preliminary objection has been taken on behalf of the respondent that no appeal lies. In support of this contention reference has been made to section 141, Civil Procedure Code which lays down that "the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction." It is argued that this section applies that the application must be taken to have been under O. IX and that being so, no appeal lies.

We do not think that there is any substance in this contention. The application purported to be made under O. XXI, r. 90 and in our opinion the appeal is competent. This view moreover is supported by *Kali Kanta Chuckerbutty* v. *Syham Lal Basu* (1).

Coming to the merits of the case two main points have been argued. It is argued firstly, that on the facts and circumstances of the case the Court below ought not to have dismissed the miscellaneous case in the absence of both the parties, and secondly, that the Court below should have satisfied itself that the parties had notice of the date fixed for the hearing of the case after the return of the record from the High Court. On referring to the order sheet of the Miscellaneous case it appears that the circumstances are somewhat unusual. The record was received back from the High Court on the 18th April 1922.

(1) 38 Ind. Cas. 598 ; 25 C L. J 163.

RAMADHIN SINGH *v.* RAM SUMER SINGH

There is a note to that effect by the Court and in the margin opposite thereto there is a note by the pleader, who had been acting for the judgment-debtor, to the effect that he was no longer acting for him. Then on the 29th April the Subordinate Judge recorded an order fixing the case for hearing on the 6th of May on the ground that the petitioner's Pleader had not received intimation of the date fixed for hearing. Thereafter on the 6th of May the order, which forms the subject-matter of the present appeal, was passed stating that both parties were absent and that the case was dismissed for default. The substantial contention urged on behalf of the appellant is that neither of the parties nor their pleaders were aware that the case would be taken up on the 6th of May and that some sort of notice ought to have been given of the date fixed after the return of the record. On the whole we think that this contention is well-founded and that having regard to the particular circumstances of the case it would be a hardship on the appellant if the order were allowed to stand. The usual procedure after the record had been recovered back from the High Court would be for the Pleaders of both to be informed of the date fixed. In this particular instance as the Pleader for the judgment-debtor had ceased to act for him it would have been more satisfactory if notice had been served on the judgment-debtor of the date fixed for the hearing of the application.

Having regard to these considerations the appeal must be allowed and the case must go back to the lower Court to be disposed of according to law. We make no order as to costs.

The Vakil for the appellant undertakes to inform his client of the date when the record is sent back by this Court.

The Rule (659 M) is discharged without costs.

K. S. D. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22 of 1923.

April 20, 1924.

Present :—Mr. Pullan, A. J. C.

RAMADHIN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SUMER SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardian and Wards Act (VIII of 1890), ss. 31, 48—Permission to sell minor's property—Improper permission—Sale, validity of.

A sanction given by the District Judge for the sale of a minor's property has no special sanctity in itself, but is open to attack on the ground not only that it was given as the result of fraud but that it was otherwise improper and did not comply with every requirement of sub-section (2) of section 31 of the Guardian and Wards Act. [p. 681, col. 1.]

A guardian applied to the District Judge for permission to sell the minor's property to pay off certain debts. The Judge thereupon passed an order simply granting permission "to sell a portion of the property to defray debts of Rs. 6700" The sale however effected by the guardian was for Rs. 1,800 and included some debts that were not binding on the minor:—

Held that the order did not comply with the mandatory provisions of section 31 (2) of the Guardian and Wards Act and the sale was not binding on the minor. [p. 681, col 2.]

Gopal v. *Mahtaba*, 2 Ind. Cas. 237 ; 12 O. C. 78; *Banke Lal* v. *Swami Dayal*, 56 Ind Cas. 328 ; 23 O. C. 72; 7 O L J. 207 ; 2 U P. L. R. (O) 82, relied on.
Rameshwar Singh Bahadur v *Dhunpat Singh*, 5 Ind. Cas. 334 ; 11 C. L.J. 197; *Gangapershad Sahu* v. *Maharani Bibi*, 11 C. 379; 12 I A. 47; 4 Sar. P C J. 621; 9 Ind Jur. 158 ; 5 Ind. Dec. (N. S.) 1012 (P. C.), distinguished

Appeal against the decree of the Subordinate Judge, Fyzabad, dated the 17th May, 1923.

Mr. *Niamat Ullah*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—In 1905 *Must.* Khatrani was appointed guardian of her two minor sons Mahadeo and Ram Sumer. On the 15th December 1909 she obtained permission of the District Judge of Fyzabad to sell a certain

portion of the property inherited by the minors to pay off certain debts. On the 15th September 1910 she executed a sale-deed of certain property for a sum of Rs. 1,800 in which the debts to be paid off are enumerated. One of the sons Ram Sumer is still a minor and he has brought a suit to set aside the sale-deed under the guardianship of one Ram Sundar. His claim is based on a plea that the debts for which the property was sold are not legally binding on him. The Subordinate Judge of Fyzabad has found that of the debts Rs. 140 are binding on the plaintiff, and he has set aside the sale-deed in respect of the remaining. The vendees appeal and three points have been argued before me. First that the lower Court was wrong in holding that the permission for sale given by the District Judge to the plaintiff's guardian was invalid, secondly that the transfers were for legal necessity and for the benefit of the plaintiff and his family, and thirdly that in any case only one-half of the property could be affected by the decree namely that which belonged to the plaintiff-appellant but that the sale of the share of the plaintiff's brother must be held to be valid in any case because his brother is now 29 years of age and filed no suit on his own behalf within three years of attaining his majority.

The appellants have argued that the permission given by the District Judge complied with the requirements of section 31 (2) of the Guardians and Wards Act and, therefore, under section 48 of that Act it cannot be assailed in any legal proceedings. Now if the first part of this contention is correct there is no question as to the second. On this all Courts are agreed, but they are not agreed as to what constitutes compliance on the part of the District Judge with the provisions of section 31 (2). In a ruling of the Calcutta High Court *Rameshwar Singh Bahadur* v. *Dhunpat Singh* (1), their Lordships held that a mortgage executed by a guardian in pursuance of a permission obtained by misrepresentation of facts and not by fraud is valid, even though the permission ought not to have been granted, and that a mortgagee is not bound to go behind the order of the Court where no case of fraud exists. This is based on a ruling of the Privy Council reported in *Gangapershad Sahu* v. *Maharani Bibi* (2), and in the case before the High Court the District Judge appears to have done no more than give permission on the basis of a petition, which pointed out the necessity for the payment of a debt, and the loss which the minors would incur if the property were put to sale. This was held to be a substantial compliance with section 31 of the Guardians and Wards Act on the assumption that the Judge in granting the application containing those statements adopted them and as there was no fraud the Judge's permission must be held to be valid. This ruling was approved by this Court in a ruling reported in *Satrohan Singh* v. *Ganga Baksh Singh* (3), but nowhere in that judgment is it shown that the Judge acted contrary to the provisions of section 31. The real effect of this judgment is to show that if the Judge gave a valid sanction under section 31 such sanction would be protected by section 48, a point on which no ruling appears to be necessary. It also appears at page 43 of the judgment that the Judge was amply justified in sanctioning the sale in the minor's interest. On the other hand, there are two judgments of this Court which lay the greatest stress on the necessity of the Judge complying with the mandatory provisions of section 31(2). These are the rulings reported in *Gopal* v. *Mahtiba* (4), and in *Banke Lal* v. *Swami Dayal* (5). The latter is the latest Oudh ruling which deals with the point in issue and it confirms the earlier finding that the provisions of sub-section (2) of section 31 of the Guardians and Wards Act are mandatory and not merely directory, and an order which failed to recite the necessity for or the advantage of the transfer was held not to be a legal order which could be pleaded as sufficient sanction for a sale by a guardian. There is nothing really in this ruling which conflicts with the ruling above mentioned in *Thakur Satrohan Singh* v. *Thakur Ganga Bakhsh Singh* (3). It merely establishes the converse, namely, that permission to sell given by a District Judge if it is to claim the protection of section 48

(1) 5 Ind. Cas. 384; 11 C L. J. 197.

(2) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. N. S.) 1012 (P. C.)

(3) 49 Ind. Cas. 375; 6 O. L. J. 89 at p. 40. 1 N. P. L. R. O. 24.

(4) 2 Ind. Cas. 237; 12 O. C. 78.

(5) 56 Ind. Cas. 326; 23 O, C. 72; 7 O. L. J. 207, 2 U. P. L. R. (O) 82.

must comply strictly with the provisions of section 31 (2). There is only one more ruling to which I need refer, namely, that reported in *Nallaka Venkatasami* v. *Rajam Viranna* (6), in which it was held that the sanction of the District Court to an alienation of the minor's property by his guardian is only *prima facie* evidence that the transaction is a good one, but will not cure any inherent defect that may exist in it, and the minor may in future time show that it was fraudulent or improper and not for the benefit of the minor, but the burden of proof would be upon him to show that it was so. The combined effect of all these rulings is to show that a sanction given by the District Judge for the sale of a minor's property has no special sanctity in itself, but is open to attack on the ground not only that it was given as the result of fraud but that it was otherwise improper and did not comply with every requirement of sub-section (2) of section 31.

If then the plaintiff was able to show that the permission given by the District Judge for sale of his property in 1909 did not comply with the requirements of section 31 and was not in the minor's interest the plaintiff is entitled to challenge the sale in the present suit. The conditions of the section which have been described as mandatory are (1) that the Court shall recite the necessity or advantage of the transaction (2) that it shall describe the property and (3) that the order should be recorded, dated and signed by the Judge with his own hand or at least be dictated by him. The order of the District Judge in this case was passed on the 15th of December 1909 immediately on receipt of the application which is dated the 11th of December 1909. It ran as follows :—

"Permission to sell a portion of the property to defray debts of Rs. 6,700 given. Creditors with deeds will attend and the debts will be paid off before the Court."

Even if the ruling of the Calcutta High Court is accepted that the Judge may be assumed to have adopted the statement made in the application it would be difficult to find that this order is a satisfactory compliance with section 31 as far as this sale is concerned. The application contains a number of debts such as payment of land revenue, and money owed on decrees which were manifestly binding on the minors, and the amount of debts is shown as Rs. 6 700. This sale is for Rs. 1,800 and is not for those necessary debts but for numerous items some of them incurred by the father and some by the mother after she was appointed guardian, which could never have been held to be binding on the sons and for which there was no necessity to sell the property. The order, therefore, is defective because it does not show what property is to be sold. At best it was a preliminary order as is seen by the fact that the Collector was asked to report as to the value of certain properties with a view to their sale. In form, therefore, the order is clearly inadequate and I cannot see how it can be deemed to comply in substance with the requirements of the law. No doubt in some other papers filed there is evidence that the question of this sale came before the learned Judge more than once but I can find no evidence that he gave particular attention to the matter, and I am of opinion that had he done so he could not have sanctioned the sale of the minor's property in respect of several of the items shown in the sale-deed. Even if the appellants take up their stand on the position that their sale-deed can only be contested if there was fraud, they are not in the safe position of strangers who have been induced to purchase on the security given by the Judge's permission, for they are themselves creditors who have obtained payment of their own claims by this sale. On the first point then raised in appeal I am in agreement with the lower Court and I do not consider that the appellants can be protected merely by the order of the District Judge which in my opinion did not comply with the mandatory provisions of section 31 of the Guardians and Wards Act and was, therefore, not saved from challenge by section 48 of the same Act.

The learned Pleader for the appellants has tried to show that of the debts, those numbered by the lower Court as Nos. 1, 7, 9, 10, 11, 12, 13, and 14 were not binding on the minor. All these are unregistered mortgage-deeds said to have been executed by the minor's father, but as they were none of them executed on account of antecedent debt they are not binding upon the sons. On this point at least the

(6) 65 Ind. Cas. 964; 45 M. 429; 15 L. W. 373; 42 M. L. J. 333; (1922) M. W. N. 357; (1922) A. I. R. M. 135; 31 M. L. T. 484.

law has not been changed by the recent ruling of the Privy Council quoted in *Brij Narain* v. *Mangal Prasad*, (7) On this issue also I agree with the lower Court that only the sum of Rs. 140 was due from the minor's estate.

The last point was not taken in the lower Court or even in the grounds of appeal. I am, therefore, not prepared to consider it at the present stage. I, therefore, uphold the decision of the lower Court and dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(7) 77 Ind. Cas. 689; 46 A. 95 at p. 104; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 63; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C) 50; 33 M. L. T. 457; 26 Bom. L. R. 500 (P. C).

CALCUTTA HIGH COURT.

CIVIL RULE NO. 193 OF 1924.

May 19, 1924.

Present :—Mr. Justice Pearson and Mr. Justice Graham.

RADHA KANTA DAS—PLAINTIFF—PETITIONER
versus
PANKOJINI DEVI—DEFENDANT—OPPOSITE-PARTY.

Calcutta Rent Act (III of 1920) s. 18—Application for fixing standard rent—Premises let for brothel—Rent Controller whether will intervene—Sub-lease in favour of prostitutes—Contract whether rendered illegal.

The mere fact that the tenanted house is occupied by prostitutes as sub-lessees does not necessarily affect the validity of the contract between the landlord and the tenant. [p. 682, col. 2.]

But where the premises are let out for the purpose of continuing a brothel and are used as such, the contract becomes void and the Rent Controller will not intervene in an application of a party for fixing standard rent. [p. 682, col. 2.]

Rule against the order of the Controller of Rents, Calcutta, in Standard Rent Case No. 702 of 1923, dated the 14th December 1923.

Babu *Bepin Chandra Mulhick*, for the Petitioner.

Babu *Mritunjoy Chatterjee*, for the Opposite-Party.

JUDGMENT.

Pearson, J.—This is a Rule calling upon the opposite-party to show cause why the order of the Rent Controller should not be set aside. The Rent Controller held that the contract of tenancy was void as the house was let out for immoral purpose and the Rent Act did not apply.

It has been argued by the learned Vakil appearing for the petitioner that the mere fact that the tenanted house is occupied by prostitutes as sub-lessees does not necessarily affect the validity of the contract between the landlord and the tenant. With that I agree. There is a finding, however, on the part of the Rent Controller from which it appears that he is quite satisfied that it has been established that the premises have long been used as a brothel and are so still that there are other brothels in the neighbourhood and that the premises were let out to the applicant for the purpose of continuing the brothel there, the applicant's mother being, according to the finding, herself an elderly prostitute or, *bari Walli*. It is argued that there is no foundation to be discovered in the evidence upon which such a finding could be arrived at. But this, I am satisfied, is not so. On the contrary I think there is evidence on the record from which the Rent Controller could have come to the conclusion that he has.

Then it is also said that suits have been filed in the High Court and also in the Small Cause Court for rent and ejectment upon the footing of the valid tenancy existing between the parties. That to my mind has nothing to do with the present application.

It is also argued that if the agreement is void as being contrary to public morals, that is a fact which cannot be relied upon by the opposite-party as an advantage to himself as was decided in the case of *Bani Muncharam* v. *Regina Stanger*(1). That, however, was a suit for ejectment and it seems to be quite a

(1) 32 B. 581; 10 Bom. L. R. 318.

different matter, where as in the present case the question is whether or not the Rent Controller ought to intervene on an application of a party for fixing standard rent.

In my opinion the rule should be discharged with costs. Hearing fee one gold mohur.

Graham, J.—I agree.

K. S. D. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO 25 OF 1924.

August 18, 1924.

Present :—Mr. Wazir Hasan, J. C.

MANNI LAL—DEFENDANT—APPELLANT
versus
MOOL CHAND—PLAINTIFF
—RESPONDENT.

Appeal—Burden of proving judgment to be wrong on appellant.

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. [p. 688, col 2.]

Nabakishore Mandal v. *Upendrakishore Mandal*, 65 Ind. Cas. 305; 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 258; 24 Bom. L.R. 846; 15 L. W. 417; 30 M.L. T.234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.), relied upon.

Appeal against the decree of the Additional Subordinate Judge, Lucknow, dated the 24th March 1924.

Messrs. *Niamat Ullah*, *Ali Zaheer* and *H. D. Chandra*, for the Appellant.

Messrs. *Bisheshar Nath*, *Hakim-ud-din*, *Ganga Dayal* and *Rampatram*, for the Respondent.

JUDGMENT.—This is the defendant's appeal. It arises out of a suit for a declaration that the house described at the foot of the plaint belongs to the plaintiff and not to the defendant. The plaintiff is the son of the defendant. The house was purchased under a sale-deed, dated the 19th April 1922 for a sum of Rs. 5,000. The deed is in the name of the defendant.

The plaintiff's case, however, is that the defendant's name was used *benami*, and that the plaintiff paid the purchase-money, has been in possession of the house and is consequently the owner of it. The defence is that the ostensible title is the real title to the house in question. The lower Court has considered the case in all its details and come to the conclusion that the sale consideration proceeded from the plaintiff. The decision of the Court below has been criticised in all particulars.

I have, however, come to the conclusion that the decree passed by the lower Court should not be interfered with. In deciding this appeal I place before myself the *dictum* of Lord Buckmaster in the case of *Nabakishore Mandal* v. *Upendrakishore Mandal* (1) for my guidance. "In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded." Each party has produced evidence in support of his respective case and in this mass of conflicting evidence I have to discover some cardinal fact which, if well established, would turn the balance. It is nobody's case that one part of the price was paid by one party and another by the other. Each party claims to have paid the entire consideration.

It is common ground that the sum of Rs. 2,000 out of the entire purchase money Rs. 5,000 was raised by mortgaging the house in question on the same day on which the sale-deed was registered. The deed of mortgage was naturally executed by the defendant in whom vested the ostensible title under the sale-deed. It is the plaintiff's case that out of the balance of Rs. 3,000 he paid Rs. 1,000 by means of a currency note. On the

(1) 65 Ind. Cas. 305; 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 263; 24 Bom. L. R. 846; 15 L. W. 417; 30 M. L. T. 284; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.)

date of the sale there stood an incumbrance as against the house in favour of one Bache Lal. It is proved by documentary evidence that Bache Lal received a currency note of Rs. 1,000 in discharge of his encumbrance. His books bear the number of the note and it is further proved to my entire satisfaction that this identical note was obtained by the plaintiff from one Puttu Lal, who served as a *munim* at the firm of Khunkhunji in the city of Lucknow and the plaintiff used to work for that firm and received his wages in large sums and sometimes in advance. In agreement with the lower Court I find, therefore, that the sum of Rs. 1,000 represented by the currency note was paid by the plaintiff. The defendant does nothing more on this part of the case than attribute forgery and perjury to the plaintiff and to his witnesses. There is no doubt that certain features of the evidence in this connection raise suspicion but on mere suspicion I cannot reverse the finding of the Court below. The plaintiff, therefore, having proved that he paid Rs. 1,000 out of Rs. 3,000 from his own pocket it is a reasonable presumption to make in the circumstances of the case that he paid the rest also. The evidence produced by the plaintiff in support of this case when considered in the light of the presumption just now mentioned acquires credence which has been given to it by the Court below.

The appeal fails and is dismissed with costs.

G. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 837 OF 1922.

April 8, 1924.

Present :—Mr. Justice Walsh, Acting Chief Justice, Mr. Justice Piggott, Mr. Justice Kanhaiya Lal, Mr. Justice Daniels, and Mr. Justice Mukerji,

GAJADHAR—DEFENDANT—APPELLANT

versus

JAGANNATH—PLAINTIFF—RESPONDENT.

Hindu Law—Joint Family—Time-barred debt—Alienation of family property—Father, power of—Pious obligation of sons.

A time-barred debt can constitute a valid antecedent debt as consideration for a sale-deed given by a father of a joint Hindu family alienating joint ancestral family property.

Indar Singh v. *Sarju Singh* 11 Ind. Cas. 737 ; 8 A. L. J. 1099 ; *Dalip Singh* v. *Kundan Lal*, 18 Ind. Cas. 726; 11 A. L. J. 244; 35 A. 207, overruled.

Ram Kishen Rai v. *Cheddi Rai*, 68 Ind. Cas. 235; 20 A. L. J. 577; 44 A. 628; (1922) A. I. R. (A) 402, approved.

Per Kanhaiya Lal, J.—Under the Hindu law it is well recognised that the father has a larger power of disposal over the ancestral and joint family property than an ordinary manager, the reason being that his sons and grand sons are under a pious obligation to discharge his just and lawful debts which may have remained unpaid. Apart from the question of family necessity or common benefit, it is open to the father to pay such a debt by an alienation of the joint family property, though the debt may had become barred by limitation because what can be revived by the father and may be recovered from him by the attachment and sale of the family property, can also be recovered from his sons and grandsons, that is to say, from the joint family estate in their possession. [p. 686, col. 2.]

Narayanasami Chetti v. *Samidas Mudali*, 6 M. 293; 7 Ind. Jur. 357 ; 2 Ind. Dec. (N. S) 483 ; *Sheoram Pande* v. *Sheoratan Pande*, 63 Ind. Cas. 279; 43 A. 604 at p. 606 ; 19 A. L. J. 613; *Harihar Bakhsh Singh* v. *Bharat Prasad*, 20 Ind. Cas. 590 ; 16 O. C. 185 ; *Muthusamy* v. *Subramania*, 14 Ind. Cas. 69 ; 11 M. L. T. 142 ; (1912) M. W. N. 453; *Naro Gopal* v. *Paragowda*, 39 Ind. Cas 23 ; 41 B. 347; 19 Bom. L. R. 69; *Udai Chunder Chuckerbutty* v. *Ashutosh Das*, 21 C. 190; 10 Ind. Dec. (N. S.) 759; referred to.

A promise to pay a barred-debt is in fact neither illegal nor immoral; and a son cannot escape liability merely because the debt, which his father had agreed in writing to pay, was one the payment of which he could have legally avoided. [p. 688, col. 1.]

Chimnaji Gobind v. *Dinkar*, 11 B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S.) 209, distinguished.

A debt revived by the father cannot be regarded as an *avyavahark* debt, or a debt not recognised by law or usage either under the old Hindu Law or under the law now in force. [p. 688, col. 2.]

A Hindu widow is competent to transfer the property, which she has received from her husband, to pay a debt due by him though it may have been barred by limitation, so as to bind the reversionary heirs of her husband. [p. 686, col. 2, & p. 687, col. 1.]

Harihar Baksh Singh v. *Bharat Prasad*, 20 Ind. Cas. 590; 16 O. C. 185 ; *Kondappa* v. *Subba*, 18 M. 189 ; 4 Ind. Dec. (N. S.) 844 ; *Bhagwat Bhaskar Koranne* v. *Nivrutti Sakharam*, 21 Ind. Cas. 356 ; 39 B. 113 ; 16 Bom. L. R. 135; *Shib Nath* v. *Alliance Bank of Simla Limited*, 25 Ind. Cas. 450 ; 110 ; P. W. R. 1914 ; 215 P. L. R. 1914 ; 3 P. R. 1915; referred to.

A debt, which was barred by time and has been revived stands on the same footing as a debt which

is not time-barred; and if it is enforceable against the father, it is also enforceable against his sons and grandsons provided it was not taken for an illegal or immoral purpose. An alienation made to pay such a debt is, therefore, valid and can bind the interests of the sons and grandsons of the person making the alienation. [p. 689, col. 1.]

Shib Nath v *Alliance Bank of Simla Ltd.*, 25 Ind. Cas. 480; 110 P. W. R. 1914; 215 P. L. R. 1914, 3 P. R. 1915; followed.

Appeal from a decree of the Officiating District Judge, Agra, dated the 7th April, 1922.

Mr. *B. N. Vyas* and Mr. *N. P. Asthana*, for the Appellant.

Messrs. *A. Sanyal* and *P. L. Banerji*, for the Respondent.

ORDER OF REFERENCE TO FULL BENCH.

Daniels and Dalal, JJ.—This appeal raises the question whether a time-barred debt can constitute antecedent debt for the purpose of supporting an alienation by the father who is a member of a joint Hindu family with his son. The point is one on which there is a conflict of ruling in this Court and we have been asked on that account to refer the matter to a Full Bench for decision. In the recent case of *Ram Kishan Rai* v. *Chhedi Rai* (1), it was held that the fact of the debt being time-barred was immaterial on the ground that the doctrine of pious action takes no account of the law of limitation. A Madras case was cited in support of the view. The same view was taken in Oudh by a Bench of two Judges both of whom are now members of this Court in 16 Oudh Cases page 185. On the other hand, there are two cases of this Court in which a contrary view has been held. The first is *Indar Singh* v. *Surju Singh* (2). The second is *Dalip Singh* v. *Kundan Lal* (3). In view of this conflict of authority we direct that the appeal be laid before the Chief Justice with a view to the question being decided by a Full Bench.

OPINION OF THE FULL BENCH

Walsh A. C. J.—The question referred to this Full Bench having been amended during the argument is as follows: "whether a time-barred debt can constitute a valid antecedent debt as consideration for a sale-deed given by a father of a joint Hindu family alienating joint ancestral family property?"

I entertain no doubt that the question ought to be answered in the affirmative and I do not propose to add to the reasons given by my brothers.

Piggott, J.—This question has been referred to a Full Bench by reason of a conflict in authority, understood to exist between the decision in *Ram Kishan Rai* v. *Cheddi Rai* (1), and certain older decisons of this Court, more particularly *Dalip Singh* v. *Kundan Lal* (3). In this later case the learned Judges quoted with approval, and purported to follow an older decision of a Bench of this Court of which I was myself a member in the case of *Indar Singh* v. *Suraj Singh* (2). I apprehend that the result of the decision which we are to-day pronouncing will be to overrule this case, as also *Dalip Singh's* case. I, therefore, feel it incumbent upon me to say a few words in explanation of my own position; otherwise I should have been content to leave this question to be decided on the authority of the Hindu Judges who are members of this Bench. As a matter of fact I should unhesitatingly have concurred with the learned Judges who decided *Ram Kishan Rai's* (1) case. Under section 25 of the Indian Contract Act a Hindu father like any other person, can enter into a valid contract by promising to pay a debt formerly incurred by himself, that payment of which can no longer be enforced by reason of the law governing the limitation of suits. If a Hindu father enters into a contract of this nature he incures a legal liability personal to himself from the date of this new contract. The liability does not, as it seems to me, differ in principle from that which the father incurred when he contracted the debt originally. The sons, therefore, can be made liable in a suit upon a promissory note or simple bond executed by their father the consideration for which was a previous debt which was statute-barred when the said bond or promissory note was executed. It does not seem to me, however, that this principle of law suffices to determine the question which this Court had to decide in *Inder Singh* v. *Sarju Singh* (2). Suppose a Hindu father, instead of giving a simple money bond in satisfaction of

(1) 68 Ind. Cas. 285; 20 A. L. J. 577; 44 A. 628; (1922) A. I. R. (A) 402.
(2) 11 Ind. Cas. 737; 8 A. L. J. 1099.
(3) 18 Ind. Cas. 776; 11 A. L. J. 244; 35 A. 207.

the statute-barred debt, enters into a contract of mortgage which involves an alienation of joint ancestral property belonging to himself and his sons. The real meaning of the decision in *Indar Singh* v. *Sarju Singh* (2) is that in the opinion of the learned Judges who decided that case, the antecedent debt of his own in satisfaction of which a Hindu father may make an alienation of joint ancestral family property which his sons cannot question except on the plea that such debt was contracted for immoral purposes must be an antecedent liability which is still enforceable against the father on the date on which the alienation of joint family property is effected. We were really applying the principle laid down by the majority of the Full Bench of this Court in Chandra Deo's case and subsequently affirmed by their Lordships of the Privy Council, subject to this that we interpreted the words "antecedent debt" in that case as equivalent to "a subsisting liability, previously incurred." On the date on which the Hindu father, in the case which we are supposing, executed the contract of mortgage, he was under no liability enforceable against him by law; he created a liability enforceable against himself when he signed the contract of mortgage. That liability we treated as being on the same footing as the liability which the father might incur by raising a loan on the security of joint family property under the very contract of mortgage which he was signing. We held, ineffect,that a liability against the father which only came into existence when he signed the contract of mortgage could not be treated as an antecedent liability validating an alienation of joint family property on the principle laid down in Chandra Deo's case. I have now had an opportunity of considering the entire question in the light of the arguments which havelbeen addressed to us and of the opinions expressed by the senior Hindu Judge who is a member of this Bench. Undoubtedly the pious duty of Hindu sons to discharge their father's debts, not tainted with immorality, cannot be affected by the usual statute of limitation. In the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangal Prasad Rai* (4), their Lordships of the Privy Council have summed up the law on this question of alienations of co-parcenary property by the manager of a joint undivided estate. They have expressly laid it down that if such manager is the father, he may by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. It seems to me to follow that if the father, instead of waiting for a decree to be passed and the estate to be taken in execution himself sells a portion of that estate in order to satisfy a previous debt of his own not incurred for immoral purposes, the sons by reason of their pious duty can no more challenge a voluntary alienation of this sort than they could have done an auction sale in execution of a simple money decree. In this view of the case it seems to me the principle of the antecedent debt can no longer be rightly interpreted as it was done by us in the case reported in *Indar Singh* v. *Suraj Singh* (2) as if the expression were equivalent to an existing liability antecedently incurred. Stress must be laid on the fact that the debt was one incurred by the father prior to and altogether independently of, the alienation of the joint family estate by which he proposes to satisfy it. I concur, therefore, in the answer proposed to the question before us for decision.

Kanhaiya Lal, J.—The question for consideration in this case is whether a time-barred debt can constitute a valid antecedent debt for the purpose of supporting an alienation, by the father of an ancestral or joint family property.

Under the Hindu law it is well recognised that the father has a larger power of disposal over the ancestral and joint family property than an ordinary manager, the reason being that this sons and grandsons are under a pious obligation to discharge his just and lawful debts which may have remained unpaid. Apart from the question of family necessity or common benefit, it is open to the father to pay such a debt by an alienation of the joint family property, though the debt may have become barred by limitation, because what can be revived by the father and may be recovered from him by the attachment and sale of the family property can also be recovered from his sons and grandsons, that is to say, from the joint family estate in their possession.

(4) 77 Ind. Cas. 689; 46 A. 95 at p. 104 ; 21 A. L. J. 934 ; 46 M. L. J. 23 ; 5 P. L. T. 1 ; 28 C. W. N. 253 ; (1924) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O.& A. L. R. 82 ; 33 M. L. T. 457 ; 26 Bom. L. R. 500 ; 11 O. L. J. 107 (P. C.)

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In the view of the Hindu lawyers a debt due is not merely an obligation but a sin, the consequences of which follow the debtor in the next life. Vrihaspati says, "He who, having received a sum lent or the like, does not repay it to the owner will be born hereafter in his creditor's house a slave, a servant, a woman, or a quadruped." Narada similarly says, "when a devotee or a man who maintained a sacrificial fire, dies without having discharged his debt, the whole merit of his devotions or, of his perpetual fire, belongs to his creditors."

The duty of relieving a person from the evil consequences of his debts, remaining unpaid, therefore, lies very heavily upon his sons and grandsons; and the only limitations, which the law recognizes, are that the debts must not be illegal or immoral and that the obligation would only be enforceable against the family estate. Narada says that "Fathers desire offspring for their own sake, reflecting that 'their sons will redeem them from every debt whatsoever due to superior and inferior beings.' In fact the older the debt the greater the responsibilities on the descendants of the man who leaves the debt unpaid. Vrihaspati accordingly lays down, "The father's debt must be first paid and next the debt contracted by the man himself but the debt of the paternal grandfather must even be paid before either of these." To the same effect is a dictum of Katyayana who declares: "The Judge shall compel a son to pay the debt of his father, provided he be involved in no distress, be capable of property and liable to bear the burden, but in no other case shall he compel the son to pay his father's debt."

A further restriction has now been introduced by the law of limitation. A son is not liable for the payment of a debt due by his father, if it was not legally recoverable from him, had he been alive. But a time-barred debt may be revived by father, and when so revived, it stands on the same footing as a debt enforceable against him in his life-time. Under section 25 of the Indian Contract Act, IX of 1872, it is open to a person against whom a debt has become barred by time to make a promise in writing to pay that debt, and such a promise would form a good consideration for a sale made to pay that debt. Under sections 60 and 61 of that Act, a creditor can law fully appropriate a payment not made for any specific purpose, towards a debt, barred by time. A contract in writing to pay such a debt may for certain purposes be treated as an independent contract; but the liability, which it renews, is a liability, which existed from before, though for the time being it may have ceased to be enforceable. The Hindu Law did not recognize any rule of limitation for the recovery of debts. Every debt which was lawful was binding and recoverable from the debtor irrespective of the period which may have elapsed since the original liability was incurred, and no restriction on its recovery was recognized beyond this that at no time more than double the amount of the principal money could be claimed.

A debt may become irrecoverable under the law now in force by reason of the lapse of the period of limitation, but the debt exists all the same, and if a person chooses to pay a time barred debt in the manner permitted by section 25 of the India n Contract Act, the debt which he chooses to pay remains the same debt, though by reason of the contract, which he enters into, it assumes a new garb and gains a fresh vitality.

As pointed out in *Subramania Aiyar* v. *Gopala Aiyar* (5) a right to receive the payment of a debt, as distinct from a right to enforce its payment, subsists even after the remedy by auction has become barred by time; and if the debt exists and the debtor is willing to pay it by an alienation of the family property, such an alienation, if otherwise valid, can bind his sons and grandsons, to the same extent as if the said debt had been revived by the debtor, and was sought to be recovered by the creditor by the attachment and sale of the family estate.

In *Narayanasami Chetti* v. *Samidas Mudali* (6), it was held that the liability of a Hindu son to pay the money due on a promissory note executed by his deceased father in consideration of his debt, which had been declared barred by limitation could be validly enforced against the assets of the father.

(5) 7 Ind. Cas. 89[illegible]; 33 M. 303; 20 M. L. J. 633; 8 M. L. T. 321.

(6) 6 M. 393 : 7 Ind. Jur. 35[illegible]; 2 Ind. Dec. (N. S.) 483.

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In *Sheoram Pande* v. *Sheoratan* (7) it was pointed out that in the matter of the pious obligation, the Hindu Law made no difference between a time barred debt and a debt which was not so barred; and in *Ram Kishen Rai* v. *Chedi Rai* (1), it was similarly held that in asmuch as the Hindu Law did not recognise any rule as to the extinction of claims by the efflux of time, the sons in a joint Hindu family were not exempt from the payment of bonds executed by their father merely because such bonds were given by way of a renewal of other bonds, which at the time of the execution of the former were barred by limitation. The same principle was recognised in *Harihar Baksh Singh* v. *Bharat Prasad* (8), and *Muttuswamy* v. *Subramanya* (9). A promise to pay a barred debt is in fact neither illegal nor immoral and a son cannot escape liability merely because the debt, which his father had agreed in writing to pay, was one, the payment of which he could have legally avoided.

Our attention has been drawn to the decision in *Indar Singh* v. *Sarju Singh* (2), and *Dalip Singh* v. *Kundan Lal.* (3). In the former case Knox, J., who delivered the judgment of the Bench, after pointing out that he had not been referred to any text of Hindu Law, or any precedent, bearing upon the point, observed: "There is no doubt that the Hindu Law did not recognise the principle of limitation with reference to debts; at the same time the fact remains that if the creditor had tried to sue for the debt at the time that the mortgage was entered into, or if the father had executed a mortgage on the basis of an acknowledgment of such time-barred debt, the debt could not have been recovered or the mortgage lien enforced in our Courts." It is difficult to understand the latter observation, because if the father had executed a mortgage on the basis of such a time-barred debt, or an acknowledgment had been made before the debt had become barred by time, a suit for the recovery of the debt either on the foot of that mortgage or on the foot of that acknowledgment could have been easily maintainable. It may, however, be assumed that the acknowledgment therein referred to was an acknowledgment made or supposed to have been made after the debt had become barred by time; but even if that was so, the debt, if revived by a mortgage in writing, would for the purpose of enforcing the pious obligation be a good and valid debt, unless it was shown to have been taken for an illegal or immoral purpose. In the second case, the ground of distinction between cases where legal necessity is proved and those where an antecedent debt is proved to have existed does not appear to have been recognized. A debt taken for legal necessity, whether taken by a father or by any other manager is binding on all the members of the joint family but an alienation made to pay an antecedent debt, *not so taken* by a manager, who is not the father, is not so binding. The rule which enforces an alienation made to pay an antecedent debt, not shown to have been taken for legal necessity or common benefit, nor shown to have been taken for an illegal or an immoral purpose, rests entirely on the theory of pious obligation; and where such a pious obligation exists, an alienation made to pay such an antecedent debt by a father is held to be binding on his sons and grandsons.

Reference has also been made to the decision in *Naro Gopal* v. *Paragowda* (10), but in that case a time barred debt was held sufficient to support an alienation by a father of his interest in the joint family property, and the question now at issue was not definitely considered.

It is argued that a time barred debt is not a *Vyavaharik* debt within the meaning of the text of *Ushanas*, cited in the *Mitakshara*. But a debt revived by the father cannot be regarded as an *avyavaharik* debt, or a debt not recognized by law or usage either under the old Hindu law or under the law now in force.

The case of an alienation effected by a Hindu widow to pay a debt due by her deceased husband, if barred by time, presents a useful analogy for the purpose of guiding the decision of this question. It is well settled that a Hindu widow is competent to transfer the property, which she has received from her

(7) 63. Ind. Cas. 279; 43 A 604 at p. 606; 19. A. L. J. 185.

(8) 20 Ind. Cas. 590; 16 O. C. 185.

(9) 14 Ind. Cas. 69; 11 M.L. T. 142; (1912) M. W. N. 649.

(10) 89 Ind. Cas. 23; 41 B. 347; 19 Bom. L. R. 69.

husband to pay a debt due by him though it may have been barred by limitation, so as to bind the reversionary heirs of her husband *Udai Chander Chakerbutty* v. *Asutosh Das*(11), *Chimnaji Govind* v. *Dinker* (12), *Kondappa* v. *Subba* (13), *Bhagwat Bhaskar Karanne* v. *Nivratti Sakharam* (14) and *Sheoram Pande* v. *Sheoratan Pande* (7). The principle underlying that rule is that she is under a pious obligation in a reasonable measure to promote the spiritual benefit of her husband whose estate she has inherited ; and one of the ways in which this benefit can be promoted is by getting him released from the penalty or sin of leaving his debts unpaid. A son is in a more independent position because he acquires a right in the family property by birth, but he too is under a pious obligation to save his father from a similar penalty and to pay the debts due by him, if not illegal or tainted with vice. If a Hindu widow can validly alienate property to pay time-barred debts due by her husband, a Hindu father can similarly alienate property to pay the time barred debts due by him in order to release himself from the sin of having left them unpaid, so as to bind his sons and grandsons. In *Shib Nath* v. *The Alliance Bank of Simla Ltd* (15)it was accordingly held that under the Hindu Law the payment of a debt due by the father, though time-barred, was a pious duty, and such a debt was a good antecedent debt, however, old it might be. A debt, which was barred by time and has been revived, stands on the same footing as a debt which is not time barred ; and if it is enforceable against the father, it is also enforceable against his sons and grand-sons, provided it was not taken for an illegal or immoral purpose. An alienation made to pay such a debt is, therefore, valid and can bind the interests of the sons and grandsons of the person making the alienation.

The reply to the question is, therefore, in the affirmative.

Daniels, J.—The answer to the question referred to us lies in a very brief compass. It is settled law that a father can alienate joint family property in lieu of his own antecedent debt when such debt was neither illegal nor immoral. Does a debt cease to be a debt because its recovery is barred by the statute of limitation? Clearly not. Limitation extinguished the remedy, but except in the case covered by section 28 of the Limitation Act does not destroy the right. Section 28 applies only to suits for possession of property and has no application to the case of a debt. Hindu law moreover recognises no limitation for debts. Even under the Contract Act a time barred debt is still recognised as a valid consideration for a contract.

There is another way of looking at the matter which leads to the same result. The sons' liablity admittedly arose from the pious obligation which lies on them to pay their father's debt. Now a pious obligation is necessarily independent of a modern statute of limitations. It may be legal to evade payment of a just debt by taking shelter under the law of limitation, but such conduct is generally regarded as dishonest, and this is still more the case under the Hindu system of law under which the obligations of payment of debts is elevated into a religious duty.

For these reasons I concur in answering the question in the affirmative.

Mukerji, J.—I also agree in answering the question put to us in the affirmative.

I shall add just a few words. According to the *Mitakshara* law as translated by Colebrook, Chapter 5, p. 188, a son is asked to relinquish his own share in the property so that the debts of his father may be paid off. This is really the foundation of the principle that a Hindu father may alienate the joint family property in order to pay off his own antecedent debts, although such debts may not have been incurred for the benefit of the family. A debt does not cease to be a debt by being barred by limitation. Even under Anglo-Indian law a barred debt forms a good consideration for a fresh contract. Under the Hindu Law, which knew of no rule of limitation for the enforcement of a debt, the rule would apply with much more force. It, therefore, seems clear to me that a father can alienate family property in order to pay off his antecedent debts, though such debts can-

(11) 21 C. 190 10 Ind. Dec. (N. S.) 759.
(12) 11 B. 8 320 ; 11 Ind. gun 342 ; 6 Ind. Dec. (N. S.) 209.
(13) 13 M. 189 ; 4 Ind. Dec. (N. S.) 844.
(14) 27 Ind. Cas. 356 ; 39 B. 118; 16 Bom. L. R. 788.
(15) 25 Ind. Cas. 480 ; 110 P. W. R. 1914 ; 215 P. L. R. 1914; 8 P. R. 1915.

not be enforced in British Courts of law on account of the rule of limitation.

By the Court:—The order of the Court is that the question be answered in the affirmative and the appeal remitted to Mr. Justice Daniels and Mr. Justice Dalal for final dispcsal.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2269 OF 1919.

October 10, 1923.

Present:—Mr. Justice Fforde and
Mr. Justice Scott Smith.

JOWALA RAM AND OTHERS—DEFENDANTS —APPELLANTS
versus
HARI KISHEN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Gift by widow to daughter as dowry, validity of—Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Appeal—Death of respondent—Abatement—Delay in making application—Ignorance of death.

Delay in making an application for bringing the legal representatives of a deceased respondent on the record may be excused where the deceased had no stationary residence and the appellants did not become aware of his death till after the expiry of the period of limitation prescribed for making an application for substitution. [p. 690, col. 2]

A gift by a Hindu widow of a reasonable portion of the estate of her deceased husband in favour of her daughter on the occasion of the latter's marriage for purposes of dowry is valid in law and binding on the reversioners. [p. 691, col. 1.]

Churaman Sahu v *Gopi Sahu*, 1 Ind. Cas. 945; 37 C. 1; 18 C. W. N. 994; 10 C. L. J. 515; *Ramasami Ayyar* v. *Vengidusami Aiyyar*, 22 M. 113; 8 M. L J. 170; 8 Ind Dec. (N. S.) 79, relied on.

A gift of less than one-quarter of the husband's estate is a gift of a reasonable portion within the meaning of the above rule. [p. 691, col. 2.]

Appeal from the order of the District Judge, Ambala, dated the 4th August 1919, confirming the order of the Senior Sub-Judge, Ambala, dated the 31st January 1919.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Govind Ram Khanna*, Dr. *G. C. Narang*, for the Respondents.

JUDGMENT.—A preliminary objection to this appeal has been raised, namely, that the appeal has abated by reason of the death of Naurang Singh, one of the plaintiff-respondents.

Naurang Singh died on the 16th July 1922 and an application to make his legal representatives a party was not made until the 3rd April 1923. As the application was not made within the time limited by law the appeal has abated so far at least as Naurang Singh is concerned.

We are asked, however, to set aside the abatement on the ground that the appellants were prevented by sufficient cause from applying within the proper time to continue the appeal. It appears that the deceased respondent had no stationary residence. He sometimes lived in the Muktsar *Tahsil* of Ferozepore District and sometimes at Dayalpure in the Patiala State. The appellants live at Phagwara in Kapurthala State. We are satisfied that the appellants were ignorant of the death of this respondent and that they have shown sufficient cause for not making the application within the prescribed period of limitation. We accordingly overrule the preliminary objection and set aside the abatement.

The subject matter of the litigation which has resulted in this appeal consists of 70 *bighas* of agricultural land alleged to have been gifted by one *Musammat* Parmeshri upon the occasion of her daughter's marriage The facts so far as it is necessary to state them for the purpose of making our judgment clear are briefly as follows.

One Labh Singh died in 1907, leaving a real estate consisting of 300 *bighas* proprietary rights and 700 *bighas* of which he was mortgagee.

He died sonless, leaving a widow *Musammat* Parmeshri and one daughter *Musammat* Malavi mentioned above.

Upon his death life-interest in the estate devolved on the widow under Hindu Law. In 1909 the daughter married Madan Gopal and it is alleged that upon the occasion of this marriage 70 *bighas* of the 300 was gifted by

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Musammat Parmeshri to her daughter as dowry. These are the 70 *bighas* in dispute. Mutation was entered on the 12th December 1919. *Musammat* Malavi died in October 1916, predeceasing her mother who died on the 17th June 1917. The plaintiffs—respondents' contention is that after the death of the widow and daughter the property should revert to them while the defendants—appellants contend that the land having been given as dowry on the occasion of the daughters' wedding, the latter was entitled to it absolutely and that they (defendants) are entitled to succeed to it as her heirs. Mr. Gobind Ram for the plaintiffs-respondents contends, first of all, that there is no finding of the lower Appellate Court to the effect that the land in dispute was in fact gifted to *Musammat* Malavi by her mother on the occasion of the former's marriage. There is a clear finding to this effect by the Court of first instance and this finding has been adopted bythe learned District Judge, who commences his judgment by stating that the facts of the case appear quite clearly from the lower Court's judgment with which he entirely agrees. The question of the factum of the gift and of the occasion upon which it was made do not appear to have been disputed in the lower Appellate Court and we accordingly find against Mr. Gobind Ram's contention on this portion of the case.

The only other point left for our determination is whether *Mt.* Parmeshri could under Hindu Law validly gift any of the property which she inherited from her husband as tenant for life absolutely to her daughter. There are many circumstances under which a Hindu widow can make an absolute gift of a reasonable or moderate portion of her deceased husband's estate and amongst them is the case of a gift upon the occasion of the marriage of a daughter provided that the gift is confined to a reasonable portion of the estate of the deceased. It has been held in *Churaman Sahu* v. *Gobi Sahu* (1) that it is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her deceased husband to her daughter on the occasion of the latter's *gowna* ceremony and that such a gift is binding upon the reversionery heirs of her husband. We can see no distinction between a gift made upon the occasion of a daughter's *gowna* ceremony and a gift made as dowry upon the occasion of a daughter's marriage. It has been held in the case *of Ramasami Aiyar* v. *Vengidusami Aiyar* (2) that a mother who had acquired the estate of her deceased son could make a valid gift of a portion of the property to her son-in-law on the occasion of his marriage with her daughter provided that the gift was not found to be otherwise than reasonable in extent.

We are entirely in agreement with the principle established by these two cases that a gift by tenant for life of a reasonable portion of the estate of a deceased Hindu for the purpose of dowry is valid in law provided that it dors not exceed a reasonable portion of the inheritance.

The only question which remains then is as to whether or not the amount gifted in the present suit exceeds a reasonable portion of the immoveable property of the deceased Labh Singh. The portion of the gifted land amounts to less than ¼th of the proprietary rights of land. The donee would have been entitled, had her mother predeceased her, to the entire of the property absolutely. We find that it is impossible under the circumstances of this case to hold that the portion gifted is not a reasonable portion of the whole inheritance. In the case of *Churaman Sahu* v. *Gobi Sahu* (1) the property in dispute was found to have been a little more than ¼th and a little less than 1/3rd of the total value of the deceased's immoveable property of the estate. In the present case the total value of the gifted portion amounts to something less than ¼th of the whole estate. We accordingly hold that in the present case the gift of the land in dispute was both proper and reasonable and conferred an absolute title upon *Mt.* Malavi.

We accordingly accept the appeal and dismiss the suit with costs throughout.

Z. K. *Appeal allowed.*

(1) 1 Ind. Cas. 945 ; 37 C. 18 C. W. N. 994 ; 10 C. L. J. 545.

(2) 22 M 113 ; 8 M. L J. 170 ; 8 Ind. Dec. (N. S.) 79.

ZAMIN HUSAIN KHAN *v.* TASADDUQ ALI KHAN

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 44 OF 1923.

August 6, 1924.

Present:—Mr. Kendall, A. J. C.

ZAMIN HUSAIN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TASADDUQ ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Dower—Debt—Widow's right—Charge—Decree for mesne profits *against husband's estate—Precedence of widow's claim—Widow forestalling other creditors—Fraud—Suspicion—Legal testimony.*

A Muhammadan widow has a right to payment of her dower debt. That right does not amount to a charge on the property, but if the widow is in possession at the death of her husband, she is allowed to retain possessionuntil the debt is paid. [p. 692, col. 2.]

A Muhammadan widow is a creditor of her sons to the extent of her dower-debt and her right, which is created on the date of her marriage, must have precedence over the right of a person who subsequently obtains a decree for *mesne profits* against the estate. [p. 693, col. 2.]

If a widow wishes to forestall other creditors and obtain what is due to her first, there is nothing fraudulent in her action in carrying such a wish out. [p. 693, col. 2.]

Narasimunnissa v. *Abdul Kadir*, 43 Ind. Cas. 280; 20 O. C. 295; *Musahar Sahu* v. *Hakim Lal*, 32 Ind. Cas. 343; 43 C. 521; 20 C. W. N. 893; 30 M.L.J. 116; 8 L. W. 207; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203: 23 C. L. J. 406; 18 Bom. L. R. 878; (P. C.), referred to.

A court's decision must rest not upon suspicion but upon legal grounds established by legal testimony.

Appeal from the decree of the Subordinate Judge, Kheri, dated July 23 1923, in Original Suit No. 37 of 1923.

Mr. *M. Wasim*, for the Appellants.

Mr. *Haidar Husain*, for the Respondents.

JUDGMENT.—The principal plaintiff-appellant in this suit had obtained a decree for *mesne profits* against Azim Ullah Khan and Khan Ali Khan in the circumstances tated in the pleadings. On the death of Khan AsliKhan his widow and three sons, who are the present defendants-respondents, were made parties to the proceedings. The decree for *mesne profits* was for upwards of Rs 4,000. and was passedon 10th June 1920. Before the decree for *mesne profits* was given, namely on 7th February 1920, the widow of Khan Ali Khan sent a notice to her three sons to make payment of her dower debt. The matter was referred to arbitration by an agreement, dated 17th February 1920, and the award was given with remarkable promptness on 19th February 1920. This award is to the effect that the dower due to the widow was Rs. 50,000 but that as the property of the deceased was not sufficient to stand so heavy a charge, a sum of Rs. 15,000 should be remitted and a sum of Rs. 35,000 was found to be due from the sons. As however they were not able to pay such a sum it was ordered in the award that the *zemindari* property of the deceased should be given to the widow, who could have mutation made in her name (*Magar ada nahin kar sakte lighaza jaidad hakiat zamindari hasb-i-zail Fariq-awal ko fariq-i-doem se gayi* Musammat *Farhatunnissa Bibi fariqiawal darkhwast dekar bamujib faisalnamaihaza dakhil kharij apne nam karalewai*). The defendants-respondents, who are the two parties concerned in these arbitration proceedings, claim that the effect of this award was to create a charge on the property in suit in favour of the widow, and thus to save it from being taken in execution of the plaintiffs-appellant's decree. The plaintiff-appellant's main contention is that the arbitration proceedings were fraudulent and collusive and that they had not the effect of creating a charge on the property. The learned Subordinate Judge decided that there was no proof of fraud and collusion and dismissed the plaintiff's suit which was for cancellation of an order passed in execution proceedings, that the property was not liable to attachment, and for a declaration that the property was liable to attachment.

It is well established law that a Mahammadan widow has a right to payment of her dower debt. That right does not amount to a charge on the property, but if the widow is in possession at the death of her husband she is allowed to retain possession until the debt is paid. In this case, the widow was not in possession on the death of her husband, but the defendants contend that the award has the effect, as I have remarked above, of creating a charge. It is pointed out that the widow made no demand for dower during

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her husband's lifetime nor until two years after the death. It was only when the suit for mesne profits was nearing completion (and it is argued when it was sufficiently obvious that a decree would be given against the widow and the sons) that she bethought herself of demanding her dower debt. The very terms of the award, it is argued, show that it was collusive. The amount awarded was far in excess of what was due, and it is pointed out that one of the witnesses summoned on behalf of the widow stated that the amount awarded practically exhausted the property left by the deceased and that the decree for mesne profits cannot be executed unless the award is set aside.

The circumstances in which the award was given are sufficient to arouse suspicion. It was contended by the parties that the widow and her sons were on bad terms, but this may have been part of their collusion, and the evidence was not believed in the lower Court. The Court's decision, however, must rest not upon suspicion but upon legal grounds established by legal testimony. The grounds given are that the amount awarded was excessive and that the circumstances generally pointed to collusion. On the first point there is no very definite evidence on the file to show the extent of the deceased's property of the value of that which would be left to the sons. It is certain that some was left to the sons, and it is argued that the amount may be eight or nine thousand each. There were several witnesses who testified to Rs. 50,000 as the amount agreed upon for dower. It is true that if the matter had been settled in Court, even if this evidence had been believed, the amount might have been reduced under section 5 of the Oudh Law Act. It will be seen, however, that the arbitrator did reduce the amount from Rs. 50,000 to Rs. 35,000, and although this appears to be a large sum there is not sufficient evidence to show that it would have been considered legally excessive, so that it is impossible to hold that the amount awarded signifies fraud. As regards the general circumstances of the case, the fact that the arbitration proceedings were quickly settled is, on the face of it, suspicious, and suggests that the object of both parties was to create a charge in favour of the widow before a decree in the suit for mesne profits could be pronounced. The widow, however, was undoubtedly a creditor of her sons to the extent of her dower debt, and her right had naturally precedence over the right of the plaintiff appellant, because it was created on the date of her marriage, which was previous to the action that gave rise to the suit for mesne profits. It has been held in *Nasimunnissa* v. *Abdul Kadir* (1), following the Privy Council ruling in *Musahar Sahu* v. *Hakim Lal* (2), that in somewhat similar circumstances if a widow wishes to forstall other creditors and to obtain what is due to her first, there is nothing fraudulent in her action in carrying such a wish out. I consider, therefore, that the lower Court was right in holding that fraud and collusion have not been proved, and that the award must be held to create a charge on the estate in favour of the widow.

Another point that was urged before me was that the widow had been impleaded as a representative of her husband, and that her share of the estate inherited from him is liable to be taken in execution of the decree against him. The wording of the award shows that in addition to the Rs. 10,000 by which the amount was reduced, the *haqq-i-shauhari* was given to the sons. The whole of the estate, therefore, on which the widow is given a charge is intended to be in lieu of the widow's dower debt. Her inherited share is in the hands of the sons, and like their shares is liable to be taken in execution of the decree. The result is that the appeal is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 43 Ind. Cas. 280; 20 O. C. 295.
(2) 32 Ind. Cas. 343 ; 43 C. 521; 20 C. W. N. 393; 30 M. L. J. 116; 3 L. W. 207; 14 A. L. J. 198 ; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL 484 No. OF 1920.

December 11, 1923.

Present :—Mr. Justice Fforde.

MUNSHI RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RADHA KISHEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXII, rr. 4, 9—Appeal—Death of respondent—Abatement—Delay in making application for substitution—Sufficient cause—Decree in favour of respondents jointly—Abatement in toto.

The mere fact that the parties to an appeal are living at long distances from each other is not a sufficient reason for excusing gross delay on the part of the appellants in making an application to bring on the record the representatives of a deceased respondent and to set aside the abatement of the appeal. [p. 694, col. 2.]

Where a decree has been passed in favour of several respondents jointly and one of them dies during the pendency of the appeal and his legal representatives are not brought on the record within the time allowed by law, the appeal abates against all the respondents and not merely against the deceased respondent. [p. 694, col. 2.]

Appeal from the decree of the District Judge, Ferozepore, dated the 10th November 1919, affirming that of the Senior Sub-Judge, Ferozepore, dated the 13th August 1917.

Dr. *Nand Lal*, for the Appellants.

Lala *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—On the 26th November 1923 the appellants' Counsel was given a fortnight's time within which to complete and retile an application made by him on behalf of his clients under O. XXII, rr. 4 and 9, Civil Procedure Code. The application has been retiled within the time allowed and a reference to it shows that Radha Kishen, respondent, died on the 16th June 1920, and his son, Ishar Dass, on the 16th January 1923. The appeal had, therefore, abated on the 20th October 1923 when the application under, r. 9, O. XXII, was tiled. Dr. Nand Lal, for the appellant-applicant contended that the affivadit tiled by Munshi Ram, appellant disclosed such cause for the delay in making this application as should be regarded "sufficient"

within the meaning of section 5 of the Indian Limitation Act, and that, therefore, the abatement should be set aside. The cause alleged in the affidavit is that the parties lived in different districts and that their residences were about 200 miles distant one from the other. This fact does not appear to us to be a sufficient reason in itself for failing to make the application for a period of over 3 years in one case and nearly 9 months in the other. It seems to us that the delay in this case amounts to grave negligence on the part of the appellants who for so long a period failed to make any enquires whatever as to the whereabouts of the most important respondents in their appeal.

We therefore, dismiss this application.

The appeal having abated against Radha Kishen and his son, must, of necessity, be held to have abated in its entirety inasmuch as the decree against the appellants was passed in favour of the plaintiffs in the case jointly. As the decree must stand so far as the deceased persons are concerned it is obvious that the appeal cannot proceed as against the remaining decree-holders.

The appeal, therefore, is dismissed as having abated. The appellants wiil pay respondents' costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 98 OF 1923.

November 2, 1923.

Present :—Mr. Dalal, J. C.

ABDULLA AND OTHERS—PLAINTIFFS—APPLICANTS

versus

MAHAMMAD NAZIR AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Jurisdiction, exercise of, by trial Court, interference with—Oudh Civil Courts Act (Act XIII of 1879), s. 17—Suit for possession of house by partition—Subject matter of suit—Valuation.

ABDULLA v. MAHAMMAD NAZIR

Under section 115 of the Civil Procedure Code the High Court is not confined to an enquiry as to the jurisdiction exercised by the lower Appellate Court above. The section gives the High Court power to enquire whether the Court of first instance has failed to exercise jurisdiction or not. [p. 695, col. 2.]

Jwala Prasad v. *East Indian Railway Company*, 46 Ind. Cas. 99; 16 A. L. J. 595, dissented from.

Plaintiff sued for possession of half share in a house either by partition or by a decree for joint possession. The defendant had purchased the house for Rs. 215 at Court auction sale, and the suit was valued by the plaintiffs at Rs. 300 for the purposes of jurisdiction. Defendant contended that he had pulled down the house purchased by him and had built a *pucca* house of considerable value on the land and that if any decree for possession was passed in favour of the plaintiff, compensation must be given to the defendant. It was discovered that the value of the house built by the defendant was over Rs. 2,000.

***Held*, (1) that the house built by the defendant was not part of the subject-matter of the suit within the meaning of section 17 of the Oudh Civil Courts Act, but that the subject-matter of the suit was the value of a half share in the house as it stood at the time of the defendant's purchase ; [p. 696, col. 1.]**

(2) that therefore the suit had not been under-valued by the plaintiff. [p. 696, col. 1.]

Shaikh Nawab Ali v. *Durga*, 11 O. C. 45, followed.

Revision against the order of the District Judge, Fyzabad, dated the 20th November 1922, upholding the order of the Munsif, Akbarpur, dated the 31st July 1922.

Mr. *M. Wasim*, for Mr. *Niamat Ullah*, for the Applicants.

Mr. *Hakimuddin*, for Mr. *Mohd. Ayub*, for the Opposite Party.

JUDGMENT.—The plaintiffs sued in the Court of the Munsif of Akbarpur for possession of half share more or less in a certain house either by partition or by a decree for joint possession. The defendant had purchased the house for Rs. 215 at Court auction sale, and the suit was valued by the plaintiffs at Rs. 300 for the purposes of jurisdiction. According to the valuation the value of the house would be Rs. 600. In the written statement in para. 8 no objection was taken to the valuation or Court-fee. What was contended in para. 13 was that the house which the defendant purchased was a commonplace one meaning thereby that its value was small. The defendant then went on to state in the same para. that he demolished that house, got a *pacca* house of considerable value built thereon and that therefore if any decree for possession is passed compensation must be given to the defendant. After the Munsif proceeded with the trial of the suit for some time subsequent to the framing of the issues, occasion arose for a report on the valuation of the house. Possibly the necessity arose to assess compensation, if any, to be given to the defendant. It was then discovered on the report of a commissioner that the house now standing was worth over Rs. 2,000 and so the value of a little over half the house would be more than Rs. 1,000 the limit of the jurisdiction of this particular Munsif. He thereupon returned the plaint to the plaintiffs for presentation to a Court having jurisdiction of higher value than Rs. 1,000. The plaintiffs appealed to the District Judge but the appeal was dismissed. They have now come here in revision under section 115, Civil Procedure Code.

They are met here first by an objection on behalf of the defendant-respondent that no revision lies. My attention has been drawn to a case of the Allahabad High Court : *Jwala Prasad* v. *East Indian Railway Company* (1) where a Bench held on facts similar to the present that no revision lay. With all respect I do not find justification for the opinion of the learned Judges in the wording of the section. In this application what the plaintiffs allege is that the Munsif has failed to exercise jurisdiction vested in him. This Court is authorised to call for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies *to it* and make such order in the case as it thinks fit where such Subordinate Court has failed to exercise jurisdiction vested in it. In my opinion this Court is not confined to an enquiry as to the jurisdiction exercised by the lower Appellate Court alone. There was no defect, as pointed out in the ruling quoted above, in the exercise of such jurisdiction by the lower Appellate Court, but with due deference it may be pointed out that the section gives this Court power to enquire whether the Court of first instance has failed to exercise jurisdiction or not. I shall, therefore, entertain this application.

On the facts I think that the reasoning of a learned Judicial Commissioner in the case of

(1) 46 Ind. Cas. 99; 16 A. L. J. 535.

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Shaikh Nawab Ali v. *Durga* (2), is applicable here. There the defendant held some land of the plaintiff on rent and built a house upon it. The plaintiff sued for the demolition of the building and the restoration of the land, and in the alternative prayed that in case demolition of the building were refused a decree might be passed in his favour for possession on payment of compensation for the building. The learned Judge of this Court held that the building was not part of the subject-matter of the suit within the meaning of section 17 of the Oudh Civil Courts Act, but that the subject-matter of the suit was the value of the property which the plaintiffs said they were entitled to take possession of. By parity of the reasoning what the plaintiffs claimed here was not the house rebuilt by the defendant but the house as it stood at the time of the defendant's purchase. It was the case of the defendant himself that the house as it stood at the time of the auction sale was a mere nothing. It need not be considered here how the plaintiffs are to be granted relief under the altered circumstances of a house of small value being replaced by one costing over Rs. 3,000 whether by demolition of the present house or by awarding the defendant compensation. In either case the value of the present house is not part of the subject-matter of the suit but the subject-matter of the suit is the original house of which the plaintiffs claimed a share. According to the admission of both parties the original house and the land on which it stood were not worth more than Rs. 2,000 or even Rs. 1,000. I decide that the Munsif has failed to exercise such jurisdiction as was vested in him.

In the result I set aside the decree or orders of both the subordinate Courts and remand the proceeding to the Court of first instance of the Munsif of Akbarpur to continue the proceeding from the point where they were left off and to come to a decision. Costs here and heretofore shall abide the result.

Z. K. *Case remanded.*

(2) 11 O. C. 45.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3100 OF 1922.

January 14, 1924.

Present :—Mr. Justice Moti Sagar.

THE FIRM OF MEGH RAJ TEJ BHAN—DEFENDANT—APPELLANT

versus

THE FIRM OF TULSI RAM DEVI DITTA MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, O. XLIII, r. 1 (m)—Compromise of suit—Compromise whether can be accepted in part—Order refusing to record compromise followed by decree—Appeal, whether lies.

Under O. XXIII, r. 3, Civil Procedure Code, a Court is bound to record a compromise and to pass a decree in accordance therewith so far as it relates to the suit if it is proved to its satisfaction that a suit has been adjusted wholly or in part by a lawful agreement or compromise. Under O. XLIII, r. 1 (*m*), Civil Procedure Code; an appeal is competent from an order under r. 3 of O. XXIII, recording or refusing to record an agreement, compromise or satisfaction. The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such order. [p. 697, col. 2.]

Mahomed Rashid v. *Rahmatullah* 24 Ind. Cas. 630 ; 96 P. R. 1914 ; 212 P. L. R. 1914 ; 134 P. W. R. 1914, followed.

A compromise should either be accepted as a whole or rejected altogether. It cannot be accepted in part and rejected in part. [p. 698, col. 1.]

Where all the terms of a compromise are not proved to the satisfaction of the Court the compromise cannot be recorded under O. XXIII, r. 3 of the Civil Procedure Code. [p. 698, col. 1.]

Appeal from the decree of the Senior Subordinate Judge, Jhang, dated the 12th October 1922.

Dr. *Nand Lal*, for the Appellant.

Lala *Ram Chand Manchinda*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of Rs. 5,046-12-9, principal and interest, on the basis of a *bahi* account. The plaintiffs were Messrs. Tulsi Das-Devi Ditta Mal, a firm of merchants, carrying on business at Gojra in the Lyallpur District. The plaint was signed by one Kala Ram and another

person Sawaya Ram, who are alleged to be two of the partners of the aforesaid firm. It is alleged and not denied by the defendants that the firm consisted of three partners namely, Kala Ram, Sawaya Ram, and one Sakhir Chand, who, however, did not actually reside and carry on business at Gojra. On the 14th of June 1922 before the issues were framed the defendants made an application to the Court that the case had been compromised for Rs. 5,000 and that the plaintiffs had agreed to accept a house belonging to the defendants in full satisfaction of their claim. A deed of sale for Rs. 5,000 in respect of this house was executed in favour of the plaintiffs but not registered. It was prayed that the compromise be given effect to and recorded under O. XXIII, r. 3, Civil Procedure Code. Kala Ram, who was really conducting the case on behalf of the plaintiffs and used to be present on all hearings, stated that the case had been compromised for Rs. 5,000 but denied that he had agreed to accept the defendants' house in full satisfaction of the claim. He alleged that the house had been agreed to be transferred to the plaintiffs for a sum of Rs. 3,000 and that it was agreed that the balance of Rs. 2,000 would be paid in cash. He further alleged that the sale-deed for Rs 5,000 had been executed by the defendants without his knowledge and contrary to the wishes of the plaintiffs. On these pleadings the following issues were framed :—

Whether the case had been lawfully compromised under O. XXIII, r. 3, Civil Procedure Code. If so, what were the terms of the compromise ?

If there had been a compromise, how far it was binding upon the plaintiffs ?

Sawaya Ram, the second partner in plaintiffs' firm, was examined by the Court and stated that he had neither himself agreed nor authorised Kala Ram to enter into a compromise. It was therefore contended that the compromise was wholly unauthorised and not binding upon the plaintiffs. A large number of witnesses were examined on both the sides but their evidence was of a most inconclusive character. The trial Court found that the case had been compromised for Rs. 5,000 but did not come to a definite finding on the question as to what was to be the mode of payment. It, however, held that Kala Ram had not been authorised by the firm to enter into a compromise and that it was consequenty not binding upon the plaintiffs. As a result of this finding it refused to record the compromise but all the same passed a decree for Rs. 5,000 against the defendants, holding that as all the parties agreed to a settlement having taken place for that sum, it would under the circumstances be "unnecessary and useless to reopen a settled point and to put the parties to the expense and worry of an endless litigation."

Against this decision the defendants have appealed to this Court and it has been urged on their behalf that the learned Senior Subordinate Judge was wrong in refusing to record the compromise and in holding that it was not binding upon the parties. It is further contended that in any case the Court was not justified in passing a decree for Rs. 5,000 against the defendants and that if the compromise was found not binding, the defendants ought to have been given an opportunity to fight out their case on the merits.

A preliminary objection is taken by the respondents that as the order refusing to record the compromise has been followed by a decree, an appeal ought to have been filed on full court-fees against the decree and that the order refusing to record the compromise, which has now been merged in the decree, is not appealable as an order. This contention, in my opinion, has no force and must be overruled. Under O. XXIII. r. 3, Civil Procedure Code, a Court is bound to record a compromise and to pass a decree in accordance therewith so far as it relates to the suit if it is proved to its satisfaction that a suit has been adjusted wholly or in part by a lawful agreement or compromise. Under O. XLIII, r. 1 (*m*), Civil Procedure Code, an appeal is competent from an order under rule 3 of O. XXIII recording or refusing to record an agreement, compromise or satisfaction. The mere fact that an order recording a compromise or refusing to record a compromise had been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such an order. In *Mahomed Rashid* v. *Rahmatullah* (1) a compromise had been arrived at between certain parties and a

(1) 24 Ind. Cas. 630 ; 96 P. R. 1914 ; 212 P. L. R. 1914; 184 P. W. R. 1914.

decree passed in accordance therewith. The defendants appealed to the Chief Court and it was held that the order of the Court below was one directing the compromise to be recorded within the terms of O. XXIII, r. 3 and an appeal against it was competent under clause (*m*) of O. XLIII, r. 1, notwithstanding that the order directed at the time that a decree be passed in accordance with the compromise and that such a decree was accordingly passed. This authority, in my opinion, is exactly in point and I hold that the order passed by the learned Senior Subordinate Judge was one under O. XXIII, r. 3, refusing to record the compromise and that an appeal lies from it under O. XLIII, r. 1 (*m*), I overrule the preliminary objection.

On the merits I am unable to agree with the contention of the learned counsel for the appellant that the alleged compromise should have been given effect to in its entirety. The burden of proving what the terms of the compromise were was upon the defendants and after carefully going into the evidence produced I am of opinion that they have entirely failed to discharge it. All what is proved is that the parties agreed to settle the case for Rs. 5,000, but on the question relating to the mode of payment the evidence is most conflicting and I must therefore hold that the alleged compromise had not been established. In view of my finding that the terms of the alleged compromise have not been fully established, it is unnecessary to give a finding upon the second question, namely, as to whether it would or would not in law be binding upon the plaintiffs. I am, however, of opinion that the compromise not having been established, the Court was not justified in passing a decree for a sum of Rs. 5,000 against the defendants. The compromise should either have been accepted as a whole or should have been rejected altogether. The defendants' allegation was that the plaintiffs had agreed to accept a conveyance of their house in full satisfaction of their claim. This not having been established, the parties should have been allowed to proceed with the suit in the ordinary manner. The learned *Vakil* for the respondents concedes that the procedure adopted by the learned Senior Subordinate Judge in this case was not in accordance with law. I accordingly accept the appeal and setting aside the decree remand the case to the Lower Appellate Court under O. XLI, r 23, Civil Procedure Code, for trial and decision in accordance with the law. No order as to costs.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 324 OF 1922.

October 26, 1923.

CHANDAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEO NARAIN SINGHAND OTHERS—DEFENDANTS—RESPONDENTS.

Res Judicata—*Mortgage—Redemption—Jurisdiction of Civil and Revenue Court—Circular No. C* 1123 *of* 1862, *operation of.*

By virtue of Circular No. C. 1123 of 1862, the jurisdiction of Civil Courts in Oudh was barred in the case of all claims by mortgagors to recover possession of the mortgaged property, whatever the date of the mortgage. [p. 699, col. 2.]

The predecessors-in-interest of the plaintiffs executed a mortgage of certain property in 1859. During Settlement Proceedings in 1862 they applied to the Revenue Court for redemption. Their application was dismissed on the ground that the term within which redemption was to be made had expired and that the mortgagors had no right left in them to redeem. In 1921 the plaintiffs instituted a suit for redemption on the allegation that the decision of the revenue Court was without jurisdiction and did not operate as *res judicata* ;

Held, that the revenue Court had jurisdiction by virtue of Circular No C. 1123 of 1862, and its order operated as *res judicata*, and the plaintiffs' suit was, therefore, barred.

Basawan Singh v. *Nawab Badsha Babu Begam*, 7 O. C. 259 followed.

Appeal against the decree of the Officiating Subordinate Judge, Unao, dated the 27th May 1922, reversing the decree of the Munsif South, Unao, dated the 17th May 1921.

Messrs. *B. N. Srivastava* and *Wasi Hasan*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

CHANDAN SINGH *v.* SHEO NARAIN SINGH

JUDGMENT.—The suit of the plaintiffs for redemption of a mortgage dated the 16th June 1859 was dismissed on appeal by the lower Appellate Court of the Subordinate Judge of Unao on the ground that the matter had been *res judicata*. Kushar and Ganga predecessors in-interest of the plaintiffs had executed the mortgage and during Settlement Proceedings in 1862 Kushar applied to the Revenue Court for redemption. The Extra Assistant Settlement Officer dismissed the application on 29th August 1862 on the ground that the term within which redemption was to be made had expired and that in consequence the mortgagor had no right left in him to redeem. The argument in the lower Appellate Court was that the force of this decree of the Settlement Court was removed by the proviso to section 2 Act No. XIII of 1866 which was subsequently repealed by Act No. XXXII of 1871. In this Court it is admitted that after repeal, Act No. XIII of 1866 can have no operation. The appellant's learned Counsel conceded that if the Settlement Court acted with jurisdiction the present suit of the plaintiffs cannot be sustained. What the learned Counsel sought to induce this Court to hold was that the Settlement Court had no jurisdiction to pass the decree which it did on 29th August 1862. His contention was that the jurisdiction of the Revenue Court was confined to mortgages executed prior to the annexation of Oudh by the British Government in 1856 and not to mortgages executed subsequently. How the jurisdiction of the Revenue Court was established and that of the Civil Court ousted in redemption suits is explained in Circular No. C. 1123 of 1862 dated 16th April 1862. It is stated in para. 2 "On the annexation of the Province, His Excellency the Governor-General in Council in laying down rules for its administration directed that the principle "found so beneficial in the Punjab of entirely excluding from the jurisdiction of the Civil Court all claims to proprietary and accessory rights to land, and of withdrawing that power of revision which in the Regulation Provinces, and in the first instance, in the Punjab also had been reserved to those Courts should be unquestionably and from the first adopted in Oudh. Thus the duty of investigating and judicially deciding all such claims was held to appertain to the Revenue authorities exclusively, that is to say, to the Settlement Office." In para. 3 it is explained that the observations of para. 2 are not merely the wishes of the Governor General, but have as orders been declared by an Act of Parliament to have the force of an Act (VIII of 1859) of the Governor-General of India in Council. It is further stated in para. 3 " All claims to proprietary and accessory rights in the land are then the suits (See section I of Act VIII of 1859) of which the Civil Courts in Oudh are barred from taking cognizance by an Act of the Governor-General in Council, and no decisions passed by the Revenue Courts on such claims can be revised or called in question in the Civil Courts." In para. 4 the suits are detailed which under the rules having the authority of an Act are cognizable by the Revenue Courts exclusively. Clause III covers claims for redemption of mortgages of landed property. In the entire circular nothing is said about limiting the authority of the Revenue Courts to mortgages executed prior to the annexation of 1856. These claims to redemption of mortgages of landed property are sub-divided in para. 18 into A: claims of mortgagees who never gain possession of the land mortgaged to recover the money advanced on the mortgaged land and B: claims by mortgagors to recover possession.

Thus the jurisdiction of the Civil Courts was barred in the case of all claims by mortgagors to recover possession whatever the date of the mortgage may be. Civil Courts derived jurisdiction at the date of the Circular in 1862 under section I of Act VIII of 1859. That section was that Civil Courts shall take cognizance of all suits of a civil nature with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any regulation of the Codes of Bengal, Madras and Bombay respectively or by any Act of the Governor-General of India in Council. Para. 3 of the Circular referred to above has indicated how the jurisdiction of the Civil Court was ousted in cases of the claims by mortgagors to recover possession in Oudh. It was not contended by the appellants' learned Counsel that what was stated in para. 3 of the Circular was incorrect.

The learned Counsel was of opinion that the Circular referred to above was explained by Circular No. 52 of 1863, dated 2nd

October 1863. This Circular was a copy of an answer sent by the Secretary to the Chief Commissioner, Oudh to the Commissioner of the Fyzabad Division in answer to some reference. The reference appears to have been on the question whether the holder of a deed of mortgage being a conditional sale executed subsequent to the annexation must apply for foreclosure to the Revenue Court or to the Civil Court under the provisions of sections 7 and 8 of Regulation 17 of 1806. The reply was :

"Sir, I have the honour to acknowledge the receipt of your letter No. 678 dated 8th instant and in reply to state that the Chief Commissioner's Circular No. C|1123 dated 16th April 1862, was framed with regard to the state of things prevailing before the annexation of the country, therefore, para. 23 was intended to apply to all mortgages, being conditional sales, effected prior to the annexation of the province but not to any that may have been made since, when our laws may have been supposed to have been in force."

On the basis of the language of this letter it is argued that the jurisdiction of the Revenue Court was confined to mortgages executed before the annexation of Oudh. I do not think that it would be safe to take such a view when it is not supported by reference to any Act of Parliament, to any Act of the Governor-General of India in Council or to any provision in Circular letter No. C|1123 of 1862. The letter of 2nd October 1863 merely quotes the opinion of a particular Chief Commissioner of Oudh or possibly of his Secretary and has not the force of law. Further, reference was made by the Commissionor of Fyzabad with regard to a suit for foreclosure and it will be seen that no mention of such a suit is made in Circular No. C|1123 of 1862. The mortgage suits covered by that Circular are those of redemptiom and for recovery of money by a mortgagee. Para. 23 refers to limitation in a suit for foreclosure as wrongly understood by the Secretary to the Chief Commissioner of Oudh in his letter of 2nd October 1863. In my opinion a suit for foreclosure was not barred from the jurisdiction of the Civil Court, so Circular No. 52 of 1863 was wholly irrelevant to the matter for consideration here.

The matter raised in the lower Appellate Court was concluded by the authority of *Basawan Singh* v. *Nawab Badshah Bahu Begam* (1). The distinction drawn by appellants, learned Counsel was that in the reported case the mortgage was executed prior to the annexation. Subsequently, there have been cases in this Court where the above ruling was followed though the mortgage was executed subsequent to 1856 (Second Civil Appeal No. 356 of 1894 unreported) and 23 O. C. page 262, Bench. I have however examined the learned Counsel's arguments in detail because the point was not raised in the two previous cases in the form in which it was raised here.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 70. C. 259 :

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1664 OF 1923.

January 23, 1924.

Present :—Mr. Justice Moti Sagar.

THE FIRM SHIV DAYAL RAM DITTA MAL
DECREE-HOLDER—APPELLANT
versus
MUHAMMED KHAN AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) S. 145—Execution of decree—Arrest of judgment-debtor—Surety for appearance of judgment-debtor — Default — Decree whether can be executed against surety.

A judgment-debtor was arrested in execution of a decree and brought before the Court. Respondent offered to stand surety for him and on his executing a surety bond, the judgment-debtor was released. By the terms of the surety-bond the surety undertook that the judgment-debtor would continue to appear in Court till the final decision of the case and that if he made default, the surety and his property would be liable for the amount of the decree. The judgment-debtor failed to appear in Court on one hearing and the decree-holder applied for execution of the decree by attachment of the surety's property :

Held, that the surety had become liable for the decretal amount under section 145 (c) of the Civil

SHIV DAYAL RAM DITTA MAL *v.* MUHAMMED KHAN

Procedure Code, and that the decree could be realised by attachment of his property. [p. 702, col. 1.]

Appeal from the order of the District Judge, Shahpur at Sargodha, dated the 11th April 1923, reversing that of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 25th January 1923.

Mr. *M. L. Puri*, for the Appellant.

Mr. *Zafurullah Khan*, for the Rsepondents.

JUDGMENT.—On the 14th of July 1922 the decree-holders obtained a warrant for the arrest of the judgment-debtor in execution of a money decree from the Court of the Senior Subordinate Judge at Sargodha. The case was fixed for a hearing for the 11th of August 1922. The judgment-debtor was arrested on the 15th of July and brought before the Senior Subordinate Judge on the same date. The respondent Muhammad Khan offered to stand surety and on his executing a surety bond, the judgment-debtor Sardar Khan was released. The surety was ordered by the Court to produce the judgment-debtor on the 11th of August and he was warned that if he failed to do so the decree would be executed against him. On the 11th of August both the surety as well as the judgment-debtor were present in Court and on the latter expressing an intention to apply to be declared an insolvent the case was adjourned to another hearing. No fresh security was taken from the judgment-debtor and there is nothing on the record to show that the surety was discharged. The judgment-debtor failed to appear on one or two hearings in the month of December 1922 and the decree-holders thereupon made an application to the Senior Subordinate Judge that the decree be realised by the attachment of the surety's property. This application was accepted and the surety was called upon to pay up the decretal amount.

An appeal was preferred against this order and the learned District Judge held that the surety was not liable for the following reasons :—

(1) That he had not stood surety under section 55 (4) of the Civil Procedure Code and that, therefore, no attachment could be levied against him ;

(2) That the only undertaking given by him was that he would produce the judgment debtor on the 11th of August 1922 and that he did produce him on that date ; and

(3) That O. XXI, r. 40, sub-clause (3) of the Civil Procedure Code, under which the Senior Subordinate Judge had purported to pass the order in question, did not apply and that the order for the attachment of the surety's property was, therefore, illegal.

The learned District Judge was further of opinion that section 145 of the Civil Procedure Code had no application and that the surety could not, therefore, be made liable under that section. The appeal was accordingly accepted and the surety was discharged.

The decree-holders have now come up in second appeal to this Court and it has been contended on their behalf that the learned District Judge has entirely overlooked the provisions of the surety bond under which the surety had given an unconditional undertaking to the effect that he would produce the judgment-debtor in Court on all the hearings until the case was finally decided. In my opinion this contention is well founded and must prevail. Section 55 (4) and O. XXI, r. 40, sub-clause (3) of the Civil Procedure Code have no application to this case, and the learned District Judge is entirely wrong in holding that the orders of the Senior Subordinate Judge were passed under any of the above two sections. A reference to the terms of the surety-bond makes it clear that the surety had become liable under section 145 of the Civil Procedure Code and I fail to understand how the learned District Judge has come to a contrary conclusion. The important words in the surety-bond under which the surety became liable are to the following effect :—

"*Jo ke mukudma mundorja unwan men madyun bazaria warant griftar ho kar adalat men hazar kiya gaya hai aur madyun se zamanat hazri baqadar zar-i-mutaliba talab hui hai lehaza main zaman ho kar ikrar karta hun ke madyun ta faisla mukadama hazar adalat hota rahega, agar madyun hazri adalat men kisi kism ka kasur karega to main zaman baqadr zar-i-mutaliba adalat men dakhal kar devega jis ki wasuli ka ikhtiar adalat ko mujh se wa jaidad har kism meri se hoga.*"

These words clearly indicate that the surety had undertaken a liability for the payment of the decretal amount in case the judgment-debtor failed to appear in Court on any hearing till the final decision of the case. Under section 145, clause (*c*) of the Civil Procedure Code the liability can clearly be enforced against the surety and the amount due under the decree realized by the attachment of his property. The contention that the surety had undertaken to produce the judgment-debtor on the 11th of August only and that the orders passed by the Court on the 15th of July 1922 were also to the same effect has no force in face of the clear terms of the surety-bond and must be overruled.

I accept the appeal and, setting aside the order of the learned District Judge, remand the case under O. XLI, r. 23 of the Civil Procedure Code, for decision on the other points that may arise in the case. Costs to abide the result.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 224 OF 1922.

May 2, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice M. N. Mukerji.

CHANDRA KUMAR AICH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JIBAN KRISHNA NATH MOHAJAN—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 180—"Chur", meaning of—Land reformed in suit—Owner, rights of.

The word 'chur' as used in section 180 of the Tenancy Act must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil, and not to the site of the deposit. [p. 708, col. 1.]

When land reformed on the site of a diluviated estate, the owner of that estate, if he had continued to pay revenue while the site was under water is entitled to claim the land as belonging to his estate. [p. 703, col. 1.]

Such land is not to be dealt with under the provisions of Regulation XI of 1825. [p. 708, col. 1.]

Felix Lopez v. *Muddun Mohun Thakoor*, 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 836; 2 Sar. P. C. J. 594 ; 20 E. R. 625, followed.

Appeal against the decree of the District Judge, Chittagong, dated the 8th August 1921, modifying the decree of the Munsif, 1st Court, Chittagong dated the 31st May 1920.

Babu *Narendra Coomar Das*, for the Appellants.

Dr. *Sarat Chandra Basak* (with him Babus *Chandra Sekhar Sen* and *Mahindra Coomar Bose*), for the Respondent.

JUDGMENT.

Walmsley, J.—This appeal is preferred by some of the defendants, against a judgment of the District Judge of Chittagong, which affirmed with slight modifications the decree of the first Court.

The plaintiff bought Noabad Taluq Mahammad Daim Najir at a sale held under the provisions of Act XI (B. C.) of 1859, on August 7, 1913, and he then brought two suits for recovery of *Khas* possession and for mesne profits. One suit No. 297 related to 52. 3 *kanis* of land in Cadastral Survey plot No. 17/13564, and the other to the whole of that plot with certain other plots. It is not necessary to mention the reasons which led the plaintiff to bring two suits, instead of one. The two suits were heard together. The first Court gave him a decree for *khas* possession and for mesne profits. Then the defendants, or some of them, filed two appeals ; these again were dealt with in one judgment. The learned Judge upheld the decision of the first Court with this modification, *viz.*, that he directed that the area of the lands covered by the decree was not to be stated, and that the decree should not make any reference to the Cadastral Survey map. The defendants have appealed, and there is a cross-objection by the plaintiff.

The case is an obscure one, and the arguments advanced on behalf of the appellants did not help to remove the obscurity. Their main contention, however, is that the defendants have a protected interest although the land is admittedly alluvial in character. It is said that the provisions of section 180 of the Tenancy Act do not apply, and the reason alleged for this argument is that the principle laid down in the case of *Felix Lopez* v. *Mud-*

dun Mohun Thakoor (1) is applicable here, and that in consequence the land is not *chur* but the old land reformed on its original site. This argument is unsound. The decision just mentioned laid down the principle to be applied in dealing with questions of title to land reformed *in situ*: it directed that when land reformed on the site of a diluviated estate, the owner of that estate if he had continued to pay revenue while the site was under water was entitled to claim the land as belonging to his estate, and that such land was not to be dealt with under the provisions of Reg. XI of 1825. It is true that in the preamble to that Regulation the words "*churs* or small islands" appear, but that is not a definition of the word 'chur' and it cannot be held that land which is reformation *in situ* may not also be *chur* land. The word 'chur' as used in section 180 of the Tenancy Act must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil, and not to the site of the deposit. I have no doubt, therefore, that the Courts below are right in saying that the provisions of section 180 of the Tenancy Act are applicable to the land in suit. It follows that the tenant defendants to escape eviction must prove continuous possession for 12 years of the identical plots in their possession at the date of the institution of the suit. On this question there is a definite finding of fact that they have failed to do so.

The other objections put forward on behalf of the defendants relate to the form of the decree: which is said to be bad because it does not specify the area to which the plaintiff's title is declared. It seems singular that this objection should come from the defendants, for it is they and not the plaintiff who benefit by the remarks made by the learned Judge in the closing paragraphs of his judgment. In fact, these remarks are the subject-matter of the plaintiff's cross-objection. Consequently, I think that this second argument for the defendants fails.

With regard to the cross-objection, the position is this. After the creation of the Noabad Taluq in 1898, some of the land comprised within it was settled with Nabin Chandra Mohajan and afterwards with Gagan Chandra Aich by the Collector. That may have been wrong, but the learned Judge has held that in the absence of the Secretary of State as a party he cannot give the plaintiff a decree which would have the effect of disturbing the possession of those who have entered on the lands by virtue of that settlement. I think that is a right view and consequently that the cross-objection cannot be sustained.

The result is that the appeal and the cross-objection are both dismissed. No order is made as to costs.

Mukerji, J.—This appeal arises out of two suits instituted by the plaintiff as purchasers at a revenue sale for establishing his title and for recovery of *khas* possession by ejecting the defendants and for mesne profits. A part of C. S. Plot 17|13564 is the subject-matter of Suit No. 297, while the said plot together with nine others are the subject-matter Suit No. 302. The main defence of the defendants in the suits was that they are *ryots* with right of occupancy and are moreover settled *ryots* of the village and, therefore, their interests were protected.

The learned Munsif decreed the plaintiff's suit in their entirety consolidating the two suits into one, and awarded costs to the plaintiff only in respect of Suit No. 302 and ordered that *mesne profits* would be ascertained subsequently on plaintiff's application.

On appeals preferred by the defendants the learned District Judge held that the plaintiff was entitled to a decree declaring his title to the plots specified in the plaint in Suit No. 302. He held also that a decree in Suit No. 297 was unnecessary as the subject-matter of that suit, namely, a part of C. S. Plot 17|13564 was wholly included in Suit No. 302, but he saw no reason to cancel it. As to Plot No. 17|13564, however, he found that a part of it, namely that covered by the *Kabulyat* Ex. F. was claimed by Government and had been settled by them as *khas mehol* lands with Nabin Ch. Mohajan in 1912 and resettled with Gagan Ch. Aich in 1913. As the Secretary of State was not a party to the suit it was not right, in the opinion of the learned District Judge, to decide finally as to what was the exact area to which the plaintiff was entitled to a decree, and so he directed that the area of the C. S. plots should not be en-

(1) 13 M. I. A. 467 ; 14 W. R. P. C. 11 ; 5 B. L. R. 521 ; 2 Suth. P. C. J. 336 ; 2 Sar. P. C. J. 594 ; 20 E. R. 625.

tered in the decree, but that the decree for *khas* possession should be limited to the portion depicted in the Commissioner's Map covering an area of 1 *drone*, 8 *kanis*, 18 *gandas* which had always been admitted by Government to fall within the plaintiff taluk and he held that of that area the plaintiff could safely take possession. He made a variation in the order as to costs and upheld the decree as to mesne profits.

The defendant's chief contentions in this appeal are two, 1st that in the absence of specification of area the decree declaring the plaintiff's title and for ejectment of the defendants is bad in law, and 2nd that section 180 of the Bengal Tenancy Act has no application to the *chur* in question as the operation of that section is limited to *churs* to which Reg. 11 of 1825 applies.

With regard to the first of these contentions a bare statement of the facts is sufficient to demonstrate its futility. The taluk in question is a Noabad Taluk created by Government in 1898, and the settlement made by Government in favour of the plaintiff's predecessors gave certain dags which are specified in the plaint in Suit No. 302. Thereafter the Government settled certain lands of the *chur* with Nabin Ch. Mahajan as per Ext. F in 1912 and the same were resettled with Gagan Chandra Aich in 1913, Parts of the lands covered by these settlements were portions of the plaintiff's taluk. The mistake arose from circumstances which need not be gone into here. The learned District Judge has held that the plaintiff was entitled to a decree declaring his title to all the dags covered by the settlement of 1898 ; and there is no difficulty in that respect as the said dags are mentioned in the plaint. As for *khas* possession he has held that there can be no possible objection to the plaintiff taking *khas* possession of such portions of the said dag to which the Government has never preferred any claim and having found from the Commissioner's map the portion so defined and being of opinion that the plaintiff can safely take *khas* possession of that portion has awarded the plaintiff a decree in respect of it. The appellant's first contention, therefore, in my opinion, has no substance.

As for the second contention there is no authority for the proposition that the word *chur* is used in that limited sense in section 180 of the Bengal Tenancy Act, I am not prepared to accept this interpretation as I can find no principle upon which such a view may be supported. The findings of fact as to the length of occupation by the appellants also negative any suggestion of their having acquired any protected interests in the lands.

Several other objections were urged on behalf of the appellant, but I do not think it necessary to notice them as in my opinion, they either do not arise in view of what I have said above or are matters which really affect the question of appreciation of evidence with which we are not concerned in second appeal.

The appeals, therefore, must fail.

The cross-objection of the respondents that he should be awarded a decree for *khas* possession in respect of all the lands with the exception of the land covered by Ext. F must also fail as it is evident from the observations of the learned District Judge that having regard to the fact that the Secretary of State was not a party to this litigation, it is desirable to confine the decree to only such lands as may safely be held to be lands to which the Secretary of State has never preferred any claim. If more lands have been excluded than what are actually claimed by Government the plaintiff must get the matter decided in the presence of the Secretary of State.

As the appeals and the cross-objection both fail, I would make no order as to costs in this Court.

K. S. D. *Appeal dismissed.*
Cross-objections dismissed.

SRI RAM *v.* CHANDO

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 122 OF 1923.

March 18, 1924.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Le Rossignol.

SRI RAM—DEFENDANT—APPELLANT

versus

Mt. CHANDO—PLAINTIFF—RESPONDENT.

Appeal, second—Finding of fact based on document not proved, whether binding.

A finding of fact arrived at on the basis of entries in a register which are not proved by any evidence is not binding on the Court in second appeal.

Appeal, under section 10 of the Letters Patent, from the order of Mr. Justice Moti Sagar reported in 80 Ind. Cas. 177.

Lala *Fakir Chand*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The question raised in this appeal under clause 10 of the Letters Patent is that the learned Judge, who heard the second appeal preferred by the plaintiff, was not justified in interfering with the finding arrived at by the District Judge, that the pro-note in favour of the plaintiff, was executed in 1911 and not in 1915. It is true that the finding was one of fact and could not be challenged in second appeal. We have however considered the matter fully and have reached the conclusion that the finding of the District Judge was vitiated by the fact that the entries in the school register, which were relied upon by him in support of his conclusion, had not been proved by any evidence such as is required by the Indian Evidence Act. If we exclude this documentary evidence from consideration, the rest of the evidence is wholly inconclusive and cannot support the contention of the defendant that the pro-note has been subsequently altered in order to bring the suit within limitation.

We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

HARI SANKAR RAJ *v.* E. I. RY. COY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 769 OF 1922.

May 16, 1924.

Present :—Justice Sir William Ewart Greaves, Kt., and Mr. Justice Chakravarty

HARI SANKAR RAJ CHANDRA DALAL —PLAINTIFF—APPELLANT

versus

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s.72 (2)—Risk note signed by person delivering goods—Railway Company, whether protected.

Under section 72 (2) of the Railways Act, a Railway Company is protected by a Risk note signed either by the person sending goods or the person delivering goods to the Company. [p. 706, col. 2.]

Appeal against the decree of the Sub-Judge, Asansole in District Burdwan, dated the 30th November 1921, affirming the decree of the Munsiff, Asansole, dated the 13th May 1921.

Babu *Sarat Chandra Rai Chowdhury* (with him Babu *Annada Charan Karkoon*), for the Appellant.

Dr. *D. N. Mitter* (with him Babu *Ambika Pada Chowdhury*), for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiff against the decision of the Subordinate Judge of Asansole confirming a decision of the Munsif of Asansole. The suit was brought by the plaintiff as the consignor of certain consignments of sugar to recover a sum of rupees six hundred and twenty-nine and annas ten, damages for loss of part of the goods. The sugar was consigned to the defendant Company for carriage to the plaintiff at Ranigunj. There were four consignments of sugar. The first was made on the 28th November 1919 of some 344 maunds and the loss claimed in respect of this consignment is in respect of deficiency of 3 maunds 18 seers of sugar. The second consignment was consigned on the 30th January 1920. The amount

of the consignment was the same as that in the first consignment and the sugar lost in course of transit was 4 maunds and 30 seers. The third consignment was on the 26th March 1920 and the loss in respect of that consignment was 1 maund and 28 seers. That fourth consignment was made on the 16th April 1920; the loss in respect of that consignment was 11 maunds and 28 seers; and the sum claimed in the suit represents the value of the deficiencies of sugar in respect of these four consignments. The only question that really arises in this suit is whether the Railway Company are protected by the provisions of section 72, sub-section (2) of the Railways Act (Act IX of 1890). Section 72, sub-section (2) provides that an agreement purporting to limit the responsibility of the Railway for the loss, destruction, or deterioration of goods delivered to it to be carried by Railway shall in so far as it purports to effect such a limitation be void unless it (*a*) is in writing signed by or on behalf of the person sending or delivering to the Railway Administration the goods. Nothing turns on the Clause (*b*) of sub-section (2) of section 72.

Now, it appears from the documents in this case that the consignor was one Sital Hari Srimani. This appears from the goods consignment notes which are exhibited in the case. The risk notes are signed by Jugal Hari Srimani, who purports to sign the risk note as the sender of the goods; and what is suggested on behalf of the appellant is that Jugal was not the agent of the consignor; and that this not being established in the case the Railway Company are not protected by the provisions of sub-section (2) of section 72. The goods consignment notes are before us; and certainly in two of them exhibits (*e*) and (*d*) Jugal Hari Srimani who appears to have despatched the goods, signed for Sital Hari Srimani. It seems to us that the matter is really concluded by an examination of the documents themselves. Section 72, sub-section (2) provides that the Railway Company are protected by an agreement signed either by the person sending goods or by the person delivering goods to the Railway Company. This is my reading of clause (*a*) of sub-section (2) of section 72.

From what I have stated it appears clear that the person who delivered the goods to the Railway was Jugal Hari Srimani. Consequently, it seems to us that as the risk notes were signed by the person who delivered the goods to the Railway the Railway are protected by the provisions of section 72, sub-section (2), clause (*a*), and I think this really disposes of the appeal.

In the result, therefore, the appeal fails and must be dismissed with costs.

Chakravarti, J.—I agree.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 97 OF 1923.

August 18, 1924.

Present :—Mr. Wazir Hassan, A. J. C.

MOHAMMAD BAQAR KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGAT NARAIN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV r. 7 (c),-8 (4). Redemption Decree—Parties taking no steps in pursuance of decree—Mortgagor dispossessing mortgagee forcibly—Mortgagee suing for possession—Parties entitled to be restored to their position on passing of decree—Duties and rights of mortgagor and mortgagee—Limitation Act (IX of 1908), Sch. I, Art. 181, when applicable.

If after the passing of a redemption decree in the terms of O. XXXIV, r. 7 of the Civil Procedure Code, neither the mortgagor pays the amount of the mortgage money within the period fixed by the decree, nor does the mortgagee apply for sale on the expiry of the said period, and then the mortgagor dispossesses the mortgagee forcibly; on the latter's suit for possession the parties are entitled to be restored to the same position in which they were on the passing of the redemption decree, and it is open to them to work out the decree in terms of its directions, if there is no legal bar to this. [p. 708, col. 1.]

A mortgagor can save the sale of the mortgaged property at any time before the sale is confirmed, inasmuch as a payment by him is not barred either by the lapse of the period prescribed in the redemption decree or by Article 181 of the Limitation Act. [p. 708, col. 1.]

MOHAMMAD BAQAR KHAN *v.* JAGAT NARAIN LAL

The expiry of period fixed by decree, without payment of the decretal amount, gives to the mortgagee a right to apply to the Court under sub-rule (4), r. 8 of O. XXXIV for a decree that the mortgaged property be sold. It does not take away the mortgagor's right to redeem, which subsists in his favour even after sale under r. 89 of O. XXI of the Code of Civil Procedure.

Bibi Jai Kishori v. *Mahommed Ali Khan*, 60 Ind. Cas. 560 ; 7 O. L. J. 620, referred to. [p. 708, Col. 1.]

Article 181 would only apply to an application where it is required by law to be made. The mortgagor is not required by any rule of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of the mortgage It is the mortgagee who is required by law to make an application, under O. XXXIV r. 8 (4), for obtaining a decree for the sale of the mortgaged property. [p. 708, Col. 1]

Appeal from the decree, of the District Judge, Rae Bareli, dated the 26th January, 1923, in an appeal preferred against the decree, of the Subordinate Judge, Partabgarh, dated the 29th April 1921.

Messrs. *M. Wasim* and *Ram Bharose Lal*, for the Appellants.

Mr. *Wasi Hasan*, for the Respondents.

JUDGMENT.—This is the defendant's appeal in a suit for possession of a certain share of *Zamindari* property situate in village Chaukhanda Deh Muafi, Pargana Patti, District Partabgarh, certain groves and a few scattered plots.

The suit in respect of the *Zamindari* share succeeded in both the Courts below but in respect of the other property it has failed and there is no appeal in that behalf.

The property now in dispute was originally transferred by Qadir Khan under two deeds of mortgage, dated the 21st August 1888, to Babu Lal, the predecessor-in-interest of the plaintiffs and the defendant No. 6. Qadir Khan has also since died and his representatives are defendants Nos. 1 to 5. In 1910 defendants Nos. 2 and 3 brought a suit for redemption of the mortgages mentioned above, impleading proper parties as the defendants. The suit was decreed on the 4th March 1911 by the Court of the Munsif, Kunda. This decree was upheld with a slight modification by the Court of appeal on the 30th May 1911. The decree of the 4th March 1911 (Exhibit 2) is before me. It is strictly in terms of O. XXXIV, r. 7, of the Code of Civil Procedure. Six months' time was allowed for payment of the mortgage money. No party to that decree took any steps in pursuance of it; neither the mortgagor paid the amount of the mortgage money within the period fixed by the decree nor the mortgagee applied for sale on the expiry of the said period. In the year 1919, however, the mortgagors set up a case of redemption by payment in the Revenue Court and obtained an *exparte* order for mutation of names in their favour on the 13th December 1920, having forcibly and illegally, as the plaintiff alleged, taken possession of the mortgaged property. The suit, out of which this appeal arises, seeks redress of the wrong committed by the defendants in taking unlawful possession of the mortgaged property.

Two pleas were urged in answer to this suit:—

1. That the defendants entered into possession with the consent of the plaintiffs on payment of a certain sum of money, and

2. That the suit was barred by the effect of the redemption decree of 1911.

The first plea has been negatived by both the Courts below and is no longer tenable in second appeal. The second plea has been reiterated in this Court.

It is argued that the right to possession of the mortgaged property arising as it did under the mortgage was merged into the redemption decree and the only right left to the mortgagees under that decree was to apply for the sale of the mortgaged property and that consequenty the relief for the recovery of possession as mortgagees is no longer available to the plaintiffs.

I am of opinion that the argument is partly sound and partly untenable. That the defendants have unlawfully dispossessed the plaintiffs is not disputed.

The object of the present suit is simply to wipe off this unlawful act of the defendants and to restore the parties to the decree to the same position in which they were on the passing of it. It is admitted that on that date the plaintiffs were in lawful possession of the mortgaged property and under clause (*c*) of rule 7 of O. 34 of the Code of Civil Procedure they were under an obligation to put the mortgagors in possession of the property only in the event of their mortgagors' paying into Court the amount declared to be due to the

mortgagees under the decree. The act of the defendants in dispossessing the plaintiffs without paying the amount fixed by the decree was a clear violation of the decree itself. In this view of the case it is not necessary for the plaintiffs to rely for their title to possession on the terms of the deed of mortgage. In my judgment the relief which has been granted to them flows in the circumstances of this case from the terms of clause (*c*) of r. 7 of O. 34 itself. This clause, as has already been observed, was incorporated in its entirety in the decree of the 4th March 1911. It will be now open to the parties to the decree to work it out in terms of its directions if there is no legal bar to it. This result is to my mind eminently equitable. There can be no doubt that the mortgagors can save the sale of the property at any time before the sale, if it takes place, is confirmed. This was pointed out in the case of *Bibi Jai Kishori* v. *Mohammad Ali Mohammad Khan* (1). Such a payment would not be barred either by the lapse of six months prescribed in the redemption decree or by Article 181 of the Indian Limitation Act. The expiry of six months fixed by the decree without payment of the decretal amount gives to the mortgagee a right to apply to the Court under sub r. (4). r. 8 of O. XXXIV for a decree that the mortgaged property be sold. It does not take away the mortgagor's right to redeem which subsists in his favour even after sale under r. 89 of O. 21 of the Code of Civil Procedure. This point was also made clear by the decision in the case of *Bibi Jai Kishore* v. *Mahammad Ali Mohammad Khan* (1) already referred to. Article 181 would only apply to an application where it is required by law to be made. The mortgagor is not required by any rule of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of the mortgage. On the contrary, theduty is laid on the mortgagee to make an application under sub-r. (4), r. 8 of O. XXXIV as already mentioned, for the purpose of obtaining a decree directing the sale of the mortgaged property. It may be that such an application is now time-barred but by the operation of limitation the relief becomes barred to the mortgagee and the mortgagor cannot complain of it. In the circumstances of the case even the mortgagee does not suffer because he now being restored to possession can continue in it till payment is made by the mortgagor.

Before I close this judgment I might mention that the learned Counsel for the appellants referred to the following cases in the course of his arguments :—*Matru Mal* v. *Durga Kunwar* (2), *Sukhi* v. *Ghulam Safdar Khan* (3), *Sunder Koer* v. *Rai Sham Kishen* (4) and *Sanchidra Nath Roy* v. *Maharaj Bahadur Singh* (5).

My decision is not in the teeth of these decisions on ; the contrary, it is in harmony with them.

The appeal therefore fails and is dismissed with costs.

L. R. *Appeal dismissed.*

(1) 60 Ind. Cas. 560 ; 7 O. L. J. 620.

(2) 55 Ind. Cas. 969 ; 47 I. A. 71 ; (1920) M. W. N. 338 ; 18 A L. J. 396 ; 27 M. L. T. 319 ; 38 M. L. J. 419 ; 11 L. W. 529 ; 2 U. P. L. R. (P.C.) 75 : 22 Bom. L. R. 553 ; 25 C. W. N. 397 ; 32 C. L. J. 121 ; 42 A. 364 ; (P. C)

(3) 65 Ind. Cas. 151 ; 48 I. A. 465 ; (1921) M. W. N. 445 ; 14 L. W. 162 ; 43 A. 469; 26 C. W. N. 279 ; 42 M. L. J. 15 ; 30 M. L. T. 175; 24 Bom L. R. 590 ; (1922) A. I. R. (P. C.). 11 (P. C.)

(4) 34 C. 150 ; 4 A. L. J 109 ; 5 C. L. J. 106 ; 9 Bom. L. R. 304 ; 11 C. W. N. 249 ; 17 M L. J. 48 ; 2 M. L. T. 75 ; 34 I A 9 (P. C.).

(5) 74 Ind. Cas. 660 ; 49 C. 203. ; 30 M. L. T. .96; 24 Bom. L. R 659 ; (1922) M. W. N. 338; 26 C. W; N. 358; (1922) A. I. R. (P. C.) 187 ; 4 U. P. L. R. (P. C.) 57; 48 I. A, 335, (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 208 OF 1922.

June 2, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

BROJENDRA NATH MUKERJEE—PETITIONER—APPELLANT

versus

JADUNATH PALTA AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 173 (3)—Sale of holding, setting aside of—Discretion of Court—Revision—Civil Procedure Code (Act V of 1908), s. 115.

It is in the discretion of the Court to decide whether a sale of a holding is voidable under section 173 (3) of the Bengal Tenancy Act or not and the

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High Court will not interfere in revision with its decision where no serious prejudice has been caused. [p. 709, col. 2.]

Gopal Chandra Mitra v. *Ram Lal Goshain*, 21 C. 554; 10 Ind. Dec. (N. S.) 1000, referred to.

Appeal against the order of the Subordinate Judge, 4th Court, 24 Perganas, dated the 8th May 1922.

Babu *Jadu Nath Kanjilal* and Babu *Santosh Kumar Pal*, for the Appellant.

Babu *Sarat Chandra Mukerjee*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This appeal arises out of an order of the Subordinate Judge of 24 Perganas refusing to set aside a sale held under the following circumstances: In execution of a rent decree brought by Jugal Chandra Mondal and others in respect of a holding of 500 *bighas* of land the rent of which was Rs. 1,000 the tenure was put to sale and purchased by one Aghore Nath Palta on the 16th June 1920. The present appellant Brojendra Nath Mukerjee held 50 *bighas* out of the 500 *bighas* under the judgment-debtors. After the sale was held on the 29th March 1921 the present appellant Brojendra Nath Mukerjee made an application in M. A. No. 29 of 1921 before the Subordinate Judge asking to have the sale set aside on the ground of irregularity and fraud and further alleging that the auction-purchasers Aghore Nath Palta is the son of judgment-debtor No. 2 and is really no more than a *benamidar*. He also stated that the value of the property was Rs. 10,000 and that the tenure was sold at an inadequate price. This application was under O. XXI, r. 90. The learned Subordinate Judge found that the application was barred by limitation and that there was no material irregularity but happens to have come to the conclusion that as a matter of fact the auction-purchaser was a *benamidar* of judgment-debtor No. 2. On the case coming up on appeal before us the learned Vakil for the appellant has not attempted to have the order of the learned Subordinate Judge set aside owing to irregularities within the meaning of O. XXI, r. 90 but has requested us to treat this appeal as an application under section 115, Civil Procedure Code and asks us to set aside the sale in virtue of section 173 (3) Bengal Tenancy Act. His case is that the sale is really a collusive one between the landlord and the tenant and he has been seriously prejudiced as being a sub-tenant of a part of the holding and that the Court should have exercised its discretion under section 173 (3) and set aside the sale as being a *benami* one. On behalf of the respondent it is contended first that the present appellant has no *locus standi* under section 173 at all. He was not the decree-holder nor is he a person interested in the sale. Secondly that the Subordinate Judge himself had the entire discretion as to whether he would avail himself of the provisions of section 173 (3) or not. The sale under that section is not necessarily void but is only voidable and it is in the discretion of the Court to determine whether the sale should stand or not. In this connection reference has been made to the case of *Gopal Chandra Mitra* v. *Ramlal Goshain* (1). In the third place it is argued that as a matter of fact if Aghore is really a *benamidar* the present appellant's interest is by no means affected by the sale as a *benamidar* would not be able to avoid any encumbrance and that there is no ground for treating this appeal as an application under section 115, Civil Procedure Code. In our opinion, in view of the wording of section 173 (3) it is the Subordinate Judge alone who will decide whether the sale is voidable under section 173 (3) or not and in his discretion he decided not to do so. Nor can I see that in this matter the appellant has been seriously prejudiced for if the sale is not set aside it will only be put up to sale again and some one who is not a *benamidar* will have the opportunity to buy it and then the appellant's encumbrance might be cancelled without further difficulty. In this view it is not necessary to come to any conclusion on the other points urged and we hold that this Court would not be justified in treating this appeal as an application under section 115 and to annul the sale under section 173 (3). The main appeal against the order under O. XXI, r. 90 is, therefore, dismissed with costs. We assess the hearing fee at two gold mohurs.

Duval, J.—I agree.

K. S. D. *Appeal dismissed.*
N. H.

(1) 21 C. 554 ; 10 Ind. Dec. (N. S.) 1000.

RAMJANAM SINGH *v.* KHUB LAL SINGH

PATNA HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 238 OF 1924.

June 19, 1924.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

RAMJANAM SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Babu KHUB LAL SINGH AND OTHERS—PLAINTIFFS AND *Babu* RAM BAHADUR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), s. 11, *O. II*, *r.* 2—*Suit for possession—Future* mesne profits *not claimed—Subsequent suit for* mesne profits, *whether barred*

Both in section 11 and in O. II, r. 2 of the Civil Procedure Code the issues and claims there referred to are those which arise out of the cause of action and not those which arise out of some possible future cause of action. [p. 712, col. 1.]

Where therefore future *mesne profits* have not been claimed in a previous suit for possession, a subsequent suit for such *mesne profits* is not barred. [p. 712, cols. 1 & 2.]

Appeal from an order of the District Judge, Darbhanga, dated the 22nd June 1923, reversing an order of the Subordinate Judge, Darbhanga, dated the 6th April 1923.

Mr. *S. N. Roy*, for the Appellants.

Mr. *J. P. Singh*, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted on the 31st May 1922 by the plaintiffs claiming from the defendants *mesne profits in respect of an occupancy* holding from the 1st June 1919 to the 21st January 1922 as well as the price of certain trees cut down by the defendants. A preliminary point was taken at the trial that the suit was barred by *res judicata*, the question of the plaintiffs' right to *mesne profits* from these defendants in respect of this property having been determined in a previous suit.

The Munsif before whom the case came for trial took the view that the suit was barred.

On appeal the learned District Judge of Darbhanga reversed the decision of the Munsif and directed the case to proceed and an investigation to be held as to the amount of *mesne profits* due.

It appears that the plaintiffs were the landlords of the holding in question which had been purchased by the defendants sometime in the year 1915. Subsequently the landlords sued for possession from the defendant on the ground that they were mere trespassers the holding in question being non-transferable without their consent. In that suit in addition to possession of the property they claimed also *mesne profits*. The claim with respect to *mesne profits* was put thus. In paragraph 8 of the plaint in that suit, after stating the value of the property in dispute and the amount of the Court-fee payable thereon, they futher state that the sum of Rs. 5-4-0 was the Court-fee on account of Rs. 69 *mesne profits* on a rough calculation and in their prayer they claim in addition to possession of the property that the Court may be pleased to pass a decree for *mesne profits* in favour of the plaintiff and the defendants' 4th party, the defendants' 4th party being some of their co-sharers who had not joined as plaintiffs, and that after passing the decree the amount of *mesne profits* may be ascertained and then they undertake to pay the deficit amount of Court-fee upon the *mesne profits* as calculated if there should be a deficiency.

In that suit the Court awarded the plaintiffs possession of the property but the judgment and the decree were absolutely silent as to *mesne profits*. No mention is made apparently in the judgment as to *mesne profits* and no determination is come to expressly upon the question of whether the *mesne profits* were recoverable or not. There was an application in review from that decree filed by the plaintiffs asking the learned Judge who decided the suit to amend the judgment by introducing into it a clause about the *mesne profits* but he refused to do so and it seems to me obvious that he had no power on an application in review to deal with a fresh matter which had never been put before him at the trial and for which so far as I can see there was no reason justifying the omission.

The matter went on appeal to the High Court and the High Court remanded the case

for re-hearing not on the question of *mesne profits* but for other reasons. When the case went back again on remand, again some mention was made about the *mesne profits* but the learned Judge who re-heard the case on remand simply stated that he refused upon this point to interfere with the decision of his predecessor and there the matter stood.

In the present suit the claim of the plaintiffs is for *mesne profits* from the 1st June 1919 up to the 21st January 1922, that is for the *mesne profits* for three years prior to the suit except that there is no claim apparently for the period between the 21st January and the 31st May 1922 when the plaint was filed. The period for which *mesne profits* are claimed in the present suit it will be observed is a period subsequent to the institution of the previous suit. The first question which arises for determination is whether these *mesne profits* which were the profits accruing after the institution of the previous suit were in fact claimed in the previous suit because if they were not then it seems to me quite clear that there could be no question of *res judicata* arising here because the previous suit can only be conclusive of questions arising between the parties which were raised in that suit or which ought to have been raised or arose out of the same cause of action. I have already referred to the plaint in the previous suit and the conclusion I have come to on reading that plaint is that there was no claim whatever for future *mesne profits*. If that is so then it seems to me that that determines the question and that the learned District Judge in appeal was right in overruling the decision of the trial Court and sending the case back for re-hearing.

The argument which has been put before us on behalf of the appellants is based upon the construction of section 11, O. II, r. 2 and O. XX of the Civil Procedure Code. Shortly the argument is this that the plaintiffs were entitled in the previous suit to claim *mesne profits* not only for the period ending with the institution of the suit but for the subsequent period up to the delivery of possession or up to three years from the date of the decree whichever might be shorter and either that they did claim such profits, a point which I have already stated I find against them, or that if they did not that they were entitled to and if they failed to claim such relief as they were entitled to and the judgment was silent upon the question it must be taken that the point was decided against them and they cannot raise it in a subsequent suit. Section 11 provides that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." It is clear that in so far as future *mesne profits* were concerned, that was not a matter directly and substantially in issue or indeed in issue at all in the previous suit but explanation V of that section is relied upon and it says "Any relief claimed in the plaint which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused." Again that part of the section is of no avail in the present case unless the claim to future *mesne profits* was a part of the relief claimed in the plaint. But it is said that with that section one must read O. II, r. 2 which provides :—

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Again in this Order the relief referred to is the relief arising out of the cause of action and this Order does not appear to me to assist the appellants in this case because it is clear that at the date of the suit no cause of action had accrued for the subsequent *mesne profits*. But it is contended that the case is covered by O. XX, r. 12 which provides that,

"(1) Where a suit is for the recovery of possession of immoveable property and for rent or *mesne profits*, the Court may pass a decree—

(*a*) for the possession of the property;

(*b*) for the rent or *mesne profits* which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or *mesne profits*;

(*c*) directing an inquiry as to rent or *mesne profits* from the institution of the suit until

(*i*) the delivery of possession to the decree-holder,

(*ii*) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or,

(*iii*) the expiration of three years from the date of the decree,

whichever event first occurs". It is contended that this was a relief which was open to the plaintiffs in the previous suit and that the Court was bound by its decree to deal with all the reliefs which the plaintiffs were entitled to sue for and if it did not deal with those matters then, under the former provisions of the Code to which I have referred, it must be taken that the Court had decided against the plaintiffs. I cannot accede to this view. It seems to me quite clear that both in section 11 and in O. II, r. 2 the issues and claims there referred to are those which arise out of the cause of action and not those which arise out of some possible future cause of action, although for the sake of convenience it is provided by O. XX, r. 12 that future *mesne profits*, although no cause of action may have arisen for such at the date when the suit was instituted, may be dealt with by the Court. It is noticeable that under O. XX, r. 12 there is no obligation whatever upon the Court to determine any question as to the future *mesne profits*. It may, if it likes, direct an enquiry as to the rent or *mesne profits* from the institution of the suit until the date of delivery of possession or until one of the other periods mentioned in the rule. But if the Court does not choose to do so, and there may be good reasons for its refusing to exercise its jurisdiction, then it seems to me that it cannot be said that any question has been decided with regard to the *mesne profits* especially where they have not been claimed in the suit as here. We have been referred to certain cases in the Madras and Allahabad High Courts, *Doraiswami Aiyar* v. *Subramania Aiyer* (1) and *Mohammad Ishaq Khan* v. *Mohammad Rustum Ali Khan* (2) in which it was held that even where future *mesne profits* had been claimed in a previous suit, if the Court had not dealt with the matter at the hearing this did not amount to *res judicata* and did not bar a subsequent suit for those future *mesne profits* when the cause of action had in fact accrued. The Bombay High Court on the other hand in the case of *Atmaram Bhaskar Damle* v. *Parashram Ballal Kelkar*(3) took a contrary view. It is unnecessary for us to decide which of these conflicting views is, in our opinion, right, because in both cases the future *mesne profits* had been claimed in the previous suit whereas in the present suit the future *mesne profits*, which are the subject matter now in controversy, were not claimed at all in any previous suit. In my opinion the learned District Judge was right and the trial Court was wrong and this appeal must be dismissed with costs.

Foster, J.—I agree.

K. S. D. *Appeal dismissed.*

(1) 42 Ind. Cas. 929; 41 M. 183; 22 M. L. T. 484; 33 M. L. J. 699; (1917) M. W. N. 847; 6 L. W. 784. (F. B.)

(2) 44 Ind. Cas. 88; 40 A. 292; 16 A. L. J. 182.

(3) 58 Ind. Cas. 419; 44 B. 954; 22 Bom. L. R. 982.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2612 OF 1918.

November 26, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Moti Sagar.

K. H. SKINNER—DEFENDANT—APPELLANT

versus

ROSY SKINNER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (Act I of 1877), s. 19, 21—Contract of sale—Suit for specific performance—

K. H. SKINNER v. ROSY SKINNER

Damages, prayer for, whether necessary—Court discretion of.

A plaintiff is not obliged in a suit for specific performance to pray specifically for damages whether in addition or in substitution. He has a choice of remedies open to him to apply for and the Court has always a discretionary power to allow damages if it is of opinion that damages are the appropriate remedy. [p. 715, col. 1.]

Ookerjee Cowasjee v. *Sabbapathy Mudaliar*, 51 Ind. Cas. 903 : 9 L. W. 471 ; (1919) M. W. N. 714; *Krishna Aiyer* v. *Shamanna*, 17 Ind. Cas. 497 ; 23 M. L. J. 610 ; (1912) M. W. N. 1188 ; *Callianji Harjivan* v. *Narsi Trichum*, 19 B. 764.; 10 Ind. Dec. (N. S.) 512, **followed.**

Issac Brickles v. *Snell*, 38 Ind. Cas. 123 ; 86 L. J. P. C. 22 (P. C.), **distinguished.**

Appeal from the decree of the Senior Subordinate Judge, Hissar, dated the 9th July 1918.

Bakhshi *Tak Chand* and Dr. *G. C. Narang*, for the Appellant.

Mr. *Abdul Rashid* and Mr. *M. Obedulla*, for the Respondents.

JUDGMENT.—This is an appeal from a decision of the Senior Subordinate Judge of Hissar, dated the 9th July, 1918, in a suit for the specific performance of a contract. It appears that on the 30th May 1914 a contract was entered into between the parties to this suit under which the plaintiffs agreed to sell and the defendant to buy six villages, namely Dhagur, Seeswal, Lalee, Jallopur, Pahal and Bhuree, in the Hissar District, for a sum of Rs. 4,23,000. These villages along with certain other properties were under mortgage with the Bank of Upper India at Meerut and it is admitted that on the day the contract was entered into, the debt due on the mortgage exceeded the sale price of the villages contracted to be sold under this agreement. One of the conditions of the sale was that a sum of Rs. 5,000 would be paid by the vendee as earnest-money and that a further sum of Rs. 1,00,000 will be paid by him into the Bank of Upper India on or before the 18th of June 1914. It was further agreed that the vendee will arrange with the Manager of the Bank of Upper India that out of the total sum due on the mortgage a sum of Rs. 3,18,000 (the balance of the sale price) would be transferred from the debit account of the plaintiff-vendors to that of the defendant-vendee and that the former would give to the latter a clear title free from all incumbrances in respect of the six villages sold under the agreement. There was a further condition to the effect that in case the Bank did not agree to the proposed transfer the vendee would be liable to pay interest on the balance of the sale price after the 18th of June, 1914 and that he would also be liable to pay costs which may accrue to the plaintiffs in case there was any litigation between them and the Bank in respect of this matter of transfer. It is alleged that the defendant paid the two sums of Rs. 5,000 and Rs. 1,00,000 on the dates agreed upon but that in spite of repeated requests on the part of the plaintiffs he failed to perform his part of the contract in respect of the matter of the transfer of the debt nor did he pay the balance of the sale price to the vendors themselves or into the Bank with the exception of a small sum of Rs. 1, 800 which the plaintiffs admit to have subsequently realised. It is further alleged that soon after the payment of Rs. 1,00,000 into the Bank of Upper India the plaintiffs applied to the Revenue Authorities for the mutation of names in favour of the vendee and that mutation was effected in his favour on the 1st of April 1915 since which date he has been in exclusive possession of the properties sold and has been realising the rents and profits thereof. On the 27th of May 1917 the plaintiffs brought this suit in which it was prayed that the defendant should be ordered to perform specifically his part of the contract and that a decree for the balance of the purchase money, namely Rs. 3,16,200 should be passed in their favour against him. It was further prayed that a sum of Rs. 83,834 should be awarded as interest by way of damages in accordance with the terms of the agreement and that they should also be given future interest from the date of the institution of the suit till realisation.

The suit was resisted by the defendant on various grounds but his main grounds of defence were

(1) that no cash payment was contemplated and that the plaintiffs had no cause of action to maintain a suit for the specific performance of the contract ;

(2) that the defendant had taken all possible steps to get a transfer of the debt effect-

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ed but that the Bank had declined to agree to the transfer. In these circumstances it was contended that the defendant was absolved from all further liability. The Trial Court held that a suit for the specific performance of the contract was not maintainable but that the defendant was liable to pay damages which were assessed at Rs. 3,16,200, the balance of the unpaid purchase money. Interest at 9 per cent. *per annum* on the balance of the unpaid purchase money from the 18th of June, 1924 till realisation was also decreed and it was ordered that the whole of the sum decreed should be paid by the defendant into the Bank of Upper India with whom the property in question was still under mortgage.

Against this decision a first appeal has been preferred to this Court by the defendant and the only points urged on his behalf are :

(1) That the lower Court having found that a suit for specific performance of the contract was not maintainable damages should not have been awarded, especially when they were not claimed in the plaint ;

(2) that under the terms of the contract it was never contemplated that the defendant would be called upon to pay the balance of the sale price in cash and that what was contemplated was that if the Bank did not agree to the proposed transfer the plaintiffs should wait till the Bank brought a suit on the basis of their mortgage and then claim interest and costs from the defendant ; and

(3) that the defendant was not liable to pay interest at the rate of 9 per cent. *per annum* but at the rate which the plaintiffs had to pay to the Bank on the basis of their mortgage deeds.

We will take up the first two points together as they are intimately connected with each other. In support of the 1st contention a Privy Council ruling reported as *Issac Brickles* v. *Snell* (1) is relied on wherein it was held that a prayer for "such further relief as the nature of the case may require", in a suit by the buyer for specific performance of a contract for the sale of land does not include a claim for damages or a refund of the deposit money in the alternative, but means only such further relief as is ancillary to the main specific relief claimed. It is argued that in the present case the main relief claimed was the specific performance of the contract, which was that the vendee will arrange with the Bank of Upper India that liability for payment of the debt of Rs. 3,18,000 should be transferred from the plaintiffs' shoulders to those of the defendant-vendee, and that as a claim for damages in the alternative was not asked for in the plaint the Court had no power to award compensation under section 19 of the Specific Relief Act. In our opinion there is no force in this contention. In the first place, we are unable to agree with the learned Counsel for the Appellant that a cash payment was not contemplated and that the contract between the parties was only that the debt would be transferred from the vendors' account to that of the vendee. There was a further condition also in the contract that in case the bank did not agree to the transfer the defendant would be liable to pay interest on the balance of the sale price. This clearly meant that if the transfer was not effected the defendant would not be absolved from further liability but that he would be liable for the natural consequences of his breach of the contract. In our opinion the intention of the parties clearly was that the vendee would endeavour to induce the bank to accept him as a debtor to the extent of Rs. 3,18,000 in place of the plaintiffs, and that, if he failed in his attempt to do so, he would be liable to pay the balance of the sale price to the vendors as well as interest at a reasonable rate on the unpaid purchase money. It appears that the bank has gone into liquidation and is not inclined to allow the defendant a set-off for certain deposits which he has in the bank, but this is a matter which rests entirely between the defendant and the bank and the plaintiffs are not in any way affected by it. It was the duty of the defendant under the agreement to get a transfer effected and, if he failed in this attempt, to pay the balance of the purchase money to the vendors. The Privy Council ruling on which reliance has been placed has, in our opinion, no application to this case. That was a case in which it was found that the plaintiff, who wanted a contract for the sale of certain land to be specifically enforced, was in default and that he was not entitled to claim a refund of the deposit money in the

(1) 38 Ind. Cas. 123; 86 L. J. P. C. 22 (P. C.).

alternative inasmuch as no such prayer had been specifically made in the plaint. There is no finding in the present case, and in fact, it has not even been argued by the learned Counsel for the appellant, that it was owing to the default of the plaintiffs that the sale was not effected. Moreover the decision of the Privy Council was given in a case which went up in appeal from the Supreme Court of Ontario in Canada and is not an interpretation of sections 19 and 21 of the Specific Relief Act in India. In *Ookerjee Cowasjee* v. *Sabhapathy Mudaliar* (2) it has been heldt hat in a case where the claim falls under section 21 (*a*) of the Specific Relief Act and cannot be specifically enforced the plaintiff is entitled to claim compensation in the alternative under section 19, and under the Explanation to that section, the Court is not precluded from granting it by the circumstances that the contract has become incapable of specific performance and that there is no prayer for such relief in the plaint. In *Krishna Aiyar* v. *Shammanna* (3) it was held that the Court can in such a case award damages in the alternative though not asked for in the plaint. In *Callianji Harjivan* v. *Narsi Tricum* (4), which was a case for an injunction, it was held that though an injunction could not be granted yet there was no reason why damages should not be awarded though they were not specifically asked for in the plaint. It is therefore clear that a plaintiff is not obliged in a suit for specific performance to pray specifically for damages whether in addition or in substitution. He has a choice of remedies open to him to apply for and the Court has always a discretionary power to award damages if it is of opinion that damages are the appropriate remedy. We accordingly hold that damages could be awarded by the Court even though there was no specific prayer in the plaint, for such relief.

The next question argued was that of interest. Our attention was drawn to the various mortgage-deeds executed by the plaintiffs in favour of the bank and it was pointed out that the rate of interest agreed upon in some of those deeds was only 6 *per cent.* It was consequently argued that the plaintiffs were not entitled to claim interest at a rate higher than 6 *per cent.* and that the decree of the Court below should be altered accordingly. It is clear, however, that in addition to 6 *per cent.* the bank has been charging the plaintiffs compound interest at half-yearly rests and this method of calculation brings up the total amount of interest due to practically the same figure as that claimed in the plaint. On our pointing this out to the learned Counsel for the appellant the contention was not pressed and was practically given up. It is therefore unnecessary for us to give any finding upon this point.

Lastly, it was contended in a half-hearted manner that in accordance with the terms of the agreement the plaintiffs were bound to convey a clear title to the defendant free from mortgage before they could call upon him to pay the balance of the sale price and as there was no evidence on the record to show that the bank was prepared to release the properties in question, no suit for specific performance of the contract was maintainable. This contention has, in our opinion, no force. It was never pleaded by the defendant in the Court below that the contract went off owing to the default of the plaintiffs and that the price was not paid because the plaintiffs were unable to convey a clear title. What was pleaded, as already observed, was that a cash payment had never been contemplated and that the plaintiffs had no cause of action to claim specific performance. This objection is on the face of it frivolous and we have no doubt that the bank would have been only too glad to release the properties if the whole of the money due under the contract of sale had been paid up. It was for the defendant to show that he performed his part of the contract and that the price was not paid because the plaintiffs failed to perform theirs. The defendant has entirely failed to prove this and we overrule the contention.

In our opinion the suit has been rightly decreed and we dismiss the appeal with costs throughout.

K. S. D. *Appeal dismissed.*

(2) 51 Ind Cas. 908 ; 9 L. W. 471 ; (1919) M. W. N. 714.
(3) 17 Ind. Cas. 497 ; 23 M. L. J. 610; (1912) M. W. N. 1188.
(4) 19 B. 764 ; 10 Ind. Dec. (N. S.) 512.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 199 OF 1923.

June 30, 1924.

Present :—Mr. Justice Das, and
Mr. Justice Ross.

Raja SIDHESWARI PRASAD NARAYAN SINHA—OPPOSITE PARTY—APPELLANT

versus

Musammat DULHIN RADHA DULARI KUAR—PETITIONER—RESPONDENT.

Execution of decree—Mortgage suit—Preliminary decree, whether can be executed—Execution Court, duty of—Property of judgment-debtor under Court of Wards—Manager not made party, Effect of.

A preliminary decree in a mortgage suit is not capable of execution. [p. 716, col. 1.]

It is the duty of the Execution Court to see that the parties to the execution are properly before the Court [p. 717, col. 1.]

When the property of the judgment-debtor is under the Court of Wards and the Manager of the Court of Wards is not made a party to the Execution, the ward is not properly before the Court. [p. 717, col. 1.]

Appeal from an order of the Subordinate Judge, 1st Court, Chapra, dated the 16th April 1923.

Mr. *Sambhu Saran*, for the Appellant.

Mr. *Sultan Ahmad*, for the Respondent.

JUDGMENT.

Ross, J.—This is an appeal against an order of the Subordinate Judge of Chapra deciding that an execution was barred by limitation against judgment-debtor No. 1, the respondent.

It appears that a preliminary decree in a mortgage suit was passed on the 23rd March 1910 and that the present application for execution was made on the 12th of May 1922. The respondent in her objection took two grounds ; first, that the execution petition was not maintainable because she had not been properly made a party to the execution case; and, secondly, that the decree was barred by limitation. It is conceded that no final decree was passed in the suit. Therefore if any decree is being executed, it must be the preliminary decree. Now a preliminary decree in a mortgage suit is not capable of execution. Whether that which is incapable of execution becomes capable of execution by reason of the objection not having been taken at an earlier stage is a matter as to which I express no opinion. But at the best it must be the date of the preliminary decree from which time is to be calculated ; and, in that case, the present petition for execution is clearly barred.

It is argued that this is a decree for the payment of money at a certain date and that under section 48 (1) (*b*) twelve years ought to be calculated from that date. The answer to this is, first, that the decree is not a decree for the payment of money, but a mortgage decree which is vitally distinct from a money decree ; and, secondly, that it is not a decree for the payment of money at a certain date. The period of grace fixed by the mortgage decree is not a certain date fixed for the payment of money.

Then it is argued that the appellant could have shown that the present application for execution was in continuation of the last execution, if the question had been raised. The question was raised in the respondent's objection ; and, in any case, it was for the appellant, who was clearly out of time, to show that his application for execution was maintainable. With regard to the objection that the preliminary decree is not capable of execution this objection failed in the case of the other judgment-debtors and succeeded in the case of the present respondent ; because it was held that she being a ward under the Court of Wards was not properly represented in the execution proceedings and was therefore entitled to raise the point now. The learned Vakil for the appellant argued that this part of the decision was wrong, because the question was raised in the trial itself and it was held not to have been shown that the property which was the subject of the mortgage had been taken charge of by the Court of Wards. The question at issue in the original trial was as to the maintainability of the suit. The order of the Board of Revenue declaring the respondent to be incompetent to manage her own property directed that the said property be taken charge of and managed by the Court of Wards. *Prima facie*, therefore, the property in suit was under the Court of Wards and the respondent is certainly disqualified to manage it. It was the

duty of the executing Court to see that the parties to the execution were properly before the Court; and it is in no sense going behind the decree to hold that this disqualified proprietor was not properly before the Court when the manager of the Court of Wards had not been made party to the execution.

I hold therefore that the execution was not maintainable against the respondent both on the ground that he was not properly represented and on the ground that the application itself was barred by time. The appeal must be dismissed with costs.

Das, J.—I agree.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 25 OF 1921.

June 25, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice and Mr. Justice Piggott.

SHAMBHU DAYAL—PLAINTIFF—APPELLANT

versus

LALLU MAL—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 118—Promissory note, suit on—Plaintiff abandoning recital—Consideration partly cash and partly by way of reducing defendant's liability—Proof—Plaintiff, what can recover.

Plaintiff sued to recover Rs. 8,000 from the defendant on the basis of a promissory note executed by the latter. Defendant admitted having executed the promissory note but denied having received any consideration therefor. Plaintiff thereupon abandoned the recital in the promissory note and tried to prove that defendant had got the benefit of Rs. 8,000 partly in cash and partly by reduction of his liabilities towards another firm. He failed to prove the latter part of his case:

Held that under the circumstances plaintiff was entitled to recover only what had actually been paid by him to the defendant.

Appeal from the decree of the Sub-Judge, Meerut.

Messrs. *S. N. Sen* and *K. C. Mittal*, for the Appellant.

Messrs. *Nithal Chand* and *S. N. Gupta*, for the Respondent.

JUDGMENT.—On the 25th of February, 1920, the defendant Lallu Mal executed in favour of the plaintiff Shambhu Dayal a promissory note for Rs. 8,000. The document begins with the following recital, "I have to-day taken a sum of Rs. 8,000 in cash for payment to Ram Chander Kedar Nath, commission agents of Meerut." On the same date Lallu Mal executed a receipt for the sum of Rs. 8,000, beginning with the words, "I have received to the last farthing the sum of Rs. 8,000 in respect of the note of hand executed by me in favour of Shambhu Dayal. Nothing now remains unpaid out of the amount of the said note of hand." This receipt was attested by two witnesses. Piarey Lal and Timmal Singh, and as it happens each witness has appended to this signature a certain note. Piarey Lal notes that he attested the receipt at the request of Lallu Mal. The ordinary meaning of such a note by an attesting witness would certainly be that he had not seen Lallu Mal with his own eyes execute the receipt, but had attested it at Lallu Mal's request upon an admission by the latter of the genuineness of his signature. Timmal Singh's note is to the effect that Rs. 8,000 were paid over in cash in his presence. The suit when first instituted was dealt with *ex parte* on the failure of the defendant to enter an appearance. Timmal Singh was examined on the 12th of August, 1920, in the *ex parte* proceedings as a witness for the plaintiff. He swore to the execution of the promissory note and receipt and stated, "the money was paid in cash in my presence." The defendant subsequently entered an appearance and satisfied the Trial Court that he could show sufficient grounds for having the *ex parte* decree set aside. His next step was to challenge the plaintiff to produce his account books and to take time to inspect the same. In his written statement he finally took the line that, while the promissory note and the receipt had undoubtedly been executed by him, and were in

fact entirely in his handwriting, no consideration whatsoever had passed. He explained the matter in this way. He had been gambling in grain with the firm of Ram Chander Kedar Nath, whose names appear in the promissory note. In the month of February 1920 he was anxious to enter into a further transaction with them in respect of 40 grain pits, deliverable three months later. The firm refused to allow him any further opportunity of speculating in grain, unless he was prepared to give some advance payment or security. Having no cash in hand and being in fact considerably indebted to the firm of Kedar Nath he offered to give them a promissory note. They thought it would not be convenient to take the promissory note either in their own names, or in the names of any member of the firm, and suggested that it might be made out in the name of the plaintiff Shambhu Dayal, who is some sort of a distant relation of Kedar Nath's. On this basis the transaction was entered into, and the two documents in suit were executed. On the case going to trial upon these pleadings, the Court very properly laid the burden of proof on the defendant and Lallu Mal himself gave evidence and was supported by two witnesses, Raghubar Saran and Bharat Singh. Lallu Mal's evidence certainly does not sound straightforward or satisfactory. In particular, when he was examined about certain *hundis* which he had executed in favour of the firm of Ram Chander Kedar Nath, he was obviously fencing with the Court and keeping back as much of the truth as he could. The important point to be noticed, however, is that he admitted the genuineness of the two *hundis* executed by him in favour of the firm of Ram Chander Kedar Nath, which the plaintiff produced as part of his evidence. The witnesses Raghubar Saran and Bharat Singh have been adversely criticised by the Trial Court, and, on examining the record of their evidence for ourselves, we can see no reason to reconsider the adverse verdict the Trial Court has pronounced upon them. Certainly, if Raghubar Sarau is telling the truth, he would have been asked to attest the receipt. If the plaintiff had rested on the case as it stood at the close of the defendant's evidence, it seems impossible to doubt that the Trial Court would have decreed the claim on the basis of the double acknowledgment contained in the negotiable instrument itself, which is the basis of the suit, and in the receipt executed on the same date. The plaintiff, however, elected to produce evidence and there is certainly room for controversy about the evidence which he produced. At the outset, the plaintiff departed from the position which he had taken up at the *ex parte* hearing. Timmal Singh himself had to admit that it was not literally true that Rs. 8,000 in cash had passed from the plaintiff to the defendant on the 26th of February 1922. The account which he now gives of the transaction may fairly be summarised thus. The plaintiff Shambhu Dayal had been engaged in speculation with the firm Ram Chander Kedar Nath and had been more fortunate than Lallu Mal. There was money due to him on a balance of account from the same firm and it seems that there was also a sum of money due to him on a loan which had been taken from him some years before by Khedar Nath. The total liability of the firm of Ram Chander Kedar Nath to the plaintiff Shambhu Dayal worked out at exactly Rs. 5,000. Now Gopal Chander, son of the plaintiff Shambhu Dayal, who seems to have carried this transaction through on behalf of his father and who was very properly produced as a witness in his father's place, deposes that he came into Meerut with Rs. 3,000 in cash, which he was prepared to advance to Lallu Mal. This advance he did make, and for the remaining Rs. 5,000, necessary to make up the total of Rs. 8,000, he turned to the witness Timmal Singh, who is himself a partner in the firm of Ram Chander and Kedar Nath, and said in effect, "now let me have the Rs. 5,000 which the firm owes me and I will hand it over to Lallu Mal to make up the total of Rs. 8,000 for which he has given me a promissory note." According to Gopal Chander it was Lallu Mal himself who replied that this would not be necessary as the firm of Ram Chander Kedar Nath would give him (Lallu Mal) credit for this sum of Rs. 5,000 in reduction of the debt which he owed them. In substance, therefore, the plaintiff's case was this. He advanced Rs. 3,000 in cash and for the rest he took over Lallu Mal as his debtor in a sum of Rs. 5,000, in substitution for the firm of Ram Chander Kedar Nath who had previously owed him the money. The plaintiff

supported his story by the production of his account books. These have been adversely criticised by the learned Subordinate Judge upon grounds which seem to us somewhat captious and unreasonable. The entries in these books of account, according to the Christian era, are correct, the day of the week being correctly given in accordance with the corresponding English date. There is a persistent error, extending throughout all the accounts which have been submitted for inspection and covering a period of at least two years, in the correspondence between the Hindi date given according to the Sambat year and the English date. This circumstance, although not particulary creditable to the plaintiff, is not really a valid reason for discrediting the genuineness of the accounts themselves. A very probable explanation of the manner in which such a discrepancy between the Hindi and English dates could come into existence, and continue aggregating itself over a series of years, was suggested to us in argument and seems to us reasonable enough. When we come to the entries for the important date, the 26th of February, 1920, we find that the account purports to show a cash payment of Rs. 8,000, to Lallu Mal on the security of a promissory note partly covered by cash receipts aggregating precisely Rs. 5,000 from the firm Ram Chander Kedar Nath on account of money previously due from the said firm. In substance, the entries agree well enough with the story told by Gopal Chander in the witness-box. They certainly cannot be said to contradict his story.

As for the other point taken by the learned Subordinate Judge, namely, that it is open to argument whether the plaintiff had Rs. 3,000 in cash on hand on the 26th of February, 1920, it does not seem to us that there is anything in it. He started the day with a cash balance of Rs. 2,133-14-6, and by the end of the day he had depleted his cash balance to such an extent that he had only Rs. 207-14-9 in hand. There had been other receipts during the day besides the nominal receipt of Rs. 5,000 from the firm Ram Chander Kedar Nath. Here again there seems no valid basis for the contention that the evidence given by Gopal Chander is contradicted by his accounts. As regards the cash payment of Rs. 3,000 the evidence given is that of Timmal Singh and Piarey Lal. Of course Timmal Singh's evidence is no doubt discounted by the fact that he had taken it upon himself at the *ex parte* hearing to depose that the entire sum of Rs. 8,000 was paid in cash. At the same time it is reasonable to make some allowance for the manner in which evidence is taken at *ex parte* proceeding. On the story told by Gopal Chander if it be assumed even for the sake of argument that the story is in the main true, there was a kind of payment of Rs. 5,000 involved in the transfer of Rs. 5,000 from Ram Chand Kedar Nath to Gopal Chander and back again to Ram Chander Kedar Nath in part satisfaction of the money which Lallu Mal owed. The evidence of Timmal Singh cannot be wholly discredited on the basis of the loose and summary statement made by him in the *ex parte* proceeding. Moreover, as it seems to us, the trial Court has wholly overlooked the extent to which any evidence produced by the plaintiff regarding the payment of consideration is corroborated by the defendant's signature on the two documents which are the basis of the suit. We are prepared to accept the plaintiff's evidence as proving a cash payment of Rs. 3,000 made to Lallu Mal in connection with the execution of the promissory note. Now as regards the balance of Rs. 5,000 there is some documentary evidence in favour of the plaintiff still to be noticed. On the said date, namely, on the 26th of February, 1920, Ram Chander Kedar Nath executed in favour of Shambhu Dayal and his son Gopal Chander a formal receipt for Rs. 5,000 as received on account of money due from the defendant Lallu Mal. They divided this into two heads, Rs. 2,700 received on account of two hundis executed by Lallu Mal, and Rs. 2,300 credited to Lallu Mal. The hundis Lallu Mal himself admitted were handed over to Gopal Chander in order that he might keep them as evidence of the payment by him and his father of this part of the consideration for the promissory note. Undoubtedly this item of Rs. 2,700 is proved up to the hilt. Our real difficulty is about the item of Rs. 2,300 in any shape or form. The accounts of the firm Ram Chander Kedar Nath were not produced. We may take it as admitted that Lallu Mal was indebted to them on the 26th of February, 1920, to an amount considerably in excess of Rs. 2,300. But

what is not proved is that they gave him credit in current account, in reduction of his liability, for this sum of Rs. 2,300. We are bound to hold that this is not proved. The only question then is whether this sum of Rs. 2,300 can be decreed in favour of the plaintiff on the strength of the defendant's signature to the pro-note and the receipts. We have already indicated our opinion that this could have been done if the plaintiff had offered no evidence at all. As the case now stands the plaintiff himself has gone back on the recital in the promissory note to the effect that Rs. 8,000 were paid over in cash. Abandoning that recital, he has undertaken to prove that Lallu Mal got the benefit of Rs. 8,000 partly in cash and partly by reduction of his liabilities towards the firm of Ram Chander Kedar Nath. In our opinion the plaintiff has failed to prove the latter part of his case to the extent of this item of Rs. 2,300, and we must give effect to this finding.

In the result, therefore, we set aside the decree of the trial Court and in lieu thereof we give the plaintiff a decree for Rs. 5,700 with proportionate interest. The parties will pay and receive costs in proportion to failure and success in both Courts. Costs in this Court to include fees on the higher scale. Under the circumstances we decline to allow the plaintiff interest *pendente lite* or future interest.

K. S. D. *Appeal allowed in part.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 124 OF 1922.

February 7, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

SHRICHAND ANOPCHAND GUJAR VAHIWATDAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

P. E. BOYCE AND SONS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Sale of goods—Deposit as security—Breach by purchaser—Forfeiture of deposit.

Plaintiff agreed to purchase 2,000 bags of cotton seed from defendant to be delivered at the defendant's factory within one month. Plaintiff agreed to pay for the goods and remove them within one month, failing which he undertook to make good the loss which the defendant might suffer and cancel the contract. The contract also contained the following clause :—

"In respect of this contract a total sum of Rs. 1,025 has been deposited for profit or loss, and the said deposit amount should, after the completion of the contract, be returned to us."

Plaintiff failed to carry out the contract ;

***Held*, that the sum of Rs. 1,025 was meant to be security for any loss that the defendant might suffer on plaintiff's failing to take delivery of the goods and was not intended as security for the performance of the contract; so as to entitle the defendant to forfeit the sum in case of non-performance.**

Appeal against the decision of the Assistant Judge, Belgaum, in case No. 249 of 1920.

Messrs. *G. V. Thakor* and *R. J. Thakor*, for the Appellants.

Mr. *A. G. Desai*, for the Respondents.

JUDGMENT.—On the 7th August 1917 the plaintiff entered into a contract with the 1st defendant to buy 2,000 bags of cotton seeds to be delivered at the defendant's factory within one month. The plaintiff agreed to pay the full amount in respect of the said bags which appear to have been sold at the rate of 41 lbs. to the rupee, and remove the goods within the said time ; and if he failed to remove the same within the same period, he undertook to make good the loss which the defendant might suffer, and treat the contract as cancelled. We confess it is difficult to extract the meaning of the words which caused the dispute in the present suit. "In respect of this contract a total sum of Rs. 1,025 has been deposited for profit or loss, and the said deposit amount should, after the completion of the contract, be returned to us."

The plaintiff did not take delivery within one month. On the 24th September 1917 he received a notice from the 1st defendant as follows :—"You should within eight days after receipt of this notice, come and pay the moneys that may be found due to us under accounts and take away the goods. If you should fail to do so, the said goods will be

sold at your risk at the market rate and as regards damages, you will be held responsible for the balance that may remain after deduction of your advance amount, and you will be required to pay interest on the amount from the date of the expiry of the period of your agreement."

The period for performance was extended to the 2nd October. That is the date on which the contract was finally broken by the plaintiff. The defendant did not sue for damages but claimed to retain Rs. 1,025.

In April 1919 the plaintiff filed this suit to recover Rs. 1,025 on the ground that defendant No. 1 had broken the contract. The plaintiff originally claimed damages to the extent of Rs. 2,175 in addition to the deposit of Rs. 1,025, but when asked to furnish particulars he failed, when the claim was reduced to Rs. 1,025, the amount of the deposit.

The suit was dismissed in both the Courts. It is contended by the 1st defendant that the parties agreed that Rs. 1,025 were security for the performance of the contract, and because of non-performance by the plaintiff the amount should be forfeited. That is not what the contract says, and that is not what the 1st defendant thought the contract meant when he wrote the letter of the 24th September 1917 ; and since it is clear that defendant No. 1 could only succeed by reading into the contract words which are not there, we see no reason why we should now accede to that request on behalf of the 1st defendant when at the time the plaintiff was in default in the performance of his part of the contract, he did not consider that Rs. 1,025 was security for the non-performance of the contract.

That would be sufficient to dispose of the defendant's contention. A part from the letter of the 24th September, it seems to us to be a rational construction to be put upon the words " In respect of this contract a sum of Rs. 1,025 is deposited for profit or loss", that Rs. 1,025 was to be security for any loss that defendant No. 1 might suffer on the plaintiff's failing to take delivery of the goods.

Unfortunately the question of damages was not sufficiently considered by the Court below. The question was mixed up with a further question whether as a matter of fact the 1st defendant had suffered any loss at all, and the question, what was the proper measure of damages, does not seem to have been considered in any way in either Court. It does not appear from the wording of the contract that this was a contract for ascertained goods and the statement in the letter of 24th that "the goods belonging to the plaintiff were lying with the defendant and that the plaintiff had not removed them" would not be sufficient, considering the terms of the contract, to show that the goods had been ascertained and set apart for the plaintiff's use. Considering the contract was for the purchase of 2,000 bags of cotton seeds, we think the 1st defendant merely meant that he had got 2,000 bags ready for delivery to the plaintiff when he chose to come and take them.

It will be necessary, therefore, to remand the case to the trial Court under O. XLI, r. 25 for the Trial of an issue : What was the loss suffered by the 1st defendant owing to the failure of the plaintiff to take delivery? The measure of damages would be the difference between the contract rate and the market rate of the contract goods on the 2nd of October 1917.

Finding to be certified by the Appellate Court in 3 months. Parties to be allowed to adduce fresh evidence. If parties come to an agreement on our findings, it will save a great deal of trouble. All costs to be costs in the cause.

Z. K *Case remanded.*

DWARKA DAS *v.* MUHAMMAD ASHFAQULLAH

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1779 OF 1923.

July 1, 1924.

Present:—Mr. Justice Mukerjee and Mr. Justice Dalal.

Babu DWARKA DAS—DECREE-HOLDER—APPELLANT

versus

Maulvi MUHAMMAD ASHFAQULLAH—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 11, *O. XXI, r.* 16—Res judicata, *principle of, whether applicable to execution proceedings—Application for execution by assignee from decree-holder—Judgment-debtor, duty of.*

The provisions of section 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently [p. 722, col. 2]

' When a judgment-debtor on receiving a notice of an application by an assignee from the decree-holder for substitution of his name in the decree, fails to prefer any objection and a definite order of substitution is passed by the Court the judgment-debtor cannot afterwards object to an execution of the decree by the assignee. [p. 723, col. 2.]

Mumtaz Ahmad v. *Sri Ram*, 21 Ind. Cas. 462 ; 11 A. L. J. 815 ; 35 A. 524; *Taj Singh* v. *Jagan Lal*, 35 Ind. Cas. 234 ; 14 A. L. J. 370 ; 38 A. 289, followed.

Kalian Singh v. *Jagan Prasad*, 27 Ind. Cas. 950 ; 13 A. L. J. 162, distinguished.

Per Mukerjee, J.—It is incumbent on the judgment-debtor under O. XXI, r. 16 of the Civil Procedure Code, when he receives notice of an application for execution made by the assignee of the decree-holder, to come forward and raise any objection that he may have to the execution of the decree by the assignee, and if he fails to do so, he cannot afterwards object to such execution by him. [p. 723, col. 2.]

Appeal from a decree of the Second Additional District Judge, Gorakhpur, dated the 23rd June 1923.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *Ajodhia Nath*, for the Respondent.

JUDGMENT.

Dalal, J—The Kayastha Bank had a decree against Ashfaqullah. Babu Dwarka Das applied for execution on 2nd November 1918 for the first time on the ground that, the decree had been transferred to him by the Manager of the Bank acting on behalf of the Bank on 6th September 1918. On 3rd February 1919 Dwarka Das's name was substituted. On 4th February 1919 he applied for execution and this application was struck off. Another application was made on 12th April 1920 with the same result. On 16th June 1920 he applied again and during the pendency of this application Ashfaqullah paid Rs. 400 on 18th January 1921 and at the same time prayed that, the money might not be paid to the decree-holder as he desired to object to the transfer in favour of this decree-holder, Dwarka Das. The execution application, however, was dismissed after part satisfaction without any direction that the money may not be paid to the decree-holder. On 26th October 1922 another application for execution was filed by Dwarka Das whereupon Ashfaqullah objected that the manager had no right to transfer the decree on behalf of the Bank and that the transfer being made in consideration of a personal debt due by the Manager to Dwarka Das was not valid. The Trial Court of the Subordinate Judge dismissed this objection on 17th March 1923 on the ground that it was too late for Ashfaqullah to raise such an objection after so many previous applications for execution. Practically it held that the question as to the validity of the transfer was *res judicata*. In appeal the learned Judge disagreed with this finding and further held that the manager was not entitled to make the transfer on behalf of the Bank and that the transfer had not been subsequently ratified by the Bank.

In our opinion the question of law was correctly decided by the Trial Court. We are supported in this opinion by Division Bench rulings of this Court in *Mumtaz Ahmad* v. *Sri Ram* (1) and *Taj Singh* v. *Jagan Lal* (2). The provisions of section 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles

(1) 21 Ind. Cas. 462 ; 11 A. L. J. 815 ; 35 A. 524.
(2) 35 Ind. Cas. 234 ; 14 A. L. J. 370 ; 38 A. 289.

are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently. The lower Appellate Court has quoted in favour of its opinion a judgment of a single Judge of this Court in *Kalian Singh* v. *Jagan Prasad* (3) which was confirmed bya Division Bench in Letters Patent appeal as reported at *Kalyan Singh* v. *Jagan Prasad* (4). There, however, the question was one of the amount due on the decree and that question had not been specifically decided at any time by the execution Court. In the present case as we have seen Dwarka Das applied on 2nd November 1918 under O. XXI r. 16 for the substitution of his name. Such a substitution could not be made without intimation to the judgment-debtor and the decree is not executed until the Court has heard the objection, if any by the judgment-debtor. The presumption will be that the court proceeded according to law and that notice was issued to Ashfaqullah. A definite order of substitution of name was passed by the executing Court. If the order was passed *ex parte* it was open to Ashfaqullah to have it set aside. Further, on 18th January 1921 Ashfaqullah applied to the Court that the money deposited by him may not be paid to the decree-holder on the ground that the decree-holder was not a rightful transferee. This application was not granted. This also amounted to a finding that Dwarka Das was a transferee who can execute the decree. Under the circumstances we are of opinion that the principle of *res judicata* will apply here.

The appeal succeeds on this point; otherwise we would have remanded it to the lower Appellate Court. The learned Judge of that Court has proceeded on evidence which is not on the record when he decided the issue of fact. He has referred to certain memorandum and Articles of Association and a power of attorney which documents or copies thereof are not on the file. As to consideration also he is in error that the transferee Dwarka Das was bound to prove the validity of the consideration paid by him. As however, we have held that Dwarka Das can execute the decree and as the point is now *res judicata* we shall not discuss the question of authority of the Manager of the Bank to make the transfer.

Mukerji, J. -I agree with my learned brother that the objection of the judgment-debtor could not be entertained. I wish only to add that having regard to the entire scheme of O. XXI, r. 16 of the Code of Civil Procedure it was incumbent on the judgment-debtor when he received the notice of the application for execution made by the assignee of the decree-holder to have come forward and raised any objection that he may have had to the execution of the decree by the assignee. An execution proceeding is always a lengthy one and various applications can be made within the course of 12 years. It is, therefore, necessary to decide where there is a transfer by the decree-holder whether the transferee is entitled to execute the decree or not. If after say nine years of execution the judgment-debtor should come forward and say that the transferee had no right to execute the decree the result would be simply disastrous. The law, therefore, insists on the assignee's application for execution not being proceeded with until the judgment-debtor has been served with a notice and he has had an opportunity to raise objections if he has any. If it be the case that the judgment-debtor had no intimation of the original application it was his duty to come forward and make an application to set aside the order for executing the decree. So long as the order for execution of the decree stands, having been passed after notice to the judgment-debtor, it does not lie in his mouth to come forward and say, in the teeth of the order, that the decree-holder has no right to execute the decree. The authorities directly on the point are all one way and some of the cases have been cited in his judgment by my learned brother. I agree in the order proposed.

By the Court.--We set aside the decree of the lower Appellate Court and restore the order of the Trial Court dismissing, the objection of the judgment-debtor with costs including fees here on the higher scale. We direct that execution proceedings do continue in the Trial Court as from date 17th March, 1923.

K. S. D. *Appeal allowed.*

(3) 27 Ind. Cas. 950 ; 13 A. L. J. 162.
(4) 30 Ind. Cas. 523 ; 13 A. L. J. 828 ; 37 A. 589.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1398 OF 1921 AND CIVIL REVISION PETITION No. 867 OF 1921.

March 10, 1924.

Present:—Mr. Justice Madhavan Nair.

NARANO MAHAPATRO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SRI SRI SRI RAMACHANDRA MARDARAJA DEO GARU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 115--Revision —Decree of first Court reversed on new point without sufficient materials—Material irregularity.

A Court acts with material irregularity, within the meaning of section 115 Civil Procedure Code when it reverses the judgment of the first Court on a new question which was not raised by the parties and for which there were not sufficient materials before the Court. [p. 724, col. 2.]

Puttangowda v. *Nilkanth Kalo Deshpande*, 20 Ind. Cas. 974; 37 B. 675 at p. 680; 20 Bom. L. R. 773, relied on.

Appeal against the decree of the District Court, Ganjam at Berhampore, in A. S. No. 382 of 1919, preferred against the decree of the Court of the Principal District Munsif, Berhampore, in O. S. No. 140 of 1919.

Mr. *P. Chenchiah*, for the Appellants.

Mr. *C. Sambasiva Rao*, for the Respondent.

JUDGMENT.—In this case the plaintiff sought to recover a sum of Rs. 12 and odd on account of *jodi* on an enfranchised inam for *faslis* 1326 and 1327. The first defendant pleaded that he was not liable to pay any *jodi*. The question that was considered in the first Court was whether the plaintiff is entitled to the *jodi* claimed. On the evidence before the first Court, it came to the conclusion that the plaintiff was not entitled to claim the jodi and so dismissed the plaintiff's suit. On appeal the District Judge agreed with the judgment of the first Court on the question whether the defendants were liable to pay the *jodi* claimed but reversed it on a question of *res judicata* which was not raised by the parties in the first Court. As against this decision this Second Appeal and the C. R. P. have been filed in this Court by the defendants.

It is obvious that no Second Appeal lies and this is admitted by the learned Vakil for the appellants himself. But he asks the interference of this Court under section 115 Civil Procedure Code on the ground that a material irregularity has been committed by the lower Court in reversing the judgment of the first Court on a new question which was not raised by the parties and for which there are no sufficient materials before the Court. In my opinion it was not right on the part of the appellate Judge to have disposed of the case on this new question. The decision as to *res judicata* was based by the Judge on two *ex-parte* decisions passed by a Small Cause Court on prior occasions with reference to payment of the *jodi* during four faslis. These judgments were availed of as pieces of evidence in connection with the question whether the plaintiff was entitled to claim the *jodi*. No attempt was ever made to build up a question of *res judicata* on these judgments. Except the decree we have no other record before us relating to these decisions which were passed by the Small Cause Court. In a case of this kind where a question of *res judicata* is sought to be raised, one would naturally expect that the Court will look into the plaint to satisfy itself as to what was the question that was really at issue between the parties. The plaints are not forthcoming; and further, even assuming that in the decision of the Small Cause Court incidentally some reference was made to the question of title, I do not think that such a decision can constitute *res judicata*. I do not propose to go through all the decisions that were referred to me on this point, but I would content myself with making a reference to the decision in *Puttangowda* v. *Nilkanth Kalo Deshpande* (1). I think, therefore, that the decision has been materialy irregular and I should set it aside and restore the decision of the first Court and dismiss the suit of the plaintiff for the *jodi* claimed for the suit faslis.

It was pressed upon me by the learned Counsel for the respondent that ordinarily the High

(1) 20 Ind. Cas. 974; 37 B. 675 at p. 680; 20 Bom. L. R. 773.

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Court does not interfere in matters coming under section 115 Civil Procedure Code and that here the utmost that could be said is that there was erroneous decision of law. I am inclined to look at the decision from another standpoint. Both Courts on the facts have found that the tenant is not bound to pay the *jodi*: it was irregular for the Appellate Court, of its own accord, to raise the question of *res judicata* and, basing it on the flimsy materials which it had before it, to reverse the decision of the first Court. I allow the Civil Revision Petition with costs here. The Second Appeal is dismissed with costs.

V. N. V. *Revision petition allowed.*
Second appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 113 OF 1923.

June 25, 1924.

Present :—Mr. Justice Dalal.

Lala BADRI PRASAD—PLAINTIFF—APPELLANT
versus
G. I. P. RAILWAY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 77—"Loss", meaning of—Denial by Railway Company of receipt of consignment—Notice, whether necessary—Limitation.

The word "loss" in section 77 of the Railways Act means loss by the Railway and not simply loss to the owner. [p. 726, cols. 1 & 2.]

Secretary of State for India in Council v. *Jiwan and Abdullah*, 71 Ind. Cas. 609 ; 45 A 880 ; 21 A L.J. 220 ; (1923) A. I. R. (A.) 426, followed.

Changa Mal v. *Bengal and N. W. Railway Co.*, 6 P.R. 1897 ; *East Indian Ry. Co.* v. *Kishen Lal Fakir Chand*, 73 Ind. Cas. 986 ; 45 A. 530 ; 21 A. L. J. 4 8 ; 9 O. & A. L. R. (A.) 531 ; (1924) A. I. R. (A.) 7, referred to.

Hills Sawyers & Co. v. *The Secretary of State for India in Council*, 61 Ind. Cas 926 ; 2 L. 133 ; 8 L. L. J. 297 (F. B.), dissented from.

No notice is necessary under section 77 of the Railways Act where the Railway Company denies the receipt of a parcel consigned to it. [p. 726, col. 2.]

When the burden of notice is laid on the consignor the words of the section must be construed strictly. [p. 726, col. 2.]

Madras and Southern Mahratta Railway Co. v. *Haridoss Bammalidoss*, 49 Ind. Cas. 69 ; 41 M. 871 ; 35 M. L. J 35 ; 24 M. L. T. 38 ; 8 L. W. 340, distinguished.

The date of the notice must be within six months of the date of the consignment [p. 727, col. 1.]

Appeal from a decree of the Subordinate Judge, Agra, dated the 4th October 1922.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Ladli Prasad M. Zutshi*, for the Respondent.

JUDGMENT.—The plaintiff Lala Badri Prasad delivered according to his statement 5 packages to the Railway Company at Dholpur for being booked to Agra to be carried in the brake van. This was done on 19th April 1920. On 22nd October 1920 he drew the attention of the Railway authorities that these 5 packages had not been delivered to him. This notice was given to the Railway Company three days more than six months from the date of delivery of the luggage. On 19th November 1920 only 4 packages were made over by the Company to the plaintiff and out of one of these it is alleged that certain articles of the plaintiff were stolen during transit. On 20th February 1921 he gave a notice to the Company of his claim for the value of the one package not delivered to him and of the articles missing from a package which was delivered to him in a damaged condition.

He instituted a suit for the recovery of Rs. 516 with the following details : Rs. 431, price of goods contained in the missing package and Rs. 85, price of articles found short in one out of the four packages returned to him by the Company. As regards the missing package the plea in para. 2 of the plaint was that it was withheld by the Railway Company. The reply of the Company was that only four packages were delivered by the plaintiff to the Company and no fifth package was received by the Company.

In the first Court one of the pleas was that notice within time had not been given by the plaintiff to the Company as required by section 77 of the Railways Act IX of 1890 and that, therefore, the plaintiff was not entitled to compensation for his loss. The first

Court of the Munsif of Agra held that the period of six months for a notice begins to run from the date on which delivery of packages is made by the Company to the consignor. The learned Munsif, therefore decreed the suit holding that the missing package was worth Rs. 431 and the value of the pilfered goods Rs. 85. On appeal by the Railway Company the learned Subordinate Judge as an Appellate Court held that notice was not given within time and further that notice was necessary under the circumstances of the present case.

In this second appeal two points were argued by the learned Counsel for the plaintiff (1) that as regards the package which was not delivered and withheld by the Company no notice was necessary and (2) that time for the giving of a notice by a consignor to the Railway Company begins to run from the date of the delivery of goods by the Company to the consignor as held by the first Court.

In my opinion the first argument is correct but not the second. Under section 77 a notice is essential when a consignor desires compensation "for the loss, destruction or deterioration of animals or goods delivered to be carried" by the Company. The question is whether the claim in the present suit is based on loss, destruction or deterioration of the package which was not delivered. In the plaint it was specifically alleged by the plaintiff that the package was withheld by the Company. The Company itself did not plead any loss or destruction of this package but alleged that no such package was delivered to it. This allegation of the Company has been found to be false by both the subordinate Courts. The Company has not explained what became of this missing package. A learned Judge of this Court Mr. Justice Lindsay approved of a Bench ruling in *Changa Mal* v. *Bengal and North-Western Railway Company* (1) where it was held that the word "loss" in section 77 of the Railways Act means loss by the Railway and not simply loss to the owner: *Secretary of State for India in Council* v. *Jiwan and Abdullah* (2). On behalf of the respondents another Punjab ruling, *Hills, Sawyers & Co.* v. *The Secretary of State for India* (3) was quoted. In this Court that ruling has been dissented from in *East Indian Railway Company* v. *Kishan Lal Fakir Chand* (4). When the burden of notice is laid on the consignor the words of the section must be strictly construed. Unless the Railway Company alleges and proves that the package has been lost no notice would be necessary only on the ground that there had been loss to the consignor whatever may have happened to the package while in the custody of the Railway Company. The facts of the Madras case quoted on behalf of the respondent were different. In the *Madras and Southern Mahratta Railway Co.* v. *Haridoss Banmalidoss* (5) it was known that the Railway Company delivered the package toa person who was not the consignee but claimed to be entitled to it. In such a case it may be said that there was lossto theCompany Where goods have been delivered inadvertently to the wrong person by the Railway Company the case would be different from the present where the Railway Company denies receipt of a package. It is obvious that this enactment of the giving of a notice is intended to enable a Railway Company to make enquiry promptly. Where, however, the Railway Company denies receipt of a parcel there can be no occasion for any inquiry as to what has happened to that parcel in transit. The present case is, therefore distinguishable from the one reported in the Madras Law Reports. As no notice was necessary the plaintiff's suit must succeed for Rs. 431.

As regards compensation for pilfered goods the plaintiff's learned Counsel admitted that a notice was necessary. His contention was that the time of six months commenced from the date of delivery of the damaged parcal by the company to the Consignor. In my opinion the words of the section are clearly against such an interpretation. They are "within six months from the date of the delivery of the animals or goods for carriage by Railway". Where there is loss or destruction there will be no delivery by the Company to the consignor and the words would not be

(1) 6 P. R. 1897.
(2) 71 Ind. Cas. 609 ; 45 A. 380 ; 21 A. L. J. 220 ; (1923) A. I. R. (A,) 426.
(3) 61 Ind. Cas. 926 ; 2 L. 133 ; 3 L. L. J. 297 (F. B.)
(4) 73 Ind. Cas. 986 ; 45 A. 580 ; 21 A. L. J. 433 ; 9 O. & A. L. R. (A.) 531; (1924) A. L. R. (A.) 7.
(5) 49 Ind. Cas. 69 ; 41 M. 871 ; 35 M. L. J. 35 ; 24 M. L. T. 38; 8 L. W. 340.

applicable. In their ordinary interpretation also the words enact that the date of the notice must be within six months of the date of the consignment. It was asked how a consignor was to know of loss, destruction and deterioration until he received some intimation from the company or there had been delivery of a damaged parcel by the company to him. In my opinion the consignor should take action immediately the delivery is delayed and such action must be within six months of the delivery of the goods to the company. This short time is fixed in order to warn the responsible officials of the company and enable them to make an inquiry when an enquiry would be possible and would be likely to be fruitful. The suit as regards price of pilfered goods is barred under the provisions of 77 of the Railways Act.

In the result I set aside the decree of the lower Appellate Court and decree the plaintiff's suit for the amount of Rs. 431 with proportionate costs of all the Courts.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2830 OF 1923.

February 4, 1924.

Present :—Mr. Justice Moti Sagar.

SEWARAM SINGH—DEFENDANT—APPELLANT

versus

SARDARNI MAYA DEVI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (V of 1908), O. XXIX, r. 1—Injunction—Plaintiff out of possession — Injunction when can be granted—Irreparable injury, meaning of.

When the plaintiff is out of possession of the property in suit, the Court will refuse to interfere by granting an injunction against the defendant, unless their is fraud or collusion or unless the act perpetrated or threatened is so injurious as to cause irreparable loss. [p. 728, col. 2.]

Loundes v. *Bettle*, (1864) 33 L. J. Ch. 451; 10 L. T. 55; 4 N. R. 609 ; 12 W. R. 399; 10 Jur. (N. S.) 226 ; *Kesho Prasad Singh* v. *Srinibash Prasad Singh*, 10 Ind Cas. 256; 38 C. 791; 13 C. L. J. 391, followed.

Irreparable injury means injury which would be a material one and which is not adequately reparable by damages. [p. 728, col. 2.]

Appeal from the order of the Senior Subordinate Judge, Rawalpindi, dated the 29th November 1923.

Bakhshi *Tek Chand* and Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Senior Subordinate Judge of Rawalpindi refusing to set aside an injunction restraining the defendant *Sardar* Sewaram Singh from proceeding with the construction of a house of which the plaintiff is seeking to recover possession from him and his two brothers Kirpal Singh and Gobind Singh. The plaintiff is the widow of one *Sardar* Gurdas Mal Singh and defendants Nos. 1, 2 and 3 are her step-sons. It is alleged that the house in dispute originally belonged to *Sardar* Gurdas Mal Singh and that he left it to her with certain other properties by means of a will dated the 15th October 1916. Disputes arose between the plaintiff and the defendants after the death of the testator as regards inheritance, and the defendant's allegation is that a family arrangement was arrived at between the parties on the 15th of August 1922 by which the title of the defendants to this property was recognised by the plaintiff and the former allowed to remain in its proprietory possession. The present suit was instituted by the plaintiff to set aside this family arrangement and to recover possession of the house on the ground that she was a *pardahnashin* lady, that she had been overreached by the defendants and that the document executed on the 15th August 1922 was void, inasmuch as it had been obtained by the exercise of undue influence and fraud. The suit was lodged in Court on the 15th August 1923. Shortly after the institution of the suit the plaintiff made an application to the Court that the defendant *Sardar* Sewaram Singh was pulling down the house in dispute and that he should be restrained from doing so pending decision of the suit. This application was granted and an injuction issued to the defendants not to pull down the house. Service of

the injunction, however, was not effected upon the defendants and demolition of the house was completed by the end of August 1923. Early in October 1923 when the Court re-opened after the summar vacations the plaintiff brought this fact to the notice of the Court and complained that the defendants had started re-construction of the house. She again prayed for an injunction that the defendants be prohibited from proceeding with the building operations. The Court granted the injunction prayed for. *Sardar* Sewaram Singh thereupon made an application through counsel for the discharge of the injunction on the ground that he had collected building materials of a considerable value and that he would be put to very great loss if the building was not allowed to be constructed and the injunction allowed to remain in force. The Court refused to set aside the injunction and rejected the application. It is against this order that the present appeal is directed.

Sardar Sewaram Singh has filed an affidavit in this Court and has given an undertaking in writing to the effect that if the plaintiff succeeds in her suit, he would not only not pull down the building but would make it over to the plaintiff without claiming any compensation from her either for the materials or for its re-construction. This undertaking on his part should in my opinion be quite sufficient to safeguard the interests of the plaintiff and to entitle the defendant-appellant to claim a discharge of the injunction. The plaintiff would not in any way suffer by the injunction being withdrawn while the loss to the defendant if the injunction is allowed to remain in force, would be immense. In view of the undertaking given by the defendant-appellant I would therefore discharge the injunction.

But apart from the undertaking given by the defendant-appellant I am of opinion that the plaintiff, who is out of possession, is not entitled in law to obtain a temporary injunction. The law on the subject is very clearly stated in *Lowndes* v. *Bettle* (1) where Kindersley V. C. after reviewing the verious authorities, relating to injunction in cases of trespass lays down as a general rule that when the plaintiff is out of possession, the Court would refuse to interfere by granting an injunction, unless there was fraud or collusion or unless the act perpetrated or threatened was so injurious as to tend to the destruction of the estate. The same rule has been laid down in *Kesho Prasad Singh* v. *Srinibash Prasad Singh* (2), where the learned Judges, Mookerjee and Caspersz, JJ. have held that where the plaintiff is out of possession and claims possession, the Court will refuse to interfere by grant of an injunction against the defendant in possession under a claim of right. But where the threatened injury will be irreparable, an injunction will lie at the instance of the complainant out of possession. Irreparable injury of course means injury which would be a material one and one not adequately reparable by damages. In the present case there is not a particle of evidence to show what irreparable injury would be caused to the plaintiff by the construction of the building.

In view of the undertaking given by *Sardar* Sewaram Singh, however, it is unnecessary to consider this question any further and the injunction ought to be discharged. I order accordingly. Parties shall bear their own costs in this Court.

K. S. D. *Order accordingly.*

(1) (1864) 33 L. J. Ch. 451; 10 L. T. 55 ; 4 N. R. 609; 12 W. R. 399; 10 Jur. (N. S.) 226.

(2) 10 Ind. Cas. 256 ; 38 C. 791 : 13 C. L. J. 394.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 97 OF 1923.

June 20, 1924.

Present :—Mr. Justice Mukerji.

NARAIN AND ANOTHER—DEFENDANTS —APPELLANTS

versus

JAGAN—PLAINTIFF—RESPONDENT.

Mortgage—Redemption, right of—Stipulation nullifying right whether enforceable—Long term whether clog on redemption—Transfer of Property Act (IV of 1882), s. 60.

The right of redemption is an absolute right provided by section 60 of the Transfer of Property Act,

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and no contract which is designed to take away that right can be enforced. [p. 730, col. 2.]

Any stipulation in the deed itself which is likely to nullify the right of redemption must be treated as a clog on redemption. [p. 730, col. 1.]

Mohammad Shar Khan v. *Raja Seth Swami Dayal*, 66 Ind. Cas 853; 20 A. L. J. 476; 30 M. L. T. 220; 9 O. L J. 81; 42 M. L. J. 584; 25 O. C. 8; 35 C. L. J. 468; 21 Bom. L. R. 695; (1922) A. I. R (P. C.) 17; 44 A. 185; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 23 C. W. N. 79 (P. C.); *Bakhtawar Begam* v. *Hussini Khanam*, 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M L. J. 474; 12 A L J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.), referred to.

Where the term of a mortgage has been fixed, there can be no redemption within that period [p. 730, col. 2.]

A term of sixty years in a mortgage is not a clog on redemption by itself. [p. 730, col. 2.]

Appeal against the decree of the Subordinate Judge, Jaunpur, dated the 9th October 1922.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption. The plaintiff is the son of Parothan, who had a brother Angnu, and Angnu's son was Manogi. The plaintiff-respondent came to Court on the allegation that 24 to 25 years before institution of the suit his father and Angnu mortgaged the property in suit, which is a plot of occupancy holding with a small area of .37 acres, in favour of the appellants' father Bodh Ahir for a sum of Rs. 20.

The defence was that the original mortgage was one dated 1st Sawan on the dark side, 1295 Fasli for Rs. 23-8. But subsequently the two mortgagors and Angnu's son Manogi sold the mortgagors' rights in the plot for a sum of Rs. 58-8 to Bodh Ahir. The result was that since the execution of this deed on 29th June 1899, Bode Ahir and after him his son and grandson have been in adverse possession of the land and no suit for redemption could be maintained. They also plead that if on a proper construction of the deed of 1899 the Court should find that it was really a deed of mortgage, then the period for redemption fixed by the deed was sixty years and the suit was premature. The appellants, of course, denied that there did not exist any mortgage with the incidents alleged by the plaintiff.

The Court of first instance dismissed the suit, but the learned Subordinate Judge on appeal has decreed redemption on condition of payment of Rs. 58-8-0.

Several grounds of appeal have been taken, two of which are these:—

First, the plaintiff did not prove the mortgage to redeem which they came to Court.

The second is that, having regard to the deed of 1899, the lower Court was not justified in allowing redemption.

In view of the fact that the second point concludes the suit, it is not necessary to say much on point No 1, which is no doubt another strong argument against the success of the respondent.

In the deed of the 29th June 1899 the three executants say that they borrowed Rs. 35 from Bodh Ahir, that they had previously borrowed on foot of the mortgage of 1295 F. a sum of Rs. 23-8-0, and had made a mortgage of the plot in suit, that the total amount came to Rs. 58-8-0, and they agree that in lieu of this sum of Rs. 58-8-0 the mortgagee Bodh Ahir should continue to be in possession of the mortgaged land for a period of sixty years. They concluded the document with the additional covenant that even on the expiry of the period of sixty years the mortgagors would not ask for redemption.

The learned Judge of the Court below held that this was a deed which clearly showed that by some means or other Bodh Ahir was anxious to deprive the mortgagors of their right of redemption. The learned Judge held that it followed from this that, the son and grandson of Bodh Ahir stood in the position of trustees towards the property. He accordingly decreed the suit for redemption on payment of Rs. 58-8-0. This sum was offered on behalf of the plaintiff. In view of the circumstances, however, of the case he ordered that the parties must pay their own costs. This only means that, the mortgagee who should always get his costs in a suit for redemption, unless his conduct disentitles him from

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getting the same, was punished by not being allowed any costs at all. I have heard the document dated 29th June 1899. It is clearly a deed of mortgage for the term of sixty years for the sum of Rs. 58-8-0. By this deed the earlier mortgage was wiped out and a fresh one was created. The term was sixty years. Under section 60 of the Transfer of Property Act a mortgagor has an absolute right of redemption after the expiry of the term of the mortgage, and any stipulation in the deed itself which is likely to nullify the right of redemption must be treated as a clog on redemption. The term, therefore, that there would be no redemption even after the period of sixty years would probably be treated as a clog on the right of redemption. Anyhow that is a point which does not arise at the present moment. The most favourable view that can be taken in favour of the respondent of the document in question is that, it is a deed of mortgage. The term of redemption is sixty years. The case of *Sarbdawan Singh* v. *Bajai Singh* (1) has been quoted as showing that, where the term of redemption is a long period, the stipulation must be regarded as a clog on the right of redemption, and, therefore, as unenforceable. It is contended on foot of this authority that the sixty years' term fixed by the mortgage must go and the property should be redeemable at any time.

In the case of *Sarbdawan Singh* v. *Bajai Singh* (1) referred to above the mortgage deed provided forty years' time for redemption. It further provided that on the day after the expiry of the term of forty years redemption must be effected, and in default the mortgage would hold good for another term of forty years. The mortgage money was deposited in Court after the expiry of the term of forty years, but it was contended on behalf of the mortgagee that there could not be any redemption for a further period of forty years. The learned Judges held that this latter agreement that the mortgage would enure for a further term of forty years was a clog on the right of redemption and was not enforceable. This is undoubtedly the right law. (see Mohammad *Sher Khan* v. *Raja Seth Swami Dayal*, (2). Their Lordships did not hold that, where a mortgage provided for a term of forty years for redemption, that term, by itself, was to be regarded as a clog on the right of redemption simply because the term was long. The right of redemption is an absolute right provided by section 60 of the Transfer of Property Act, and no contract which is designed to take away that right can be enforced. In the Privy Council case of *Bakhtawar Begam* v. *Husaini Khanam* (3) their Lordships of the Privy Council held that, where a term of mortgage has been fixed, there can be no redemption within that period. In this case before me, therefore, there can be no redemption within the period of sixty years from 1899.

In the above view of the case I need hardly point out that the plaintiff sought the redemption of a mortgage of 1295 or about that time which was made for a sum of Rs. 20 or some such small amount. He has been granted by the court below a decree for the redemption of a mortgage of 1899 for a sum almost thrice the amount for which the redemption was sought. This could not be justified in any case.

The result is that the appeal succeeds and the suit of the respondent fails and it is hereby dismissed with costs throughout. The costs in this Court will include counsel's fees on the higher scale.

K. S. D. *Appeal allowed.*

(1) 24 Ind. Cas. 705 ; 12 A L. J. 927; 36 A. 551,

(2) 66 Ind. Cas. 853 : 20 A L. J. 476 ; 30 M. L. T. 220; 9 O. L. J. 81 ; 42 M. L. J. 594 ; 25 O. C. 8 ; 35 C. L. J. 468 ; 24 Bom. L. R. 695 ; (1922) A. I R. (P. C.) 17 ; 44 A. 185 ; (1922) M. W. N 378 ; 4 U. P. L. R. (P. C.) 50 ; 28 C. W. N. 79 (P. C.).

(3) 23 Ind. Cas. 355 ; 36 A. 195 ; 18 C. W. N. 586 26 M L J. 474 ; 12 A. L. J. 473 ; 19 C. L. J 477 ; (1914) M. W. N. 411 ; 15 M. L. T. 389 ; 16 Bom. L. R. 344 ; 1 L. W. 813 ; 41 I. A. 84 (P. C.).

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 47 AND 48 OF 1922.

February 28, 1924.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

P. S. RAMANATHAN CHETTIAR
DECREE-HOLDER—APPELLANT

versus

M. G. MOIDEEN SAHIB—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (V of 1908)—s. 48—Fraud—Wilful evasion of arrest by judgment-debtor—Limitation.

When a judgment-debtor, who is able to pay, evades arrest in execution of the decree, he is guilty of fraud within the meaning of section 48 of the Civil Procedure Code and consequently the period of limitation is extended under the section [p. 731, col. 1.]

Annamalai Goundan v. *Rangasami Chetti*, 6 M. 365 ; 2 Ind. Dec. (N. S.) 534, followed.

Seshachalam Chetti v. *Rajam Chetti*, 8 M. L. J. 203, not followed.

Appeals against the orders dated the 6th September 1921, of the City Civil Court, Madras, in C. M. P. No. 813 of 1921 in E. P. No. 152 of 1920 in O. S. No. 428 of 1907 and E. P. No. 152 of 1920 respectively.

Mr. *V. Rajagopala Iyer*, for the Appellant.

Mr. *V. Tyagaraya Iyer*, for the Respondent.

JUDGMENT.—In this case the appellant is a decree-holder in O. S. No. 428 of 1907 in the Madras City Civil Court. He attempted to execute the decree on several occasions in 1911, 1914, 1917 and finally, just as the decree was about to be barred by limitation, he filed the present petition E. P. No. 152 of 1920. In that he asked for the arrest of the judgment-debtor and also for the appointment of a Receiver in order to collect a debt due to the judgment-debtor. The arrest was ordered and apparently *batta* was paid for this arrest on five different occasions, but on no occasion was the debtor found. Meanwhile, an order had been made appointing a Receiver for the collection of the debt. After these many attempts at arrest had failed, the petition was rejected on the 29th of October 1920 but it was restored to file on the 2nd December 1920 so far as the application for the appointment of Receiver was concerned, but the Judge refused to issue any further warrants for arrest. An appeal was made against that order but was dismissed by this Court on the ground that the appellant had other remedies. He finally obtained a certain sum of money by filing a suit against the judgment-debtor's debtor but only realised a sum of Rs. 754 the decree amount being over Rs. 4,000. He then put in another petition praying that the judgment-debtor might be arrested, C. M. P. No. 813 of 1921, but that petition was dismissed on the ground that it was a fresh application and not a continuance of the former application and was, therefore, barred as being more than twelve years from the date of the decree. An appeal has been filed against that order as well as against the final order dismissing the execution petition, and it is urged that, firstly, C. M. P. No. 813 must be treated as a continuation of E. P. No. 152 and it is, therefore, in time and, secondly, that it is in time by reason of the fraud of the judgment-debtor who has been evading arrest.

The first point is one of considerable difficulty and we have been referred to a number of decisions dealing with the point, but we think that it is unnecessary to determine it in these proceedings because the appellant must succeed on the second point. It has been held so far back as *Annamalai Goundan* v. *Rangasami Chetti* (1) that, when a judgment-debtor is able to pay and evades arrest in execution of the decree, he is guilty of fraud within the meaning of section 48 or section 230, as it then was, of the Civil Procedure Code. This was affirmed in *Ayyavu* v. *Somasundaram Chettiar* (2) and the only case to the contrary is *Seshachalam Chetti* v. *Rajam Chetty* (3) a decision of a single Judge which was expressly dissented from in *Seshachalam Chetti* v. *Rajam Chetti* (3). We agree with this view taken in *Ayyavu* v. *Somasundaram Chettiar* (2) that the evasion of arrest is fraud within the meaning of section 48 and the question is whether there has been such an evasion

(1) 6 M. 365 ; 2 Ind. Dec. (N S) 534.
(2) 60 Ind. Cas. 630 ; 12 L. W. 710 ; (1920) M. W. N. 788.
(3) 8 M. L. J. 203.

in the present 'case. It must be conceded that in the lower Court this point was not specifically urged, for it is not dealt with at all in the judgment, but there is a ground taken in the memorandum of appeal and there have been assertions of this evasion of arrest in the course of the proceedings, more especially in the affidavit of the 29th of November 1920 in which it was alleged that the judgment-debtor was evading arrest and that when steps were taken to enter his house, a plea that *gosha* ladies were inside was raised and no one was allowed to enter. Apart from this affidavit we have the fact that a warrant was taken out on five occasions and returned unexecuted. It is suggested now that the judgment-debtor was unaware of these proceedings and was not in any way evading arrest and, in fact, the judgment-debtor has appeared here and has asked for permission to file an affidavit to the effect that he was in Madras at the time the warrants were issued and was living quietly in the mosque and never attempted to evade arrest. We see, however, that notice of the execution petition was sent to him and it is quite clear that he received that notice and was represented by a Vakil in the lower Court who applied for an adjournment for putting in a counter-affidavit on the 27th of August 1920. On the adjourned date, this Vakil reported that he had no instructions and the judgment-debtor was still absent. Two further warrants were issued after that and again the judgment-debtor could not be found. In these circumstances, we think that it is conclusively proved that the judgment-debtor was keeping out of the way in order to avoid arrest and it would be useless to allow him now to put in any affidavit with a view to showing that he was perfectly innocent of any idea of fraud. We must hold that he was evading arrest in execution of this petition and consequently under section 48 the period of limitation is extended and this petition is in time. The appeal is, therefore, allowed. C. M. P. No. 813 will be referred for fresh disposal. Respondent will pay appellant's costs in C. M. A. No. 47 of 1922. No orders are necessary in C. M. A. No. 48 of 1922.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL No. 124 OF 1923.

June 25, 1924.

Present :—Mr. Justice Dalal.

Syed SIDDIQ ALI—PLAINTIFF—APPELLANT

versus

CHANDA—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901) *s.* 194 (1)—Lambardar *whether an agent of co-sharers—Presumption—Contrary arrangement, effect of.*

If a *lambardar* sues a tenant either for recovery of rent or for ejectment, the presumption is that he is appointed as agent to act on behalf of all the co-sharers. But it is open to the tenant to prove that in that particular *mahal* the arrangement between the co-sharer is such that the *lambardar* cannot be created as an agent of all the co-sharers.[p. 733, col. 1.]

Gulzari Mal v. *Jairam*, 24 Ind. Cas. 178 ; 12 A. L. J. 606 at p. 609 ; 36 A. 441, referred to.

Where, therefore, the co-sharers have agreed to collect rent separately and not to appoint the *lambardar* an agent on their behalf the *lambardar* is not entitled to act as agent of all the co-sharers of the mahal. [p. 733, col. 2.]

Appeal against the decree of the District Judge, Bulandshahr, dated the 1st November 1922.

Mr. *Iqubal Ahmad*, for the Appellant.

Mr. *S. Abu Ali*, for the Respondent.

JUDGMENT.—The plaintiff *lambardar* sued a tenant for recovery of rent and his defence was that he had paid it in good faith to one of the co-sharers *Musammat* Fatima. The Trial Court of the Assistant Collector accepted the defence and dismissed the suit. On appeal the learned District Judge held that the rent was not paid and even if paid the defendant did not do so in good faith. The learned Judge disagreed with the first Court and found that the defendant was a tenant of the proprietary body in general of the *khata khewat* in which the land in suit was included. He also disagreed with another finding of the first Court that the defendant was a tenant of *Mst.* Fatima alone. He then went

on to discuss whether the plaintiff as *lambardar* was entitled to collect the entire rent from the defendant.

In the written statement the defendant had specifically pleaded that the *lambardar* had no right to realise rent in the *mahal* in suit. The learned Judge found as a fact by reference to entries in the settlement records that in this particular *mahal* there was a provision that each co-sharer collected his own rents. On this ground the plaintiff's suit was dismissed and he has come here in second appeal.

His learned Counsel argued that the point in controversy was concluded by the Full Bench ruling in the case of *Gulzari Mal* v. *Jairam*. (1) This view does not appear to me to be correct. What was held in that case was that where a *lambardar* has a right to collect rents from tenants in the village, he is entitled to maintain a suit for ejectment of a tenant without joining the order co-sharers as parties. Their Lordships observed (page 609 of report), " we think that it is extremely improbable that section 194 was intended to apply to the case of a *lambardari* village. If, however, it does apply, in our opinion, where the suit is brought by the *lambardar* in a *lambardari* village, strictly as *lambardar*, then the co-sharers must be deemed to have acted jointly through the person who is declared by law to be their representative." This means that in the absence of any evidence to the contrary, a *lambardar* must be presumed to have been appointed an agent by the rest of the co-sharers to act on behalf of them all under section 194 (1) of the Tenancy Act. It cannot convey the meaning that even where the lambardar is specifically debarred from collecting rents on behalf of all the co-sharers, he can against the wishes of the other co-sharers act as their agent under section 194 (1). In my opinion the point decided is one of persumption. If a *lambardar* sues a tenant either for the recovery of rent or for ejectment the presumption would be that he is appointed as agent to act on behalf of all the co-sharers. But it would be open to the tenant to prove that in that particular *mahal* the arrangement between the co-sharers was such that the *lambardar* cannot be treated as an agent of all the co-sharers. In *Mojiz Fatima* v. *Ali Akbar* (2) Piggott, J., in delivering the judgment of a Bench observed at p. 438 " Under clause (1) of section 194 the obligation imposed upon all co-sharers to sue jointly for any arrears of rent due to them jointly is made subject to this exception, that if they have appointed an agent to act in behalf of them, the suit may be maintained by the said agent. In a *lambardari mahal*, the *lambardar* is from the date of his appointment the agent appointed to act on behalf of the co-sharers and is the only person who under section 194 (1) aforesaid has a right to institute a suit against a defaulting tenant for the recovery of any rent not statute barred."

This will be the case when the contest lies between the *lambardar* and the tenant and there is no evidence of the appointment of the *lambardar* by all the co-sharers as their agent. This Court cannot have intended to hold that inspite of arrangements to the contrary between the co-sharers and the refusal of the co-sharers to appoint the lambardar as their agent, the *lambardar* should in virtue of his office be entitled to act as agent of principals who repudiate him. In every case the question will be one of burden of proof. The *lambardar* in virtue of his office shall be presumed to be an agent under section 194 (1) until the contrary is proved. The learned Judge of the lower Court was not justified in criticising the reasoning of a judgment of this Court that for a *lambardar* there was no necessity of specific evidence of his appointment as agent.

At the same time I do not agree with the arguments of the appellant's learned Counsel that every *lambardar* is entitled to act as agent of all the co-sharers of the *mahal* in spite of a contrary arrangement between the co-sharers, who have agreed to collect rent separately and not to appoint the *lambardar* an agent on their behalf.

It was suggested to me on behalf of the appellant that an issue should be remitted to discover whether the *lambardar* in this particular *mahal* had a right to collect rents or not. I think, however, that this point has been carefully gone into by the Judge of the lower Appellate Court and decided against the appellant

(1) 24 Ind. Cas. 178 ; 12 A. L. J. 606 at p. 609 ; 36 A. 441.

(2) 56 Ind. Cas. 112 ; 18 A. L J. 435 ; 42 A. 435.

There is an arrangement in this village that every co-sharer shall collect his own rent. Under the circumstances in this particular case the *lambardar* is not an agent of all the co-sharers.

The plaintiff may be entitled to recover his share of the rent but that question has not been brought into issue here, nor is it one of the grounds of appeal. Under the circumstances I am not prepared to remand the suit for a trial of that issue.

I dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 357 OF 1923.

July 25, 1924.

Present :—Mr. Baker, J. C.

SHER SINGH—DEFENDANT—APPELLANT

versus

KALU SINGH AND OTHERS—PLAINTIFFS —RESPONDENTS.

Central Provinces Tenancy Act (*I of* 1920) *s.* 89—*Surrender of undefined share by co-tenant, validity of.*

If on the relinquishment by a co-tenant of his undivided share his sons succeed and the landlord recognises them as tenants instead of their father, the arrangement is valid. [p. 735, col. 1.]

Appeal against the decree of the District Judge, Nimar, dated the 15th June 1923, in Civil Appeal No. 61 of 1923.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The plaintiffs are the sons of one Devi Singh who was a co-tenant of the land in dispute, which is an occupancy land, along with the defendant Shersingh. They sue to set aside a sale by Devi Singh, their father, of his interest to the defendant on the ground that their father had already abandoned the holding and that they had succeeded to his rights and had been recognised as tenants along with the defendant by the landlord. Hence Devi Singh had no interest left which he could transfer.

The first Court dismissed the plaintiffs' suit, but this decision was reversed by the District Judge, Nimar, who held that Devisingh intentionally surrendered his rights in favour of the plaintiffs who were accepted as tenants by the landlord.

A great many rulings have been quoted on both sides in the argument of this case, but in view of the finding of fact by the lower Appellate Court that Devisingh abandoned his share of the holding and his sons, the plaintiffs, were recognised by the landlord as tenants in his stead, the case is not very complicated.

The question, therefore, of sons having no interest during the life-time of their father and tenancy being created only by contract does not arise. I am not aware of anything in the Tenancy Act which can prohibit such an arrangement between the tenant, his heirs and the landlord.

The case of *Nilkanth* v. *Bhagwant* (1) which lays down that there can be no surrender or abandonment of an undefined share of a holding, does not apply to the facts of the present case. This case does not consider the case of a co-tenant surrendering his undefined share to the landlord. In *Kubir Munshi* v. *Baikunta Chandra Shaha* (2). Jenkins, C. J., held that a relinquishment made in favour of the landlord by one of two co-tenants so as to affect his share is valid, and following *Peary Mohun Mondal* v. *Radhika Mohun Hazra* (3) said: "I feel no doubt, as Mr. Justice Banerjee held, of the validity of a relinquishment made in favour of the landlord by one of two or more tenants for the purpose of affecting the share of that tenants." This view finds support in *Ganpat* v. *Trimbak* (4), in which my learned predecessor, after pointing out that in the case of *Sarju Prasad* v. *Muratlal* (5) there was not a sole landlord held on the authority of an

(1) 42 Ind. Cas. 270; 13 N. L. R. 175.
(2) 11 Ind. Cas. 382; 15 C W. N. 680.
(3) 8 C. W. N. 315.
(4) 19 Ind. Cas. 759; 9 N. L. R. 54.
(5) 14 C. P. L. R. 38.

English case *Holme* v. *Brunskill* (6) and of *Peary Mohun* v. *Radhika* (*supra*) (3) that there seems to be no reason in equity or good conscience why the landlord should be deprived of what the surrender gave him. The landlord is not a party to the present suit, but that he accepted the plaintiffs as tenants in their father's place is shown by the fact that he sued them for rent along with the defendant, Devisingh not being made a party to the suit. Nothing requires the surrender of tenancy to be in writing: cf. *Bengal Coal Company Ltd.* v. *Manoranjan Bagchi* (7).

In these circumstances it appears to me that the arrangement cannot be disturbed and that Devisingh having parted with what interest he possessed in the holding, had none left to transfer to the defendant, and therefore, the view of the lower Appellate Court is correct. The appeal must be dismissed with costs.

G. R. D. *Appeal dismissed.*

S. D.

(6) (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.

(7) 44 Ind. Cas. 297; 22 C. W. N. 441.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2473 OF 1923.

February 27, 1924.

Present :—Mr. Justice Le Rossignol.

HARDAWARI—DEFENDANT—APPELLANT
versus
CHUNI LAL—PLAINTIFF AND OTHERS
—DEFENDANTS—RESPONDENTS.

Hindu Law—Guardianship—Mother—Paternal uncle —Alienation by uncle, whether binds share of minor.

A paternal uncle may be the natural guardian of his minor nephew under Hindu Law, but he is not the natural guardian in the presence of the minor's mother and has no power to bind the minor's share in joint property by an alienation. [p. 735, col. 2.]

Appeal from the decree of the District Judge, Karnal, dated the 9th August 1923, confirming the decree of the Munsif, 1st Class, Sonipat, dated the 31st July 1922.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—Piare Lal and Chhotu on their own behalf and acting as guardians of their nephew Hardwari executed in 1916 two mortgage-deeds; one of agricultural land for Rs. 500, the other of a house for Rs. 400 and this appeal and the connected appeal arise out of two suits brought by the mortgagees for recovery of the mortgage-debt. The first Court decreed the plaintiff's suit and the decrees were affirmed on appeal by the learned District Judge. These appeals are pressed on behalf of Hardwari only and the contention on his behalf is that on the finding of the learned District Judge that Piare Lal and Chhotu and Hardwari did not constitute a joint family, Hardwari's share in the properties should be relieved of all liability to satisfy the decrees.

For the respondents it is contended that even if Chhotu and Piare Lal are not the natural guardians of Hardwari during the lifetime of Hardwari's mother still it is clear from the record that they had many common interests and in view of the finding of the learned District Judge that the mortgages were effected for the benefit of the minor there should be no interference by this Court.

Paternal uncles no doubt may be natural guardians under Hindu Law, but they are not natural guardians in the presence of the minor's mother. For this reason I must hold that although Hardwari participated in the benefits derived from these mortgages, his uncles were not his natural guardians and consequently had no power to bind his share in the joint property. I accordingly accept the appeals and modify the decrees given by the Courts below by directing that they shall be executed only against Chhotu and Piare Lal and their shares in the mortgaged property. Costs in the Courts below shall be borne by Piare Lal and Chhotu and in this Court by the parties incurring them.

Z. K. *Appeals accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 399-B OF 1922.

July 28, 1924.

Present :—Mr. Kotval, A. J. C.

AHMED KHAN AND ANOTHER —DEFENDANTS —APPELLANTS

versus

SADASHEO —PLAINTIFF AND ANOTHER —DEFENDANT — RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 45, 105, 107—Kabuliyat, whether transfers right to enjoy immoveable property—Registration.

A registered *kabuliyat* executed by the lessee and accepted by the lessor does not operate to transfer the right to enjoy immoveable property. [p 737, col. 1.]

Appeal against the decree of the Additional District Judge, Yeotmal, dated the 27th June 1922, in Civil Appeal No. 19 of 1922.

Mr. *K. K. Gandhe*, for the Appellants.

Messrs. *B. R. Pendharker* and *W. B. Pendharker*, for the Respondents.

JUDGMENT.—The plaintiff Sadasheo sued the defendants for possession of a field of which he alleged defendant No. 3 *Mt.* Tulsi had given him a lease for seven years ending in 1337 *Fasli* on a rent of Rs. 50 a year. No lease was executed by Tulsi but the plaintiff relied on a registered *kabuliyat* executed by himself in her favour on the 3rd March 1921. Defendants Nos. 1 and 2 are alleged to have forcibly taken possession of the field in July 1921. Defendant No. 3 disowned any interest in the field. Defendants Nos. 1 and 2 are subsequent purchasers from Tulsi. The lower Courts have decreed the plaintiff's claim. Defendants Nos. 1 and 2 appeal.

The *kabuliyat* was presented for registration by Tulsi and was in her possession. Tulsi produced it in Court. It has, therefore, been rightly held that it was accepted by her.

It is not disputed that the lease in this case could not have been made otherwise than by a registered instrument. The sole contention here on the appellants' behalf is that the *kabuliyat* did not amount to a lease and conferred no title on the plaintiffs. *Nand Lal* v. *Hanuman Das* (1) and *Turof Sahib* v. *Esuf Sahib* (2) are cited as authorities in support of this contention, and *Ajam Sahib* v. *Ananthanarayana Aiyar* (3) and *Raimoni Dassi* v. *Mathura Mohan Roy* (4) as authorities to the contrary. The most recent case not referred to by either side is *Kedar Nath* v. *Shanker Lal* (5) which reviews previous cases on the point and upholds the view taken in *Nand Lal* v. *Hanuman Das* (1). *Turof Sahib* v. *Esuf Sahib* (2) has been overruled in *Ajam Sahib* v. *Ananthanarayana Aiyar* (3).

According to section 105, Transfer of Property Act a lease is a transfer of a right to enjoy immoveable property. Substituting for the word transfer its meaning given in section 5 "a lease is an act by which a person conveys the right to enjoy immoveable property." Under section 107 the act by which a person conveys the right must be performed by a registered instrument. According to *Ajam Sahib* v. *Ananthanarayana Aiyar* (3) this act can be performed not only by executing and signing the instrument and registering it, but also by accepting a *kabuliyat* executed by the transferee and registered. Can it be said that when a person accepts a document in which another acknowledges his title and agrees to cultivate this land on certain terms he conveys the right to enjoy the land? I think not. The view of Stuart, J., in *Kedar Nath* v. *Shankar Lal* (5) seems to be logical.

The mode prescribed for making a sale is exactly the same as for a lease but in none of the rulings relied on by the respondents is it suggested that an instrument of sale need not be executed or signed by the vendor. If, therefore, we interpret the same words in the two sections similarly the instrument of lease must be executed and signed just as an instrument of sale.

The fact that under section 4 of the Transfer of Property Act, section 107 is to be read

(1) 26 A. 368 ; 1 A. L. J. 96; A. W. N. (1904) 46.
(2) 30 M. 322 ; 2 M. L. T. 270 ; 17 M. L. J. 395.
(3) 8 Ind. Cas. 668 ; 35 M. 95; (1910) M. W. N. 766; 8 M. L. T. 437; 21 M. L. J. 202 (F. B.).
(4) 14 Ind Cas 540 : 39 C. 1016 ; 16 C. W. N. 606; 15 C. L. J. 665.
(5) 78 Ind. Cas. 934 ; 46 A. 803 ; 22 A. L. J. 185.

as supplemental to the Registration Act does not help one in arriving at the conclusion that a *kabuliyat* accepted by the lessor operates to convey the right to enjoy the property. Reading section 107 as a part of the Registration Act and reading the word lease therein as including a counterpart *kabuliyat*, undertaking to cultivate or occupy and an agreement to lease the only conclusion is that all these transactions have also to be made by registered instruments. It does not justify the conclusion that they are all transfers or that a *kabuliyat* accepted by the lessor amounts to a conveyance by him of the right to enjoy.

In a conveyance one expects words indicating that the owner of the property is thereby conveying it. No such words exist in the *kabuliyat* in dispute. It may not be necessary for the lessor to sign the instrument but the instrument itself must be one purporting by its contents to pass the right from the owner to the transferee.

I prefer to follow the view in *Kedar Nath* v. *Shankar Lal* (5) and hold that a registered *kabuliyat* executed by the lessee and accepted by the lessor does not operate to transfer the right to enjoy immoveable property. The plaintiff's suit must, therefore, be dismissed. As the plea on which the defendants have succeeded was not raised in the lower Courts I direct that the parties pay their own costs throughout.

G. R. D.
S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 478 OF 1921.

June 4, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

THE EAST INDIAN RAILWAY COMPANY, LIMITED, CALCUTTA—DEFENDANT—APPELLANT

versus

JANKI PRASAD—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Railway Act (IX of 1890), s. 70—Railway Company, position of—Risk note form B.—Deterioration or damage to consignment—Railway Company, whether liable—Consignee, position of—Liability, how far continues.

A Railway Company, when entrusted to carry goods from one station to another has, under section 72 of the Railways Act the liability of a bailee, but it can contract itself out of that liability by a special contract in one of the forms recognised by Government. [p. 739, col. 2.]

Under the risk note form B the Company is held free from all responsibility for any loss, destruction or deterioration or damage to the consignment except when there is a loss of a complete consignment or one or more complete packages forming part of the consignment. [p. 739, col. 2.]

Where therefore all the bags belonging to any consignment arrive and none of them is missing the Company is protected by Risk Note B even though it is found that the bags had been damaged owing to the wilful neglect of the Railway Company.

The Railway Company is protected by the Risk Note B equally against a claim by the consignor and the consignee. [p. 740, col. 1.]

Bengal and North Western Railway Co. v. *Mulchand*, 53 Ind. Cas. 1000 ; 42 A. 655 ; 18 A. L. J. 764; 2 U. P. L. R. (A) 268, distinguished.

The position of the Railway Company as carriers protected by Risk Note B continues till the date of the delivery to the plaintiff. It is not therefore liable as warehousemen even if the loss is occasioned after the consignment arrives at its place of destination and before delivery to the consignee. [p. 740, col. 2.]

Rohilkhand and Kumaun Railway Co. v. *Ismail Khan*, 29 Ind. Cas. 207 ; 13 A. L. J. 417, referred to.

Appeal from the decree of the Resident and District Judge for Railways at Gwalior, dated the 20th June 1921.

Messrs. *B. K. Mukerji* and *O. M. Chiene*, for the Appellant.

Messrs. *Ladli Prasad Zutshi* and *Balmakund*, for the Respondents.

JUDGMENT.—This is an appeal by the East Indian Railway Company, defendant No. 2, arising out of a suit for compensation for loss of sugar and for damages. It appears that on the 15th of May 1919, 125 bags of sugar No. 6713, invoice No. 2 were despatched from Kantapukar station on the East Indian Railway to Gwalior station on the Great Indian Peninsula Railway. A person said to be named Chhote Lal, purporting to act on behalf of the consignor,

despatched these goods at Kantapukar station. The wagon containing the consignment was transferred at Manikpur and arrived at Gwalior on the 28th of May 1919. It is the case of both the parties that when the wagon arrived at Gwalior the seals were found intact, indicating that there had been no pilfering in transit. The goods were unloaded and placed in the goods shed for some 2 days before they were delivered to the plaintiff. At the time of delivery, however, it was found that many of the bags were cut and a good part of the sugar had disappeared and there was a shortage of about 83 maunds and odd in quantity.

The plaintiff claimed Rs. 1,841-6-0 as compensation for the sugar lost and Rs. 240 as interest and damages on the said amount.

The pleas taken by the two Companies in substance were that the goods despatched had been defectively packed so as to be liable to damage, leakage or wastage in transit, and the Risk Note Form A had been taken. They had also been despatched at a reduced rate under Risk Note Form B. It was, therefore, pleaded that under no circumstances the plaintiff was entitled to any damages for the loss inasmuch as no complete package had disappeared, and that there was no wilful negligence on the part of any of the Railway Companies.

At the trial the plaintiff appears to have disputed the genuineness of the Risk Note Form A, Risk Note Form B as well as the forwarding note, which were relied upon by the Railway Companies.

The learned District Judge, the Resident of Gwalior, came to the conclusion that it was not satisfactorily established that Risk Note Form A had been actually executed to the knowledge of the consignor, or with his authority, but that having regard to the fact that lower rates were charged it should be presumed that the goods were despatched under Risk Note Form B. As to the forwarding note he was rather suspicious as to whether some entries in it had not been made subsequently. He further came to the conclusion that there was wilful negligence, or theft, or both, on the part of the servants of both the defendant Companies. He found it difficult to attribute how much of the loss was due to the wilful negligence or how much to theft on the part of the servants of the two Railways or to apportion the liability for the negligence and theft between them. Holding that under the circumstances the defendant Companies were not at all protected, he finally passed a decree in these terms:—

> "I give a decree in favour of the plaintiff against the two Railway Companies jointly *i.e.* in equal shares for a sum of Rs. 1,675 interest on the sum at 6½ *per cent.* from the 20th May 1919 to date with costs".

The East Indian Railway Company has filed an appeal impleading the G. I. P. Railway Company as one of the respondents. The latter Company has filed cross-objections against the decree.

The first point which we have to consider in appeal is the terms of the contract under which the goods were despatched from Kantapukar station.

We are of opinion that the learned District Judge is not quite correct in thinking that it is not established that the goods were despatched under Risk Note Form A. As a matter of fact we find that in the notice which was sent on behalf of the plaintiff on the 19th August 1919 to the Agent, G. I. P. Railway it was clearly admited that "the execution of the Risk Note Form A could not be denied." This original document had been produced and was admitted at the trial by the plaintiff's Vakil. It was also further admitted in that notice that there was a remark made on the Railway Receipt that bags were 'slack in condition'. Risk Note FormA is only executed when the articles tendered for carriage are either already in a bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. It is clear to our mind, therefore, that it must have been noticed at the place of despatch that the goods were either in a bad condition or defectively packed and it was on that account that the Risk Note Form A was taken. In order to prove the Risk Note Form A the plaintiff has produced one of the Railway clerks at the station of despatch who attested this document on the date it bears. He proves that he signed it on that date. It is true that no attempt was made on behalf of the defendant Companies to summon Chhote Lal who purports to have signed it on behal of the consignor. At the same time no attemp

was made on behalf of the plaintiff also to produce this person, who must be the agent of his consignor, to deny his signature on this document. The plaintiff is a consignee. He had to admit that the goods were consigned by Messrs Bhagat Ram Shiva Pratap and must have been despatched either by the proprietors or by some one acting as their agent. Great reliance, however, is placed on the circumstance that the railway receipt which must have been returned to the G. I. P. Railway on delivery has not been produced. At the trial it was suggested that it must have been destroyed after the expiry of six months. Whether this is or is not a true explanation we are unable to say. The fact however, remains that the railway receipt which was a very important document in the case in dispute is not forthcoming. In spite of this, however, we are of opinion that having regard to the admission of the plaintiff himself in his previous notice it must be accepted that the goods were despatched under risk note Form A and that the Form which has been produced in this case and which was attested by the witness Serish Chandra Biswas is the document which was signed by the person who gave his name as Chhote Lal and who really tendered the goods for despatch to Gwalior.

The other disputed document is risk note Form B. It also purports to bear the signature of the same person Chhote Lal. We have compared the signatures on Forms A & B as permitted by section 73 of the Indian Evidence Act and we are satisfied that both these documents bear the signatures of one and the same person. Furthermore form B also is proved by the witness Biswas in the same way *i. e*, that it was attested by him on the date it purports to bear and was written at Kantapukar station.

As regards the forwarding note the main point urged against its genuineness is the entry under the column " Condition of goods " which is as follows :—

> " Gunny packing weak and strained at several bags also liable to sweat in transit due to inherent moisture. Several bags torn, resewn and badly slack condition."

This purports to be in an ink different from the ink with which the entries above referred to were filled up. But the ink, as pointed out by the learned judge, is similar to the ink used in the marginal notes as to the condition contained in form A. We are of opinion that this entry is by no means suspicious. When the plaintiff admitted that the form A was executed and when we are satisfied that form A could never have been executed unless the goods were in a bad condition or defectively packed, there is really no suspicion in finding an entry to that effect in the forwarding note. The forwarding note also purports to have been signed by the same person Chhote Lal whose signature tallies with the signatures on forms A & B. Although the defendant Companies have not produced better evidence which they could have produced, yet we are satisfied that no good ground is shown for rejecting the genuineness of the three documents. We may point out that the learned District Judge himself presumed that the form B was a genuine document.

A Railway Company, when entrusted to carry goods from one station to another, has, under section 72 of the Railways Act the liability of a bailee. The Company can however contract itself out of that liability by a special contract in one of the forms recognised by Government. Risk Note B is one of those forms. Under this risk note the consignor holds the Company harmless and free from all responsibility for any loss, (destruction or deterioration of, or damage to the said consignment, from any cause) whatever, except for the loss of a complete consignment, (or of one or more complete packages forming part of a consignment) due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit, over the said Railway or other Railway lines working in connection therewith, or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment, provided the term " wilful neglect " be not held to include fire, robbery from a running train or any other unforeseen event or accident.

The plaintiff had suggested that some of the bags were found missing. The finding of the Court below is against the plaintiff and no serious attempt has been made before us to

challenge that finding. We must therefore accept that 125 bags did arrive at Gwalior, although some of them had been cut or were broken and their contents had been partially removed or had disappeared. All the same it is to be conceded that under the risk note form B the Company was held free from all responsibility for any loss, destruction or deterioration or damage to the consignment except when there was a loss of a complete consignment or one or more complete packages forming part of the consignment. It follows therefore that when all the bags did arrive and none of the bags were missing the company cannot be held liable even though it be found that the bags had been damaged owing to the wilful neglect of the Railway Company. It is, therefore, unnecessary for us to go into the question in what way the damage was caused to the sugar. We are satisfied that under the terms of the contract which were entered into between the parties in consideration for accepting lower rates the defendant companies were free from responsiblity unless a whole package had been lost.

The learned Counsel for the defendant—appellant has however urged that the risk note was merely an indemnity bond signed by the consignor for the benefit of the Company and could not affect the rights of the consignee, who was entitled to receive the consignment. The contention is that he must have a decree against the Railway Companies, which however, may have their remedy against the consignor. He relies in support of his contention on the case of *The Rohilkhand and Kumaun Railway Co.* v. *Ismail Khan*, (1). We are unable to accept this contention. The case relied upon was quite different inasmuch as there the loss had been caused to the plaintiff by refusal of delivery after the consignment had arrived and a subsequent unjustified sale.

It is next contended that the position of the Railway Companies was that of a warehouseman and they were liable for the loss occasioned after the consignment had arrived at Gwalior. In support of this contention reliance is placed on the case of *Bengal & North Western Railway Co.* v. *Mulchand* (2). We are unable to accept this contention either. The contract of the Railway Companies as pointed out in that case at p. 660, was not only to carry the goods but also to deliver them. It follows that the custody of the goods with the carriers must extend beyond the period of their transit. Risk Note form B also uses the expression "during and after transit". We are satisfied that the position of the Railway Companies as carriers continued till the date of the delivery to the plaintiff. After the arrival of the goods at Gwalior and before delivery they never either expressly or impliedly agreed to hold the custody of the goods as wareshousemen. Their liability therefore canot be extended.

In this view of the matter the suit was wrongly decreed in favour of the plaintiff and against the Railway Companies.

The G. I. P. Railway has not filed an appeal against the decree but has preferred a cross-objection under O XLI, r. 22, Civil Procedure Code. A preliminary point is taken on behalf of the plaintiff—respondent that such a cross-objection does not lie. It is strongly urged that the decree having been against the G. I. P. Railway Company it was their duty to appeal from it against the plaintiff and not merly file a cross-objection against the co-defendant appellant. It is not necessary for us to consider whether under the provisions of O. XLI, r. 22, which differs slightly from the old section 567, a co-respondent can file cross-objections against another co-respondent. The decree passed by the learned District Judge in favour of the plaintiff against the two Railway Companies proceeds on a common ground, and the G. I. P. Railway Company can be transposed from the array of the respondents to that of the appellant, as suggested by the Counsel for the two Companies.

The position then is this. There was a decree for Rs. 1675 with costs passed jointly against both the defendants, who were to be liable in equal shares. One of the defendant companies, namely the East Indian Railway, appeals from that decree and the relief claimed by it is that this Court be pleased to reverse the decree of the lower Court so far as it is against the appellant with costs, or grant such further relief as it deems fit. This appeal, as

(1) 29 Ind. Cas. 207 ; 13 A. L. J. 417.
(2) 58 Ind. Cas. 1000 ; 42 A. 655 ; 18 A. L. J. 764 ; 3 U. P. L. R. (A.) 268.

originally laid, was directed against the decree so far as it affects the East Indian Railway Company and was valued at Rs. 837-8-0 *i.e.*, half the amount decreed. The G. I. P. Railway challenges the decree on the same ground. It has paid the Court-fee on its half share of the total liability imposed by the decree. The East Indian Railway has paid the Court-fee on the remaining half share. We direct that the G. I. P. Railway Company be transposed from the array of respondents to that of the appellant, and proceed to determine the appeal on the ground common to both. The necessary alteration will also be made in the valuation given in the memorandum of appeal. The whole case is thus before us.

We allow the appeal and set aside the decree of the Court below against both the defendants, but considering the unsatisfactory way in which the case has been conducted, the omission of the Railway Companies to produce the Railway receipts and the faulty manner in which the consignor had packed his goods, we direct the parties to bear their own costs throughout.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2235 OF 1920.

November 14, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

THE HINDUSTAN ASSURANCE AND MUTUAL BENEFIT SOCIETY, LIMITED, GUJRANWALA—PLAINTIFFS —APPELLANTS

versus

GURDIT SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (*XXVI of* 1881), *ss.* 9, 118—*Holder in due course—Presumption—Burden of proof—Companies Act* (*VII of* 1913), *s.* 89—*Manager of Bank, whether has authority to transfer negotiable instrument.*

Under section 118 of the Negotiable Instruments Act it is a legal presumption that every negotiable instrument is made or drawn for consideration, and, that every transfer of it is also for consideration, and further, that the holder of a negotiable instrument is a holder in due course. The *onus* is, therefore upon the person challenging the rights of the transferee of a negotiable instrument to prove facts which would show that such transferee is not in fact a holder in due course. For instance, he must show either that the holder received the instrument without consideration or that he had sufficient cause to believe that there was a defect in the title of his transferor to the instrument. [p. 742, col. 1.]

The manager of a Bank has authority to make a valid transfer of a negotiable instrument on behalf of the Bank. [p. 742, col. 2.]

Appeal from the decree of the District Judge, Gujranwala, dated the 17th July 1920, reversing that of the Senior Subordinate Judge, Gujranwala, dated the 26th March 1920.

Mr. *D. C. Ralli*, for Bakshi *Tek Chand*, for the Appellants.

Mr. *M. L. Puri*, for Dr. *Nand Lal*, and Lala *Gopal Chand*, for the Respondents.

JUDGMENT.—The plaintiff sues on the foot of a promissory note for Rs. 2,000 bearing interest at the rate of 12 per cent. per annum, made by the defendants Gurdit Singh and Nihal Chand in favour of the Empire Bank, Hafizabad, on the 30th June 1913. The plaintiff claims to be a holder in due course. The Court of first instance framed a number of issues on all of which it found in favour of the plaintiff Company and gave judgment for the Company for the sum of Rs. 3,160, being Rs. 1,997 principal and the balance interest.

On appeal to the lower Appellate Court the District Judge reversed the judgment of the Court below on a complete misapprehension of the law governing negotiable instruments of this kind. The defendants throughout appear to have based their defence on the contention that there was on valid consideration for the making of the promissory note. Unfortunately an issue was not framed in the Court of first instance as to whether or not the plaintiff was a holder in due course; but evidence was produced by the plaintiff which if believed would establish that the transfer of the promissory note to the plaintiff was for good consideration, the evidence consisting of the statement of Ganpat

Rai, Manager of the Empire Bank, and the accounts produced from the custody of the liquidator. These accounts show that at the time of the transfer a sum of over Rs. 8,000 was due by the transferor to the transferee and the item of Rs. 1,997 was debited to the plaintiff at the time of the transfer. It has nowhere been suggested that the circumstances surrounding the making of the promissory note were in any way tainted with fraud, still less has it been suggested that the plaintiff had any knowlege of any such fraud or of any other defect in the title of the payee of the promissory note. Under section 118 of the Negotiable Instruments Act it is a legal presumption that every negotiable instrument is made or drawn for consideration and that every transfer is also for consideration; further, that the holder of a negotiable instrument is holder in due course. The *onus* is, therefore, upon the person challenging the rights of the transferee to prove facts which would show that such transferee was not in fact a holder in due course. The defendants have not attempted to produce any such evidence; nor have they attempted to rebut the evidence of Ganpat Rai supported by the accounts produced in Court. Their evidence having been produced subsequently they had every opportunity to do so. The mere fact that an issue on this point was not framed could not in the circumstances be held to prejudice the defendants. Apparently the learned District Judge did not consider the context of section 43 of the Negotiable Instruments Act which provides that even though a negotiable instrument may be drawn without consideration, if the payee has transferred that instrument to a holder for consideration such holder may recover the amount due on the instrument from the transferor or any prior party. "Holder in due course" is defined by section 9 of the Act as any person who for consideration became the possessor of a promissory note, bill of exchange or cheque, if payable to bearer, or the payee or indorsee thereof, if payable to, or to the order of, a payee, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. As the *onus* lay upon the defendants under the provisions of section 118 of the Act to challenge the position of the plaintiff as "Holder in due course," it would have been necessary for them to show, in order to defeat the plaintiff's claim, that the plaintiff either received the promissory note without condsideration or had sufficient cause to believe that there was a defect in the title of the Empire Bank to that instrument. As we have already pointed out no such evidence has been attempted to be produced and the circumstances in our opinion show conclusively that there was consideration for the transfer. Moreover the circumstances in our opinion futher show that there was pefectly valid consideration for the making of the promissory note in the first instance. The District Judge says, "It has not been proved whether any consideration was really due from the Empire Bank to the plaintiff, the Empire Bank having gone into liquidation." We must confess we do not quite understand the meaning of this somewhat cryptic sentence. There is clear unchallenged evidence of the transfer for adequate consideration of the promissory note from the Empire Bank to the plaintiff, which the Court appears to have completely ignored.

The Court below is under a further legal misapprehension in holding that a transfer of the instrument could not validly be made by the Manager of the Empire Bank. The reason he gives for this alleged disability is that the Manager did not know whether under the rules of the Association of the Empire Bank he could transfer promissory notes without special authority from the Bank and no Articles of Association were produced by the plaintiff. The ignorance of the Manager of the Bank of the terms of the Articles of Association do not affect his power to make a transfer of negotiable instruments. He is the Agent of the Bank for performing all ordinary banking transactions, and a transfer of such an instrument is a very ordinary transaction. Section 89 of the Indian Companies Act (VII of 1913) expressly enacts that "a bill of exchange, *hundi*, or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company, if made drawn accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied." It is of course absurd to suggest that the Manager of the Bank is not a person act-

ing under such authority when carrying out a transaction of this kind.

For the reasons that we have given we accept the appeal and setting aside the order of the lower Appellate Court restore that of the Court of first instance with costs throughout.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 944 OF 1922.

May 1, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Boys.

HARISH CHANDRA AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat KASTOLA KUNWAR AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *ss.* 19, 31—"*Prescribed*," *meaning of—Suit on mortgage—Period of limitation, extension of—Mortgagor, acknowledgment by.*

The word "prescribed" in section 19 of the Limitation Act means "prescribed by any law for the time being in force" and is not limited to the period prescribed in the First Schedule of the Act.

Plaintiff sued on foot of a mortgage on the 2nd January 1919. The mortgage was executed in 1889 and the suit would have been time-barred but by operation of section 31 of the Limitation Act 1903, the period of limitation was extended to the 8th August 1910. Before its expiry the mortgagor made an admission of liability on the 24th January 1910;

Held, that this was a good acknowledgment within the meaning of section 19 of the Act and the suit was therefore within time. [p. 743, col. 2.]

Vasudeva Mudaliar v. *Sreenivasa Pillai*, 30 M. 426; 9 Bom. L. R. 1104; 4 A L. J. 625; 11 C. W. N. 1005; 6 C. L. J. 379; 2 M. L. T. 333; 17 M. L. J. 444; 34 I. A. 186 (P. C.), referred to.

Appeal against the decree of the District Judge, Mainpuri, dated the 30th March 1922.

Dr. *S. N. Sen*, for the Appellants.

Mr. *G. W. Dillon*, for the Respondents.

JUDGMENT.—The question in this appeal is one of limitation. The mortgage was executed in the year 1889. Under the twelve years limitation laid down by the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1) the suit would have been time-barred. The legislature, however, by section 31 of the Limitation Act of 1908 extended limitation to a period of sixty years from the date when the money became payable or two years from the passing of the Act whichever period first expired. This period expired in the case of the present mortgage on 8th August 1910. Before its expiry, on 24th January 1910, the mortgagor made an admission of liability. He made a subsequent admission on 1st July 1916 within twelve years of the former admission. The suit was filed on 2nd January 1919. The question is whether the acknowledgment of 24th January 1910 was a good acknowledgment within the meaning of section 19 of the Limitation Act. In our opinion it was. Section 19 requires that the acknowledgment should have been made before the expiration of the period prescribed for the suit. The period prescribed for the suit did not expire till 8th August 1910. The application was made before that date. It was therefore in time. Dr. Sen for the appellants has argued that the word "prescribed" in section 19 of the Limitation Act must be limited to the period prescribed in the first schedule of the Act. There is no warrant for any such limitation. The word "prescribed" is not defined in the Act. It means "prescribed by any law for the time being in force." The period of limitation for some classes of suits is not prescribed in the Limitation Act at all but in some other Act, as in the case of the Agra Tenancy Act. The word "prescribed" would certainly apply to any such period. The prescribed period for the institution of any suit mentioned in the First Schedule of the Limitation Act is no doubt ordinarily to be ascertained by reference to that schedule, as is laid down in section 3 of the Act. Section 31 is a special provision which, where it is applicable, overrides Article 132 of the Schedule. The section takes effect

(1) 30 M. 426; 9 Bom. L. R. 1104; 4 A. L. J. 625; 11 C. W. N. 1005; 6 C. L. J. 379; 2 M. L. T. 333; 17 M. L. J. 444; 34 I. A. 186 (P. C.).

"notwithstanding anything contained in this Act." In cases governed by the section it is to the section and not to the schedule that we must look in order to ascertain the period prescribed for the institution of a suit.

No other question has been argued. The appeal, therefore, fails and we dismiss it with costs including in this Courtfees on the higher scale.

K. S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 68 OF 1923.

January 21, 1924.

Present:—Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice May Oung.

D. R. SAKLAT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BELLA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Abatement of appeal—Costs incurred by appellant in Trial Court, effect on.

Where an appeal abates as regards an injunction sought for, it abates also as regards the costs incurred by the appellant as a consequence of the dismissal of his suit. [p. 745, col. 1.]

Josium Tiruvengadachariar v. *Sawmi Iyengar*, 5 Ind. Cas. 937 ; 34 M. 76 ; 7 M. L. T. 195 ; (1910) M. W. N. 643 ; 20 M. L. J. 760, relied on.

Applications arising out of First Civil Appeal No. 4 of 1919, dated the 28th July 1920.

Mr. *Das*, for the Appellants.

Mr. *Doctor*, for the Respondents.

JUDGMENT.—These are two applications to bring the legal representatives of a deceased respondent on the record. The original suit was filed by the plaintiffs—the present petitioners—against two defendants:—

(i) For a declaration that the 1st defendant was not entitled to the use and benefit of the Parsee Fire Temple, or to attend at, or participate in, any of the religious ceremonies performed therein;

(ii) For an injunction restraining the 1st defendant from entering the said premises and repeating the trespass complained of; and

(iii) For an injunction restraining the 2nd defendant from taking the 1st defendant into the said Fire Temple premises.

The suit was dismissed with costs by the Judge on the original side of this Court on the 23rd of April, 1918. The 2nd defendant applied for and obtained permission to withdraw a sum of Rs. 10,211-10-8, decreed as costs and undertook personally, as well as as the guardian of the 1st defendant, to refund the same in the event of this Hon'ble Court so directing. An appeal was filed against the decree but was dismissed on the 28th of July 1920. The decree contained an order directing the plaintiffs-appellants to pay to the defendants-respondents the sum of Rs. 10,211-10-8. Leave to appeal to His Majesty in Council was granted, and the appeal was admitted on the 17th of March 1921. The appeal has not, however, yet been transmitted to His Majesty in Council. The 2nd respondent died, on the 4th of July 1923, and on 28th of September 1923, the present applications were filed.

It is admitted now that the 1st defendant is of age, and that the presence of her guardian on the record is no longer necessary. It is not denied that the suit as against the 2nd defendant for an injunction has abated by reason of his death; but it is urged that, he having withdrawn the sum awarded as costs, his estate would be liable to refund those costs in the event of the appeal to His Majesty in Council being successful, and that, therefore, the appellants are entitled to a certificate declaring who his legal representatives are.

Under Rule 71 of this Court's Rules relating to appeals to the Privy Council, the applications have been properly filed in this Court. The question for decision is whether, the suit and appeal having abated in respect of the 2nd respondent, any rights remain as regards the incidental orders as to costs. The orders as to these costs awarded them to the defend-

ants, and, even if the appeal to His Majesty in Council be successful, it will be open to the present petitioners to recover those costs from the 1st respondent. Moreover, it is admitted before us that the 2nd respondent died, leaving a will, under which the 1st respondent will succeed to a large estate.

It has been held in the case of *Josium Tiruvengadachariar* v. *Sawmi Iyengar* (1) that if an action fails what is incidental fails also, and if an appeal abates as regards an injunction sought for it abates as regards the costs incurred by the appellant as a consequence of the dismissal of his suit. This authority is exactly in point, and with the reasons on which it is based, we entirely agree.

The application will, therefore, stand dismissed with costs, advocates' fees three gold mohurs.

Z. K. *Application dismissed.*

(1) 5 Ind. Cas. 937 ; 34 M. 76 ; 7 M. L. T. 195 ; (1910) M. W. N. 543; 20 M. L. J. 760.

PATNA HIGH COURT.

CIVIL REVISION NOS. 95 AND 102 OF 1923.

May 29, 1923.

Present :—Mr. Justice Foster.

THE INDIAN GENERAL NAVIGATION AND RY. CO., LTD.—PETITIONER

versus

FIRM DAULAT RAM CHATURBHUJ—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) ss. 21, 45—Jurisdiction, want of—Objection not taken in trial Court—Revision—Decree, whether can be set aside—Failure of justice, proof of.

A decree cannot be reversed in revision on the ground of want of jurisdiction in the Trial Court, unless objection to the jurisdiction of the Trial Court was taken in that Court at the earliest opportunity, and there has been a failure of justice, as required by section 21 of the Civil Procedure Code. [p. 745, col. 1.]

Revision from the decisions of the Small Cause Court Judge, Darbhanga, dated the 22nd December 1922 and the 12th January 1923 respectively.

Messrs. *Shareef* and *Rai G. S. Prasad*, for the Petitioner.

Mr. *Murari Prasad*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Small Cause Court Act and section 115 of the Code of Civil Procedure. The main ground on which the applications have been pressed is that of jurisdiction.

The applicant Company received a consignment of cotton from the opposte party, the firm Daulat Ram, at Jageranath *Ghat* Calcutta booked to Simaria *ghat* for Darbhanga. It should be mentioned that Simaria *ghat* is a steamer *ghat* in Monghyr District, and from there to Darbhanga the cotton would have to proceed by railway. On the forwarding note there is an instruction signed by the consignor, directing the railway to sign the railway forwarding note and the necessary risk note on his behalf at Simaria *ghat* through their steamer agent, and recognising that if the goods be refused by the railway they shall remain at the steamer terminus at the shippers' risk and exppense. It appears that the cotton arrived at Darbhanga deficient in weight and it has been found that the deficiency was caused during the transit on the river when in the applicants' custody. The case that was brought by the consignee, the firm Daulat Ram, was tried by the Small Cause Court Judge at Darbhanga and decreed. The applicants' contention is that their contract and their contractual responsibilities extended only between Jagernath *Ghat* and Simaria *ghat* and that in no capacity and in no part of their dealing with the plaintiff firm Daulat Ram had they anything to do with Darbhanga. The applicants urge that by implication the terms of section 99 of the Civil Procedure Code give them the right to have the decree reversed. Against this the opposite party has a very strong reply. He refers to section 21 of the Civil Procedure Code and also to several rulings which practically were to the same effect as the section. In addition to this he points out that the applicants have never asserted in their petition that they have suffered any prejudice by reason of the trial of the suit at Darbhanga. The applicants urge that there is no need of

any proof of prejudice when it is admitted that they have no office at Darbhanga and no connection at all with the place. But this argument would only have any pertinence if the applicants had themselves raised in their pleading the question of prejudice. Prejudice must be pleaded first and then will come the question whether it has been proved. In my opinion this contention of the applicants must fail for the grounds put forward by the opposite party.

Other points have been urged which have reference only to matter of evidence admitted on the record.

The applications are rejected with costs. Hearing fee on the scale of second appeal in one charge.

Z. K. *Application rejected.*

RANGOON HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NOS. 66 AND 67 OF 1923.

January 30, 1924.

Present :—Mr. Justice Pratt and Mr. Justice MacColl.

HAJI PU AND OTHERS—APPELLANTS

versus

TIN TIN—RESPONDENT.

Probate and Administration Act (V of 1891) ss. 86, 90 — Order granting permission to sell immoveable properties—Appeal, whether lies—'Rules' in s. 86, meaning of—Permission to sell when to be granted—Dispute as to title—Incumbrances—Enquiry.

The word 'rules' in section 86 of the Probate and Administration Act, means rules of procedure regarding appeals laid down in the Civil Procedure Code. [p. 747, col. 1.]

The meaning of section 86 of the Probate and Administration Act is that all orders made by the District Judge or District Delegate by virtue of the powers conferred upon him under the Act are subject to appeal in accordance with the rules of procedure laid down in the Code of Civil Procedure. [p. 747, col. 1.]

Kalimuddin v. *Maharui*, 13 Ind. Cas. 690 ; 39 C. 563 at p 566 ; 15 C. L J. 382 ; 16 C. W. N. 662, dissented from.

Brojo Nath Pal v. *Dasmoney Dassee*, 2 C. L. R. 589; *Abhiram Dass* v. *Gopal Dass*. 17 C. 48 ; 8 Ind. Dec. (N. S) 571, referred to.

Under section 86 of the Probate and Administration Act, an appeal lies to the High Court against an order passed by a District Judge granting permission to an administrator to dispose of immoveable property under section 90 of the Act. [p. 747, col. 2.]

Umacharan Dass v. *Muktakeshi Dasi*, 28 C. 149 5 C. W. N. 443, relied on.

It is not desirable to grant permission to an administrator to sell immoveable properties not in his possession to which third parties claim an absolute title, or which are subject to ostensible incumbrances, unless it is proved that other properties, not the subject of contention, are not available for sale. Nor should permission be granted unless the Court is satisfied that the sale is necessary and in the interests of the estate as a whole. [p. 748, cols. 1 & 2.]

It is not legally necessary for letters of administration to the estate of a Burman Buddhist to be taken out. [p. 748, col. 1.]

Appeal from the order of the District Court, Mandalay, in Civil Miscellaneous case No. 172 of 1920.

Mr. *Lutter*, for the Appellants.

Mr. *Sanyal*, for the Respondent.

JUDGMENT.

Pratt, J.—This is an appeal against an order of the District Court granting permission to the administratrix of an estate to sell certain landed properties belonging to the estate.

Relying on *Kalimuddin* v. *Maharui* (1) a preliminary objection has been taken that no appeal lies.

It was held by a Bench of the Calcutta High Court in the case cited that no appeal lies against an order of a District Judge assigning a bond under section 79 of the Probate and Administration Act.

It was rightly pointed out that section 86 of the Act enacts that every order of a District Judge under the Act shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals ; but it was held that one of those rules is to be found under section 105 of the Code, which lays down that "save as otherwise expressly provided" no appeal shall lie from any order. The inference was accordingly drawn that as there is no express provision in the Code for an appeal from an order

(1) 13 Ind. Cas. 690; 39 C. 563 at p. 566; 15 C. L. J. 382; 16 C. W. N. 662.

assigning a bond it followed that no appeal lay against the order assigning a bond.

I find myself unable to agree with this view, which does not appear to me to be based on a correct interpretation of the word "rule" as used in section 86. To my mind the word 'rules' in the section in question relates to rules of procedure regarding appeals laid down in the Civil Procedure Code. The words "save as otherwise expressly provided" in section 105 of the Code would seem to directly contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code, and to include appeals allowed under other laws such as the Probate and Administration Act.

The obvious meaning of section 86 of the Act, I take to be, that all orders made by the District Judge or District Delegate by virtue of the powers conferred upon him thereunder are subject to appeal in accordance with the rules of *procedure* laid down in the Code of Civil Procedure.

I do not think the rulings referred to in *Kalimuddin* v. *Maharui* (1) justify the construction placed upon section 86 therein. In *Brojo Nath Pal* v. *Dasmony Dassee* (2) it was held that no appeal lay against an order reopening a case on the ground that it was an order passed in the course of a suit prior to decree.

Regarding a contested application for probate as a suit, it is a tenable position that no appeal would lie against an interlocutory order, which was not final and did not decide the merits, since there would ultimately be an appeal against the decree in the course of which the order complained of could be made a ground of attack. Or, as it was put in a later Calcutta ruling the order in that case was found to be an order admitting a review of judgment, and such an order is not appealable under the Code of Civil Procedure.

In *Abhiram Dass* v. *Gopal Dass* (3) an order admitting a respondent as caveator was held to be appealable on the ground that it had the same effect as an order making him a defendant in the suit.

It will thus be seen that in the two cases upon which the Bench relied in *Kalimuddin* v. *Maharui* (1) the appeal was held to be admissible or not on the ground that the order, which it was sought to reverse in each instance, was of a character expressly dealt with under the provisions of the Code relating to orders in suits. These cases do not, therefore, seem to be authorities for holding that an order granting permission to sell estate property is not subject to appeal, since the Civil Procedure Code does not make provisions regarding orders permitting the sale of property by an administrator under the Probate and Administration Act.

In *Uma Charan Dass* v. *Muktakeshi Dasi* (4) a Bench of three Judges of the same Court held that an appeal lies to the High Court against an order passed by a District Judge or Delegate granting permission to an executor or administrator to dispose of immoveable property under section 90 of the Probate and Administration Act.

A wide interpretation was equitably placed upon the word 'hereby' in section 86.

The position taken was that such an order was appealable as passed under powers conferred by the Probate and Administration Act, and it was there pointed out that section 86 of the Act says that every order made by a District Judge or District Delegate by virtue of the powers thereby conferred shall be subject to appeal to the High Court.

In view of this definite statement of the contents of the section it does not seem to me a justifiable criticism to say that the effect of the words "Under the rules contained in the Code of Civil Procedure" does not seem to have been considered, and I see no reason to suppose these words were overlooked.

I consider that the decision in *Uma Charan Dass* (4) is good authority for holding that the present appeal lies.

Section 86 of the Act as it stands allows the appeal and there is no express provision of the Civil Procedure Code, of which I am aware, which takes away the right.

Turning to the merits of the appeal before us,—the administratrix Tin Tin, who had obtained letters of administration in accordance with the orders of this Court on appeal from the Mandalay District Court's order in Mis-

(2) 2 C. L. R. 589.
(3) 17 C. 48; 8 Ind. Dec. (N. S.) 571.

(4) 28 C. 149; 5 C. W. N. 448.

NEMICHAND *v.* KENALCHAND

cellaneous (Administration) proceeding No. 172 of 1920 has obtained from the District Court permission to sell certain lands as part of the estate. The application for permission to sell was opposed with regard to certain lands by Haji Pu and three others, the appellants in Appeal No. 66 of this Court, on the ground that they had purchased these lands from Maung Thu Tin and Ma The, heirs to the deceased U Ye Din, owner of the estate.

With regard to other lands, Maung Saw and Maung Ni, appellants in appeal No. 67, opposed the sale on the ground that they were in possession by virtue of a mortgage from the late Tin Tin Gyi, eldest son of the deceased U Ye Din. The District Court overruled the objections without enquiring into their merits and allowed the sale.

It should be remarked that both the transactions regarding the land took place prior to the grant of letters to Tin Tin, whose application for letters was dismissed by the District Court on the ground that she had not proved her status as adopted daughter of U Ye Din, but was subsequently granted on appeal by a Bench of this Court, which found the adoption proved.

It is not legally necessary for letters of administration to the estate of a Burman Buddhist to be taken out.

The natural children of U Ye Din denied Tin Tin's status as adopted daughter and unless that was established she was not an heir to the deceased and had no interest in his estate. They partitioned the estate between them.

Application for permission to sell the lands in dispute was made on the ground that Tin Tin was in need of money to defray the expenses incurred in the letters of administration proceedings and for her maintenance.

The Court ought to have inquired into the truth of her allegations and the necessity for the sale before granting permission.

The estate was an extensive one and included valuable moveable property.

It was not desirable that permission should be given to sell immoveable properties not in the possession of the administratrix, to some of which third parties claimed an absolute title, and others of which were subject to ostensible encumbrances, unless it was proved that other properties, not the subject of contention, were unavailable for sale.

The Court ought also to have satisfied itself that the sales were necessary and in the interests of the estate as a whole.

It has not done so. I do not consider the necessity for the sale has been established. I would set aside the order with costs. Advocate's fees 3 gold mohurs in each appeal.

It will be open to respondent, if she considers it desirable, of course to make a fresh application to the Court for sale of estate property, when the Court will pass orders after due enquiry in the light of the remarks made in this appeal.

MacColl, J.—I concur.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 173 OF 1923.

March 10, 1924.

NEMICHAND BHICKCHAND MARWADI —PLAINTIFF—APPLICANT

versus

KENALCHAND JASRAJ MARWADI —DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908) O. XXXIII, r. 1—Suit in forma pauperis by minor—Pauperism, proof of—Next friend, pauperism of, whether must be proved—Property possessed by parents of plaintiff, effect of.

The rule of English practice which prevents a minor from instituting a suit *in forma pauperis* through his next friend, unless he gives proof not only that he himself is a pauper, but that the next friend is also a pauper cannot be deduced from the provisions of the Civil Procedure Code. Under the Civil Procedure Code when a minor is seeking to file a suit *in forma pauperis* it is only necessary for him to show that he himself has no means. The mere fact that his parents were possessed of certain property would not be sufficient to show that the minor is not a pauper, unless it could be shown that the property actually came into his posession. [p. 748, cols. 1 & 2.]

MA SEIN *v.* MA PAN NYUN

Venkatanarasayya v. *Achemma*, 3 M. 3; 1 Ind. Dec. (N. S.) 558, relied on.

Application against an order passed by the First Class Subordinate Judge, Nasik, in Miscellaneous Application No. 139 of 1922.

Mr. *D. R. Putwardhan*, for the Applicant.

Mr. *D. C. Virkar*, for the Opponent.

JUDGMENT.—The petitioner in this case applies to the Court under section 115 of the Code of Civil Procedure. He was a minor and applied through his next friend for permission to sue as a pauper. The minor claimed that he had been adopted by one Parvati who died in April 1920 and his claim to have been adopted by her was resisted by the opponents. The Judge said :—

"The minor was the only child of his parents. The father had a shop and the mother ornaments of about Rs. 1,500. Besides the father has left a house in Marwar. It is said that the father sold his shop and wife's ornaments before his death, but this is not satisfactorily proved. The adoption deed is not produced, and is said to be missing. No certified copy is produced. These facts show that the applicant is not a pauper and the claim is doubtful."

We do not think that the Judge has rightly dealt with the application. On the question whether or not the applicant had sufficient means to pay the Court-fees, it would not be sufficient for the opponent to prove that his father had a shop and his mother had ornaments, unless it could be shown that the shop and the ornaments actually came into his possession. Because if his case was correct and he had been adopted into another family, he could not succeed to the property of his natural parents.

It has been contended that the real appellant is the maternal uncle, and he would have to show that he was a pauper before the suit could be instituted *in forma pauperis*. This question was decided in *Venkatanarasayya* v. *Achemma* (1) where it was held that the rule of English practice which prevents a minor from instituting a suit *in forma pauperis* through his next friend, unless he gives proof not only that he himself is a pauper, but that the next friend is a pauper, should not be deduced from the provisions of the Civil Procedure Code, and that it was only necessary to show, when a minor was seeking to file a suit *in forma pauperis*, that the minor had no means. We see no reason to differ from that decision. We must, therefore, remand the application to the lower Court so that it may be decided definitely whether the minor applicant has sufficient means to pay the Court fees. We note that his application in the lower Court was not resisted by the Government Pleader.

Costs of this application to be costs in the cause.

Z. K. *Rule made absolute.*

(1) 3 M. 3; 1 Ind. Dec. (N. S.) 559.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 93 OF 1921.

January 21, 1924.

Present :—Mr. Justice Heald and Mr. Justice Lentaigne.

MA SEIN—PLAINTIFF—APPELLANT

versus

MA PAN NYUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law, Chinese—Inheritance, rules of—Daughters, whether succeed in presence of sons—Burmese woman married to Chinese Buddhist—Law applicable.

Where a Burmese woman married to a Chinese Buddhist adopts her husband's form of religion, becoming, to all intents and purposes, a Chinese Buddhist, succession to her estate must be regulated by the Chinese Customary Law. The rule of inheritance under Chinese Customary Law is that, when a man dies, all his property, real and personal, is divided equally among all his sons ; daughters succeed only when there are no sons, and the widow succeeds only when there are neither sons nor daughters. [p. 751, cols. 1 & 2.]

If there are sons or daughters, the widow has only a right to administer the estate and to be maintained out of it and a claim for provision for her funeral. [p. 750, col. 2.]

Maung Po Maung v. *Ma Pyit Ya*, 74 Ind. Cas. 933; 1 R. 161 ; 2 Bom. L. J. 79; (1923) A. I. R. (R.) 180, followed.

MA SEIN *v.* MA PAN NYUN

Appeal against the judgment and decree of the District Court at Pyapon, in its Civil Regular No. 1 of 1921.

Mr. *Burjarjee*, for the Appellant.

Messrs. *Gile* and *Ormiston*, for the Respondents.

JUDGMENT.

Heald, J.—The parties are children of a Chinaman, Sit Shan, who died many years ago and of a Burmese woman, Ma Myit, who was his wife.

Appellant, Ma Sein, sued her brothers, Sit Paung and Sein Don, and her sister, Ma Pan Nyun, for her share in her mother's estate. She alleged that the share to which she was entitled was one-fourth, and she asked for the appointment of a Receiver and the administration of the estate by the Court.

The sister did not contest the claim, but gave evidence for appellant.

The two brothers filed a written statement, in which they denied that Ma Myit was Burmese Buddhist at the time of her death, or that she left any estate, or that if she left any estate appellant was entitled to a one-fourth share of it or to have it adminsitered by the Court. They said that their father, Sit Shan, was a Chinese Buddhist, that he married Ma Myit about 1881, that he subsequently married a Chinese wife Kyi Ya, that he died intestate in 1902, leaving Ma Myit as one of his two widows with five children by her and Kyin Ya as his other widow with one child by her and another whom they had adopted, that after his death there was a partition of his estate in accordance with Chinese Customary Law, the three sons being allotted equal shares while the widows and daughters got nothing, that the adopted son of the Chinese wife actually took away his share, and their shares remained undivided in the hands of their mother and were managed by her as they were minors, that the property of which their mother died possessed represented their two shares of their father's estate, that Ma Myit was a Chinese Buddhist, and that, therefore, even if she left property, being sons, they would inherit to the exclusion of appellant, who was a daughter.

The District Court held that the partition of Sit Shan's estate between the three sons to the exclusion of the widows and daughters was proved, and that, even if Ma Myit died possessed of any property, Chinese Customary Law would apply, so that only her sons would inherit. Appellant's suit was accordingly dismissed with costs.

Appellant appeals on the ground that Ma Myit was a Burmese Buddhist for the purposes of succession to her estate, and that, therefore, appellant was one of her heirs.

It was recently held in this Court in the case of *Maung Po Maung* v. *Ma Pyit Ya* (1) that the rule of inheritance under Chinese Customary Law is that, when a man dies, all his property real and personal, is divided equally among all his sons, that daughters succeed only when there are no sons, and that the widow succeeds only when there are neither sons nor daughters. It there are sons or daughters, the widow has only a right to administer the estate and to be maintained out of it and a claim for provision for her funeral.

Sit Shan undoubtedly a Chinese Buddhist, so that Chinese Customary Law would regulate the succession to his estate, and the presumption that that law would be applied renders the story of the partition told by the two sons probable.

The evidence seems to me to make the matter certain; appellant's own witness U. Po, an Honorary Magistrate, said that the partition, which was made by Chinese elders after Sit Shan's death, was made according to Chinese custom, and that the two widows and the daughters were excluded, the three sons sharing the estate equally.

The Chinese widow swore that Sit Shan's estate was divided by Chinese elders into three shares, that Ma Myit's two sons got a share each and her son got the other share. She herself claimed a share, but it was refused, and neither Ma Myit's daughters nor her daughter received a share, but she got some gold, probably for her daughters.

The Chinese son, Pwin Lip, also gave similar evidence.

I think, therefore, that it is proved that Ma Myit did not inherit any part of Sit Shan's estate, but remained in possession of

(1) 74 Ind. Cas. 933; 1 R. 161; 2 Bom. L. J. 79; (1923) A. I. R. (R.) 180.

that part of it which was allotted to her two sons as manager.

It seems probable, therefore, that she left no estate of her own ; but I do not think it necessary to decide that question because I am of opinion that the lower Court was right, in holding that Chinese Customary Law would apply to her estate also, so that, as there were sons, appellant being a daughter, could not inherit.

I do not of course suggest that the Chinese Customary Law applies to the estate of every Burmese woman who was married to a Chinaman. In many cases, I have no doubt the wife remains a Burmese Buddhist, so that Burmese Buddhist Law would apply to her estate, but it seems not unlikely that in some cases, the wife adopts her husband's form of religion, becoming, to all intents and purposes, a Chinese Buddhist, and the evidence seems to me to show that this was such a case.

The matter is one of fact rather than of law.

There can be no doubt that Ma Myit continued to follow Chinese customs after Sit Shan's death. She mourned for him for the period of three years prescribed by Chinese custom, and she put her children, as well as herself, into the mourning dress which is customary among Chinese and not among Burmese. She did not marry again, the second marriage of widows, though permitted, being regarded as disreputable by the Chinese. She sent both her sons to China to be educated. She married one of her two daughters to a Chinaman and she refused her consent to appellant's marrying a Burman. When she died, she was buried in the Chinese cemetery in a grave of Chinese pattern and with the usual Chinese monument, although her husband had had to be buried in a Burmese cemetery because there was no Chinese cemetery in existence at Pyapon at the time when he died there. It is true that her burial in the Chinese cemetery may not have been due to any wish she had herself expressed, but it seems to me to show that she was regarded by the Chinese community at Pyapon as one of themselves. Her adoption of the Chinese form and period of mourning, and her sending her sons to China to be educated seems to me to show that after her husband's death, she still attached herself to the Chinese community, that she regarded herself practically as a Chinese woman, and that she desired her sons to be regarded, and to regard themselves, as Chinamen.

There is little evidence, and, so far as I am aware little is known as to what are the parcular religious observances of Chinese Buddhists, and how they differ from those of Burmese Buddhists. It is natural that Chinamen who are Buddhists, living in Burma, should, to some extent, observe the religicus usage of their Burmese Buddhist neighbours and much more natural that their Burmese wives should do so. There can be no doubt that both Sit Shan and Ma Myit did observe both Burmese and Chinese religious customs, but that fact clearly did not prove that Sit Shan had forsaken his Chinese Buddhist religion, since it is admitted that he died a Chinese Buddhist and I do not think that under the circumstances, it goes far towards showing that Ma Myit had not adopted the Chinese form of the Buddhist religion.

Appellant's own admission as to her mother's mourning, as to her having sent her sons to be educated in China, as to her continuing to live with those sons who were admittedly regarded as Chinamen and with the daughter whom she had married to a Chinaman, as to her refusal of her consent to appellant's marrying a Burman, and as to her having been buried in the Chinese cemetery, seem to me to be sufficient to show that Ma Myit regarded herself as a Chinese Buddhist and attached herself to the Chinese community, to which her husband and her sons and the son-in-law, with whom she lived, admittedly belonged, and I would hold that the Chinese Customary Law should be applied to her estate.

Under that law her sons, and not her daughters, would inherit, and, therefore, appellant's suit was rightly dismissed.

I would accordingly dismiss the appeal with costs.

Lentaigne, J.—I concur.

Z. K. *Appeal dismissed.*

SHIVLINGAPPA *v.* SHIDMALLAPPA

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 341 OF 1922.

February 13, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SHIVLINGAPPA MALLAPPA SADALGI—PLAINTIFF—APPELLANT

versus

SHIDMALLAPPA NURANDAPPA KAPALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 41—Execution of decree—Transfer for execution—Certification, what amounts to—Notification of payments—Jurisdiction to execute decree.

Where a decree is transferred to a Court for execution that Court continues to have jurisdiction to execute the decree, until it certifies to the Court that passed the decree, under section 41 of the Civil Procedure Code, that the decree has been executed, or, where it fails to execute the same, the circumstances attending such failure. [p. 752, col. 2.]

Where a decree has once been transferred to another Court, certification is a very important step, for its consequence is that the Court to which the decree has been transferred ceases to have jurisdiction to execute the decree. There must, therefore, be a formal certification by the Court to which the decree has been transferred for execution to the Court which passed the decree. [p. 752, col. 2.]

The mere fact that certain payments made under the decree are notified to the Court which passed the decree does not amount to certification within the meaning of section 41 of the Civil Procedure Code. [p. 752, col. 2.]

Appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 68 of 1921, confirming the order of the Subordinate Judge, Gokak, in Darkhast No. 271 of 1920.

Mr. *A. G. Desai*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondents.

JUDGMENT.—These are execution proceedings in a decree passed on December 13, 1906. We are now in 1924. It might be suggested that the law of procedure was at fault and has been the cause of delay. But that is not the fact. The relevant provisions of the Code are quite adequate but they have not been complied with, as they have not been understood by the Judges in the Courts below. The decree was originally passed by the Chikodi Court, and was transferred for execution to the Gokak Court on January 11, 1907. The Gokak Court would continue to have jurisdiction to execute the decree until it certified to the Chikodi Court that the decree had been execute, or where it failed to execute the same, the circumstances attending such failure. There is no evidence whatever in this case that the Gokak Court certified as required by law either the execution of the decree or the failure to execute it, to the Chikodi Court, and once that fact has been realised, it will be seen how the lower Courts have fallen into error.

Certain payments were made under an instalment order of November 26, 1908, and those payments appear to have been noted in the register of suit in the Chikodi Court. It was suggested apparently in argument that the fact of such entry was proof of certification. The lower Courts have rightly declined to accept that argument. It may very well be that the Gokak Court informed the Chikodi Court that certain payments had been made in satisfaction of the decree, and in consequence of such notification certain entries were made in the register of suits in the Chikodi Court showing those payments. But such notification would not be certification under section 41 of the Code. Thereafter Darkhast No. 340 of 1911 was filed. That darkhast was struck off for non-prosecution on June 11, 1912. The result of the execution is found to have been recorded in the register of suits in the Chikodi Court. Both the lower Courts have now come to the conclusion that the proper inference to be drawn from that is that the Gokak Court had made certification to the Chikodi Court. We think that such inference is not permissible. Certification is a very important step when a decree has once been transferred to another Court, for its consequence is that the latter Court ceases to have jurisdiction to execute the decree. We are, therefore, clearly of opinion that there must be a formal certification by the Court to which the decree has been transferred for execution to the Court which passed the decree. Another Darkhast No. 370 of 1914 was filed but met the same fate as the previous darkhast. When Darkhast No. 294 of 1917 was filed, it was struck off by the Gokak Court on

MAUNG SAN MYAING *v.* U PON GYAW

the ground that no certificate of non-satisfaction of the decree had been produced from the Chikodi Court. That was an error which has not been in any way explained. That error resulted in another mistake being made because when the unfortunate creditor applied in 1919 to the Chikodi Court for a certificate it was refused. Not knowing what he ought to do, he filed the present *darkhast* on September 13, 1920, in the Gokak Court. The Judge represents his action as being "reminiscent of a sheep, which failing to mind or rather find a gap in a wall, attempts to ram its way through." The simile is hardly a happy one as it invites the remark that the applicant could not be expected to find the gap which had been closed by the decisions of the Courts. In our opinion the decree has been resting throughout in the Gokak Court and the applicant is entitled to execute it there provided he is within time. The order of the lower Court will be set aside and the darkhast allowed to proceed with costs throughout on the respondent.

Z. K. *Order set aside.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 178 OF 1923.

January 23, 1924.

Present :—Mr. Justice Pratt.

MAUNG SAN MYAING—DEFENDANT—APPELLANT
versus
U PON GYAW—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XXXIV, r. 1—Mortgage suit—Party claiming title paramount, whether can be impleaded.

A mortgage suit cannot be so framed as to draw into controversy the title of a third party who is in no way connected with the mortgage sued on and sets up a title paramount to the mortgagor and the mortgagee. [p. 754, col. 1.]

Jaggeswar Dutt v. *Bhuban Mohan Mitra*, 33 C. 425; 3 C. L. J. 205, relied on.

Nga Paw E v. *Nga Sin*, 18 Ind. Cas. 874 ; 1 U. B. R. (1911) 92, distinguished.

Appeal from the order of the District Court, Myingyan, in Civil Appeal No. 20 of 1923.

Mr. *Dutt*, for the Appellant.

Mr. *Mookerjee*, for the Respondent.

JUDGMENT.—Plaintiff sued for a mortgage decree and sale of certain land against the mortgagors-defendants Nos. 1 and 2. Defendants Nos. 1 and 2 admitted the claim.

The third defendant was added as a party because his name appeared in the revenue map as mortgagee and he was in possession.

The third defendant Maung San Myaing admittedly was not a party to the mortgage on which plaintiff sued.

He set up a title paramount, denied that he was a necessary party and challenged the jurisdiction of the Court alleging that the suit had been undervalued. Plaintiff was granted a decree in both Courts against all defendants.

Third defendant now appeals on the ground that he was not a necessary party to the suit, that the court had no jurisdiction and that the mortgage was not proved against him amongst other grounds.

Under O. XXXIV, r. 1, all persons having an interest in the mortgage security or in the right of redemption must be joined as parties.

Appellant set up a prior mortgage, which he alleged had been converted into a sale. It is clear from the explanation that a prior mortgagee is not a necessary party to the suit.

Appellant is in possession and claims to be owner. He challenges plaintiff's right to mortgage the land.

It must be taken as settled law that the question of his paramount title could not be litigated in the present suit.

The question is exhaustively discussed in Gour's Transfer of Property Act, paragraphs 2096, 7-8 and 2130, where the authorities are cited in detail.

In *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1), which is one of the leading cases on the

(1) 33 C. 425 ; 3 C. L. J. 205.

point it was clearly laid down by a Bench of the Calcutta High Court that a plaintiff-mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and has set up a title paramount to that of the mortgagor and mortgagee. The facts in the case of *Nga Paw E* v. *Nga Sin* (2) relied upon by the Appellate Court were not similar. I hold, therefore, that appellant was not a necessary party to the suit. Appellant's contention that the mortgage was not proved as against him must also succeed and on this ground the suit as against third defendant ought to have been dismissed.

It is not necessary to go into the other grounds of appeal.

The decree against third defendant Maung San Myaing cannot stand.

The appeal is allowed and the decrees of the lower Courts as against the present appellant will be set aside and the suit against him dismissed. Appellant will be allowed costs throughout.

Z. K. *Appeal allowed.*

(2) 13 Ind. Cas. 874 ; 1 U. B. R. (1911) 92.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 670 OF 1922.

February 13, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

MALHAR NARAYAN PRABHU—
DEFENDANT—APPELLANT

versus

VISHNU SONU GANADA—PLAINTIFF—
RESPONDENT.

Foreign decree—Decree against person in absentem, *validity of—Transfer to British Court—Execution of decree—Judgment-debtor, failure of, to object—Sale in execution—Suit to set aside sale, maintainability of.*

A decree passed by a foreign Court against a person *in absentum* is a nullity. Where, however, such a decree is transferred to a British Court for execution, and the judgment-debtor appears in the course of the execution proceedings and takes no objection to the jurisdiction of the foreign Court or the validity of the decree and allows his property to be sold in execution proceedings, he must be deemed to have submitted to the jurisdiction of the foreign Court, and cannot subsequently be allowed to file a suit to set aside the sale on the ground that the whole proceeding was null and void as against him. [p. 755, col. 1.]

Appeal from the decision of the District Judge, Ratnagiri in Appeal No. 287 of 1920, confirming the decree passed by the Second Class Subordinate Judge, Malvan in Civil Suit No. 154 of 1918.

Mr. *A. G. Desai*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.—The facts in this second appeal are as follows. The second defendant obtained a decree in the Kudal Court in Sawantwadi against five persons, the plaintiff, his two brothers Gopal and Govind, and his two sisters-in-law Ramabai and Baibai. It would appear from the Roznama in that suit that the plaintiff was not served with the summons. Gopal and Govind alone defended the suit, in which a decree was passed award ing a certain sum of money against the five defendants. The appeal against that decision was unsuccessful. Thereafter the decree was transferred to the Malvan Court in British territory for execution. The decree was sent to the Collector, who attached the properties in suit and put them up for sale. The first defendant purchased the property at the auction. The sale was confirmed and possession was given on December 20, 1916.

The plaintiff filed this suit in 1918 for a declaration that the decree was void and unenforceable against him and that, therefore, the sale of his interest was void. In the plaint the plaintiff put his share as one-fifth, and that of his brothers and sisters-in-law four-fifths. He claimed that he had purchased the interests of his brothers and his sisters-in-law, but that has been found as a fact to be incorrect by the Subordinate Judge of Malvan, who awarded the plaintiff possession and injunction with regard to one-third of the property sold by the Collector. The auction-purchaser, defendant No. 1, appealed, but the appeal was dismissed on the ground that the original decree was void as against the plaintiff and that the auction-purchaser should have known the law with regard to the nullity

of a decree passed by a foreign Court against a person *in absentem*.

Now undoubtedly the decree as it stood of the Sawantwadi Court was not binding on the plaintiff, and as far as he was concerned, he could treat it as a nullity. When the decree was transferred to the Malvan Court for execution, and in execution it was sought to sell his property, he could have contended that there was no decree which could be executed against him, and that undoubtedly would have prevented his property being sold in execution. But it has been found as a fact that the plaintiff accepted the notice of the Collector with regard to the sale in execution of his property. He appeared before the *Mamlatdar* and made a statement and said he was ready to pay what was due from him under the decree. Therefore to all appearances he submitted to the decree of the foreign Court, and that was perfectly competent for him to do. There was no necessity for him, if he wished to accept the decree, to raise an objection to its execution.

It has been argued before us that the Sawantwadi Court had no jurisdiction and, consequently, the plaintiff could not consent to its having jurisdiction to pass a decree against him. But that is not as a matter of fact the proper aspect of the case. The Sawantwadi Court had jurisdiction to pass a decree against the plaintiff, and it is only the circumstance that he did not submit to its jurisdiction that would prevent the decree from being executed against him. But if he took no steps when that decree was being executed against him in British territory to assert his rights against the executing creditor, then it seems to us he cannot now seek to set aside the sale which took place in the execution proceedings. It would seem very strange either in law or in equity that a party, who submitted to a decree and allowed his property to be sold in execution, should then be allowed to file a suit in order to set aside the sale to the prejudice of the rights of the auction-purchaser on the ground that the whole proceeding with regard to him was null and void. In our opinion, therefore, the decision of the Court below was wrong. The appeal is allowed and the plaintiff's suit dismissed with costs throughout.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 286 OF 1919.

August 13, 1923.

Present :—Mr. Justice Mookerjee and Mr. Justice Chotzner.

RANI AMRITA SUNDARI DEBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUNSHI SERAJUDDIN AHMED CHOUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 75, O. XLI, r. 25—Local investigation—Commissioner, report of, when can be overruled—Remand—Lower Court, whether can take view inconsistent with remand order.

Where a matter has been referred to a Commissioner for local investigation, it is not safe for a Court to act as an expert and to overrule the elaborate report of the Commissioner whose integrity is unquestioned, whose careful and laborious execution of his task is proved by his report and who has not blindly adopted the assertions of either party. [p. 757, col. 2.]

Surut Soondree Debea v. *Prosonno Coomar Tagore*, 13 M. I A. 607 ; 6 B L. R. 677 ; 15 W. R. P. C 20 ; 2 Suth. P. C. J. 393 ; 2 Sar. P. C. J. 632 ; 20 E. R. 677; *Monkee Dumbr Sahee* v. *Bhullundur Sahee*, 15 W. R. 423 ; *Kamini Kishore* v. *Parbartya Tipperah Raj*, 60 Ind. Cas. 434, followed.

When a case is remanded to the lower Court it is not open to it to take a view inconsistent with that followed in the order of remand

Appeal against the decree of the Additional Subordinate Judge, Faridpur, dated the 30th July 1919.

Babus *Dwarkanath Chakrabarti*, *Satis Chandra Bhattacharya*, *Jatindra Nath Sanyal* and *Ramaprasad Mookerjee*, for the Appellants.

Dr. *Sarat Ch. Basak*, Babus *Asitaranjan Ghose* and *Bhupendra Chandra Guha*, for the Respondents.

JUDGMENT.—The subject-matter of this litigation is a large tract of alluvial land formed in the bed of the river Ganges, also called Kirtinasha, in the District of Faridpur. The plaintiffs claim the land as included within village Bhaga. The defendents claim the

land as comprised within village Sakhipura. The present suit was commenced on the 26th September 1907 and terminated in the Trial Court on the 25th April 1910 with a partial decree in favour of the plaintiffs. The defendants thereupon appealed to this Court. On the 31st July 1914 the appeal was allowed and the decree of the Subordinate Judge was discharged. It was declared that the plaintiffs were entitled to possession of such portion of the disputed lands as lay within the *thak* boundaries of the property known as Bhaga *char*, *char* Datali and *char* Lasti. The case was remanded to the Subordinate Judge in order that the *thak* boundaries of the *chars* mentioned might be relaid by a Commissioner who would be free to take evidence to determine the trijunction point from which the *thak* line was to be relaid. The judgment of this Court which has been reported—*Amrita Sundari* v. *Serajuddin Ahamed* (1)—shows that one of the points argued in the appeal was, whether the decree was to be made on the basis of the *thak* map or the survey map. This Court came to the conclusion that the decree should be based not on the survey map but on the *thak* map, after the latter had been relaid with as much accuracy as practicable. We need not recapitulate all the reasons assigned in support of this view; but one circumstance may be usefully recalled. This Court found that the features of the land had been changed by diluvion which took place in the interval between the *thak* proceedings and the revenue survey; consequently, any disagreement between the *thak* line and the survey line was attributable, *prima facie*, not to the inaccuracy of the *thak* measurements but to the altered condition of the lands surveyed. The result was that the case was remitted to the Trial Court for reconsideration.

The Subordinate Judge after remand appointed a Commissioner to hold a local investigation and to prepare a case map so that the direction of this Court might be carried out. The Commissioner received the commission on the 8th December 1915 and submitted his final report on the 21st January 1917. The report of the Commissioner and the annexures thereto leave no room for controversy that the enquiry was conducted by him with great thoroughness. There was a dispute before the Commissioner as to how the *thak* line was to be relaid. The defendants urged that the starting point to be adopted was a point towards the southwest of the disputed land, where the *Deara* authorities had, in 1878, posted an iron pillar to indicate the trijunction point of *mouzas* Bhaga, Nimua and the river. The plaintiffs urged, on the other hand, that the starting point should be taken towards the southeast of the disputed land as the trijunction point of *mouzas* Bhaga, Nimua and Tarabunia. The Commissioner rejected the second alternative and gave *prima facie* sufficient reasons for his opinion that the trijunction point of Bhaga, Nimua and Tarabunia could not be ascertained with reasonable approach to accuracy, and that the trijunction points as identified by the defendants were correct. The Commissioner further explicitly recorded his view that the *thak* map of *char* Bhaga could not be correctly relaid except by the process already adopted by the *Deara* authorities. He then prepared a map on this basis and showed the portion of the disputed land which fell within the village claimed by the plaintiffs.

The Subordinate Judge was not satisfied with the result of this enquiry. He held that the south-eastern point was entitled to preference over the south-western point on account of its proximity to the disputed land. He then proceeded to investigate whether the tri-junction point at the south-east corner could be presumed to be identical with the revenue survey point and he came to the conclusion that a presumption should be made in favour of the identity of the two points. The Subordinate Judge argued that as the south-east tri-junction point was in the middle of the island on the bank of a canal, it was not likely to have been affected by river action during the season which intervened between the *thak* proceedings and the revenue survey. The course adopted by the Subordinate Judge is in our opinion obviously inadmissible. In the first place he assumes that there had been no changes in the situation of the disputed land during the period mentioned. This is directly contrary to the finding contained in the jugment of this Court. As that judgment had become

(1) 29 Ind. Cas. 156 ; 19 C. W. N. 565.

final, neither of the parties litigant was entitled to get round the conclusions then adopted on evidence. In the second place, the Subordinate Judge assumes that the tri-junction point had been correctly depicted on the survey map. This was negatived by the judgment of this Court pronounced on the last occasion. What has happened in substance is that the Subordinate Judge after remand has made a decree on the basis of the survey map which was found unreliable by this Court when the order of remand was made.

The Subordiate Judge stated that there was wide divergence between the boundary lines obtained by the adoption of the two starting points. He had consequently to face the question, which of the two positions should be accepted. He rejected the south-west point on the arbitrary ground of its distance from the disputed land. But if a map has been accurately drawn, it should, in theory at least, be immaterial, from what starting point it was relaid. Accordingly, the root question was, which tri-junction point had been ascertained with precision. The commissioner selected the south-western point. There is this to be urged in support of his view that he thus accepted a point which had been previously adopted by the *Deara* auohorities in 1878. The Subordinate Judge, on the other hand, preferred the south-eastern point. But that point itself had not been ascertained with accuracy; its identification was based on the erroneous and inadmissible assumption that the survey map was accurate and reliable. We are consequently of opinion that the Subordinate Judge has not only taken a view inconsistent with that followed in the order of remand but that his conclusions are based on unwarranted assumptions.

The Subordinate Judge states in one portion of his judgment that the *thak* lines do not agree with the revenue survey lines. This in fact was emphasised in the order of remand and reasons were given why the *thak* map should in the present case have preference over the survey map. The respondents have incidentally suggested that it is probable that neither the *thak* map nor the survey map is entirely reliable. If this be the fact, the respondent plainly cannot be benefited thereby. The only result of such a conclusion would be that the foundation of their claim would disappear. The burden lies upon the plaintiffs to establish that the disputed land is within the village held by them. If the boundaries of their village cannot be located with fair approach to precision, no decree can be made in their favour. We need not develop this point further, because the defendants have not, in this appeal, attacked the entire decree and have proceeded on the assumption that the *thak* boundary line was correctly relaid by the commissioner.

We may point out finally that the method adopted by the Subordinate Judge was liable to lead to error and was disapproved by the Judicial Committee in the case of *Surut Soondree Debea* v. *Prosonno Coomar Tagore* (2). In that case, a question arose as to the title to *char* lands thrown up by the river Brahmaputra. A commissioner was appointed to make a local investigation and the Trial Court made a decree in conformity with his report. This Court, on appeal, adversely criticised the report and made a decree "on an examination of the maps filed in the cause and on the explanations and arguments of the pleaders on both sides." The Judicial Committee reversed the decision of this Court and deprecated interferenee with the result of a long and careful local investigation except upon clearly defined and sufficient grounds. The same view was adopted in *Monkee Dumbur Sahee* v. *Bhullundur Sahee* (3) and *Kamini Kishore* v. *Parbartya Tipperah Raj* (4). In circumstances like these, it is not safe for a Court to act as an expert and to overrule the elaborate report of a commissioner whose integrity was unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party. We need not go minutely into the details, but we see no ground for impugning the accuracy of the conclusion of the commissioner upon what must be regarded as the broad and cardinal issue whereon the determination of this case depends. On the other hand, we are unable to see any satisfactory grounds for the assumption which is the

(2) 13 M. I. A. 607; 6 B. L. R. 677; 15 W. R. P. C. 20; 2 Suth P. C. J. 393; 2 Sar. P. C. J. 682; 20 E. R. 677.

(3) 15 W. R. 423.

(4) 60 Ind. Cas. 434.

foundation of the judgment of the Subordinate Judge and is in conflict with the order of remand.

The result is that this appeal must be allowed, the decree made by the Subordinte Judge on the 30th July modified and a decree made in favour of the plaintiffs in accordance with the report of the commissioner Babu Joges Chandra Das Gupta, dated 21st January 1917. The report of the commissioner and the map annexed thereto (before it was modified according to the direction of the Subordinate Judge issued on the 21st July 1919) will be treated as part of this decree. The appellants are entitled to their costs in this Court. The hearing fee is assessed at ten gold mohurs.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 25 OF 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

February 12, 1924.

JEHRABI SADULLA KHAN MOKASI —PLAINTIFF—APPELLANT

versus

BISMILLABI SADRUDDIN KAJI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of defendant—Legal representatives, all, whether must be brought on record.

Where a defendant dies during the pendency of a suit, it is sufficient for the plaintiff to put one of the heirs of the deceased on the record as his legal representative, who will then represent the estate of the deceased for the purposes of the suit. If the other heirs of the deceased wish to be represented in the suit they can apply to be substituted in his place. [p. 758, col. 2 & p. 759, col. 1.]

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, 26 M. 230 ; 12 M. L. J. 368, relied on.

Appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 108 of 1921, modifying the decree passed by the Second Class Subordinate Judge at Wai, in Civil Suit No. 379 of 1916.

Mr. *A. G. Desai*, for the Appellant.

Messrs. *Y.V. Bhandarkar* and *P.B. Shingne*, for the Respondent.

JUDGMENT.—The plaintiffs filed this suit to obtain their shares in the suit property. There is no dispute with regard to the shares of the parties. The only question that arises in this appeal is whether the lower Appellate Court was right in holding that properties 32, 36 and 39 to 42 did not belong to Mahomadkhan. There can be no doubt that this decision was right. These properties were sold in execution of the decree against Talumiya so far back as 1873, and they were purchased by one Balkrishna Sapre. He got symbolical possession in 1877. He filed Suit No. 143 of 1899 against Mahmadkhan for actual possession. The suit was dismissed in the lower Court, and before the appeal which was filed was decided Mahmadkhan died leaving a widow Sahebbi who was put on the record as his legal representative. The appeal was successful. Possession was decreed in 1902 while the second appeal filed by defendant No. 2 was dismissed. Sapre's widow sold this property to the seventh defendant, who had been in possession of it, we are told, on behalf of the second defendant, for a thousand rupees. It is perfectly clear, therefore, that this property went out of the family so far back as 1873, and no suggestion has been made to show how it was possible for it to be restored to the family unless it had been acquired by adverse possession. The only contention that the appellants could raise was that the appeal against the decree in Suit No. 143 of 1899 by which the auction purchaser got actual possession was not valid against any of the heirs of Mahmadkhan except his widow who had been put on the record. That point, however, was decided in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (1). That case makes it clear that it is sufficient for the plaintiff in a suit, if a defendant dies, to put one of the heirs on the record as his legal representative who will then represent the estate of the deceased for the purpose of the suit. As the learned Judge points out

(1) 26 M. 230 ; 12 M. L. J. 368.

it would be impossible for a plaintiff to find out who are all the heirs of a deceased defendant, and it is for those who claim to be heirs to come in if they wish to be represented in the suit. It was contended that defendant No. 7 bought Mahmadkhan's estate on behalf of the heirs of Sapre's widow. That is a question which could not possibly be decided in this suit, and must be left for any further proceedings which the parties may be advised to take. Assuming that defendant No 7 obtained possession of the property he was only in possession as a trespasser, the title being in Sapre. Sapre's widow was entitled to sell to him and that property could not be included in the present suit for partition. Whether any of the members of the family have any cause of action against defendant No. 7 on account of his purchase from Sapre's widow remains at present undecided. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 60 OF 1923.

January 23, 1923.

Present :—Mr. Justice Lentaigne and Mr. Justice Carr.

MAUNG PE GYI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HAKIM ALLY—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 31—Evidence Act (I of 1872), ss. 92, proviso I, 93—Transfer of Property Act (IV of 1882), ss. 58 (c), 60—Rectification of deed—Sale-deed—Agreement of re-purchase—Consideration, amount of, left blank—Evidence of amount, admissibility of—Mortgage by conditional sale—Redemption—Mortgage money.

Section 31 of the Specific Relief Act entitled a party to a document, on the ground of fraud or mistake, to have the document rectified so as to bring it into accord with the real intention of the parties. Where, therefore, a blank has been left in a document owing either to fraud or to mistake, evidence to fill the blank is admissible under proviso I to section 92 of the Evidence Act [p. 760, col. 1.]

A sale-deed contained an agreement for re-purchase in the following terms :—" Will re-sell to the vendor at his request within three years for Rs. " but the amount of the consideration was omitted. In a suit by the vendor for rectification of the deed by insertion of the amount of the consideration :

Held (1) that the omission was due either to an oversight of both parties, which would amount to a common or " mutual " mistake, or to the action of the defendant, on whose instructions the deed was prepared in order that he might subsequently take advantage of the omission as against the plaintiff, which would amount to fraud on his part, and that, in either case, evidence was admissible to fill in the blank ; [p. 760, col. 2.]

(2) that looked at from another point of view, the deed was a mortgage by conditional sale, and the mortgagor was, under section 60 of the Transfer of Property Act, entitled to redeem the mortgage, in the absence of a specific agreement to the contrary, on payment of the mortgage money, that is to say, in the present case, the amount of the original loan. [p. 760, col 2.]

Appeal against the decree of the District Court, Myaungmya, in Civil Regular No. 9 of 1922.

Mr. *Surty*, for the Appellants.

Mr. *M. C. Naidu*, for the Respondent.

JUDGMENT.

Carr, J. -On the 30th April 1920, by the registered deed, Exhibit 1, the plaintiff-respondent conveyed his land, measuring 33·98 acres, to the defendants for a sum of Rs. 600. The deed contained also an agreement for repurchase by the plaintiff within three years. The amount to be paid for the repurchase was, however, left blank.

The plaintiff sued for specific performance of this agreement and for rectification of the deed or in the alternative for its cancellation. (He also alleged that the defendants had dispossessed him of an adjoining holding which is referred to as an " extension " but which in fact is larger in area than the original holding. This land he alleged that he had himself cleared and brought under cultivation. He prayed for possession of this land.) His contention as regards the repurchase was that the price was to be the original sum paid by him, he paying interest in the meantime and remaining in possession of the land.

The defendants alleged that the land was to be repurchased at the market price obtaining at the time of repurchase, and alleged

that plaintiff remained in possession as their tenant, paying rent, not interest. (As regards the adjoining holding they alleged that they themselves cleared and brought it under cultivation.)

The District Judge gave the plaintiff a decree as prayed and the defendants now appeal.

The sixth ground of appeal alleges that plaintiff did not exercise his right of repurchase within three years. This is obviously wrong, since the suit was filed within two years of the date of the deed.

The fifth ground is that the Court (wrongly described as the Appellate Court) erred in finding that the "extension" was made by the respondent.

On this question I have no hesitation in agreeing with the District Judge that the extension was made by the plaintiff-respondent. His story is strongly supported by his witnesses, who are all persons likely to have a knowledge of the facts. On the other hand the appellant's story as to his clearing is extremely vague and unsatisfactory, as is the evidence of his witnesses. The appellant did not in fact work the purchased land himself and it is unlikely that he would employ coolies to clear the adjacent land. He himself has very inadequate knowledge of how much land he got cleared and what it cost him. His witnesses, too, appear to know very little about the matter. The impression created by their evidence is that had they been asked to point out the land to which they refer the majority of them would have been unable to do so. And they all live (except Po Tun) at a very considerable distance from the land. The first ground is to the effect that the lower Court should not have admitted oral evidence to fill up the blank. Section 93 of the Evidence Act is relied upon and that section read with Illustration (*b*) certainly seems to bear directly on this case. On the other hand proviso 1 to section 92 allows proof of any fact which will entitle any person to any decree or order relating to the document "such as fraud—or mistake in fact or law." And section 31 of the Specific Relief Act entitles a party on the ground of fraud or mistake to have a document rectified so as to bring it into accord with the real intention of the parties. Reading these provisions together I am of opinion that if either fraud or mistake be established evidence to fill the blank can be admitted.

Rendered freely the relevant part of the deed reads as follows:— "(1) will resell to the vendor at his request within three years for Rs. ." The amount is all that is omitted. The only possible inference from this is that it was intended to insert the amount of the price for repurchase. And the omission to insert it can be attributed to only one of two reasons. Either it was omitted owing to an oversight of both parties, which would amount to a common or "mutual" mistake, or it was intentionally omitted by the defendant, on whose instructions the deed was prepared, in order that he might subsequently take advantage of the omission as against the plaintiff. That would amount to fraud on his part.

I am of opinion, therefore, that evidence on this point may be admitted. And on the evidence on the record I have no hesitation in agreeing with the finding of the District Judge that the plaintiff's version is correct and that the amount agreed upon was Rs. 600, the same as the consideration for the original sale.

In my view, therefore, the appeal fails.

The deed may be looked upon in another light. On the face of it the deed is clearly a mortgage by conditional sale as defined in section 58 (*c*) of the Transfer of Property Act. That being so in the absence of a specific agreement as to the payment of a different sum for redemption the mortgagor is entitled to redeem on payment of "mortgage money," under section 60 of the Act. The mortgage money can in such circumstances mean only the amount actually due under the deed, in this instance the amount of the original loan. From this point of view also the plaintiff is entitled to the relief sought.

I would, therefore, dismiss this appeal with costs.

Lentaigne, J.—I concur.

Z. K. *Appeal dismissed.*

VIJAYA SINGH *v.* SHIVAJIRAO

BOMBAY HIGH COURT.

CIVIL APPEAL FROM ORDER NO. 54 OF 1922.

February 28, 1924.

VIJAYA SINGH DATTAJIRAO THORAT—PLAINTIFF—APPLICANT

versus

SHIVAJIRAO NARAYANARAO THORAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 9—Death of plaintiff—Abatement — Applicatson to bring legal representatives on record, whether can be treated as one to set aside abatement—Procedure.

Where an application to bring the representatives of a deceased party on the record is made after the suit has abated, the application should be treated as one to set aside the abatement under O. XXII, r. 9 of the Civil Procedure Code and should be disposed of as such. [p. 761, col. 1.]

Appeal from an order passed by the Joint First Class Subordinate Judge, Satara, in Miscellaneous Application No. 58 of 1921.

Mr. *H. C. Coyajee*, with Mr. *D. C. Virkar*, for the Applicant.

Messrs. *Kanga*, *S. S. Patkar* and *A. A. Adarkar*, for the Respondents.

JUDGMENT.—This is an appeal from an order dismissing the application by one Tarabai on behalf of the minor Vijayasing to set aside the abatement of the suit which was filed by the minor's father. The father died on August 30, 1920. According to the law of limitation then prevailing the suit would abate on February 28, 1921, unless an application had previously been made to put his legal representatives on the record. But on January 1, 1921, Act XXVI of 1920 came into force under which the period of limitation for putting the legal representatives on the record was reduced from six months to three months. The application on behalf of the minor had then to be made before January 1, 1921. But it was not made until February 28, and as the suit had then abated, the proper application to make to the Court was to set aside the abatement. The Court, instead of amending the application so as to make it one under O. XXII, r. 9. Civil Procedure Code, rejected the application as being made under O. XXII, r. 3, and so beyond time. On July 30, 1921, a fresh application was made to set aside the abatement of the suit. The Judge, on June 16, 1922, rejected the application on the ground that the delay in making the application could not be excused and expressed an opinion that an appeal ought to have been filed against the order on the previous application. We think that the mistake in this case arose from the method of dealing with the first application of February 28, 1921. If that application had been considered as an application to set aside the abatement, even if the Judge had refused it, an appeal in the circumstances of the case should have been successful. We do not think that the minor should be prejudiced by the fact that the proper remedy was not suggested to him by the Court. We set aside the abatement of the suit and place the minor through his next friend on the record.

The appellant should pay the costs of this appeal, of the application in the lower Court, and of the civil application for excuse of delay in filing the civil extraordinary application which can now be rejected.

Z. K. *Order set aside.*

MAHTON *v.* JHAMAN MAHTON

PATNA HIGH COURT.

CIVIL REVISION NO. 324 OF 1923.

January 3, 1924.

Present:—Mr. Justice Jwala Prasad.

JWALA PRASAD THAKUR MAHTON—DECREE-HOLDER—PETITIONER

versus

JHAMAN MAHTON AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 18—Civil Procedure Code (Act V of 1908), O XXI, r. 90—Execution of decree—Sale, application to set aside—Limitation—Fraud by decree-holder, effect of.

A decree-holder who is once guilty of fraud in bringing about an execution sale and keeping the judgment-debtor in ignorance of it, must shew that opportunity was offered to the judgment-debtor to discover the fraud and that the fraud was in fact dispelled subsequent to the sale. Otherwise the

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fraud once committed would continue and the judgment-debtor would be entitled to the benefit of the provisions of section 18 of the Limitation Act in making an application for the setting aside of the sale. [p 763, col. 1.]

Case-law discussed.

Application against an order of the Additional District Judge, Patna, dated the 26th June 1923, reversing the order of the Munsiff, Bihar, dated the 30th November 1922.

Messrs. *K. P. Jayaswal* and *B. C. Sinha* for the Petitioner.

Mr. *Brij Kishore Prasad*, for Mr. *Shiveshwar Dayal*, for the Opposite Party.

JUDGMENT.—This is an application against the appellate order of the District Judge, dated the 26th June 1923, setting aside an auction sale. The decree holder purchaser is the appellant petitioner. The sale took place on the 26th March 1922, and was confirmed on the 21st April 1922. The application to set aside the sale under O. XXI, r. 90 was filed on the 20th July, 1922, that is, three months after the date of the confirmation. In order to get over limitation the judgment-debtor alleged fraud in suppressing the processes. The petition for setting aside the sale runs as follows:—

"That the decree-holder executed the said decree out of sheer *mala fide* intention, having got all the processes, *i.e*, notices, attachment, sale proclamation, etc., served *bala bala* and has himself by fraudulently bringing the property of the judgment-debtor to sale, purcased the property for an insignificant price... that the decree-holder did so fraudulently and with intent to purchase the *kasht* 'bala' *bala*, so that there might not be a gathering at the sale and the judgment-debtors might remain in dark .. ..; that owing to the fraudulent service of processes *bala bala* there was no information of the execution proceedings to the judgment-debtrs.....they came to know of the salo, etc., all of a sudden when the Court peon went for delivery of possession, whereupon on further inquiry the fraud practised by the decree-holder was discovered .....that owing to non-service of the execution processes in the *mofassil* there could not be bidders at the sale and the decree-holder thus got the opportunity of purchasing the property worth Rs. 400 for an insignificant sum of Rs. 64 only .....and that had there been any information of the execution proceedings they would not have allowed their property to be sold for bare Rs. 64 which is calculated to be much to their detriment."

The Court below held:—

(1) That the property worth not less than Rs 500 was sold for a grossly inadequate price of Rs. 60;

(2) that there was material loss to the judgment-debtor;

(3) that this loss was due to material irregularity in deliberate misstatement and under-valuation and to the suppression and non-service of notice under O. XXI, r. 22 of the Code of Civil Procedure;

(4) that the non-service and suppression of processes was with the *mala fide* motive on the part of the decree-holders to purchase the property themselves and to keep the knowledge of the pending execution and sale from the judgment-debtors;

(5) and that the judgment-debtor was kept out of the knowledge of the sale and his right to apply for setting aside the sale under O. XXI, r. 90 at the time when the *dakhaldehani* was executed.

Upon these findings the Court below set aside the sale, holding that the sale was illegal, irregular and fraudulent and that the judgment-debtor was kept out of the knowledge of the execution proceedings and the sale, and of the right to apply under O. XXI, r. 90 by fraud practised by the decree-holder; and consequently the judgment-debtors are entitled under section 18 of the Limitation Act to apply for setting aside the sale within 90 days from the time when the fraud became known to them and they had knowledge of the sale.

These are findings of fact and are not capable of being challenged in revision. The learned Counsel for the decree-holder purchaser urges that the judgment-debtors were not entitled to the benefit of section 18 of the Limitation Act, inasmuch as the finding as to their having been prevented from getting any information of the sale is wrong, for there is no allegation in the petition for setting aside the sale, or in the evidence, of any fraud having been committed by the decree-holders in keeping the judgment-debtors ignorant of the sale and their right to apply under O. XXI,

r. 90 to set aside the sale. In order to appreciate this argument, I have considered the petition and the evidence. The case of the judgment-debtor has been that on account of the fraud and dishonesty the processes in execution were altogether suppressed and that they were kept out of the knowledge of the execution and the sale by the fraud of the decree-holders who wanted to purchase the property themselves. It is clearly stated both in the petition as well as in the evidence that the fraud practised by the decree-holders resulting in the ignorance of the judgment-debtors of the sale continued till the *dakhaldehani* when for the first time they came to know of the execution and the sale, and the fraud was dispelled. In such a case the decree holders once guilty of fraud in bringing about the sale and keeping the judgment-debtors ignorant of it must show that opportunity was offered to the judgment-debtor to discover the fraud and that the fraud was in fact dispelled subsequent to the sale, or else the fraud once committed would continue: vide *Rahimbhoy Habibhoy* v. *Charles Agnew Turner* (1). The principle there enunciated was applied by Ross, J. recently in *Mahabir Ram* v. *Rambahadur Dubey* (2) and in the case of *Dirgopal Singh* v. *Kewal Kishun Singh*. Civ. Rev. No. 377 of 1923. I have considered the authorities cited at the Bar during the hearing of the case: *Jagdhar Missir* v. *Dhorai Khatwa* (3); *Babu Das Narayan Singh* v. *Mir Muhammad Yusuf* (4); *Rahimbhoy Habibhoy* v. *Charles Agnew Turner* (1); *Mahabir Ram* v. *Rambahadur Dubey* (2), and *Kumar Chandra Kishore Roy Chowdhury* v. *Basarat Ali Chowdhury* (5). These cases do not help the petitioner, inasmuch as in the present case fraud was specifically alleged in the decree-holders suppressing the notices and the processes and thus keeping the judgment-debtors ignorant of the sale until the *dakhaldehani*. The fraudulent acts whereby the judgment-debtors were kept ignorant of their right to apply to set aside the sale have also been found by the Court below.

(1) 17 B. 841; 20 I A. I.; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec (N.S) 222 (P. C.).
(2) 72 Ind. Cas. 625; 4 P. L. T. 806; (1923) A. I. R. (Pat.) 485.
(3) 57 Ind. Cas. 404.
(4) 61 Ind Cas; 823; 2 P. L. T. 401; (1921) Pat. 181; 3 U. P. L. R. (Pat.) 38; 6 P. L. J. 319.
(5) 44 Ind. Cas. 763; 27 C.L.J. 478; 22 C.W.N. 627

The application is, therefore, dismissed with costs. Hearing fee two gold *mohurs*.

Z. K. *Application dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 669 OF 1922.

February 8, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

KRISHNAJI SONJI GAWADE—PLAINTIFF—APPELLANT
versus
SADANAND MAHADEV THAKUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Dekkhan Agriculturists Relief Act (XVII of 1879) s. 15 D—Limitation Act (IX of 1908) Sch. I, Art 134—Mortgage by member of joint family—Sale of equity of redemption—Suit to redeem mortgage, maintainability of—Limitation.

A suit under section 15 D of the Dekkhan Agriculturists' Relief Act will only lie on the presumption that there is a mortgage in existence by an agriculturist, and an issue whether or not the mortgage is in existence cannot be entertained in such a suit.

Chandabhai v. *Ganpati*, 86 Ind. Cas. 517; 18 B L. R. 763, referred to. [p. 764, col. 2.]

J. and K, two brothers, fromed a joint Hindu family. In 1868 J mortgaged certain property belonging to the family and shortly afterwards sold the equity of redemption of the property to the mortgagee, who sold the property to the predecessor-in-interest of the defendant in 1873. In 1914 plaintiff purchased the share of K. in the property from K's successors-in-interest and thereafter brought a suit to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act;

Held (1) that the share of K in the property having been sold by his brother J in 1873, the former could challenge the sale within twelve years of his coming to know of it; [p 764, col. 2.]

(2) that K's lack of knowledge of the sale could not be presumed at this distance of time, and the sale could not, therefore, now be challenged by the plaintiff who claimed under K; [p. 764, col 2.]

(3) that the predecessor of the defendants having purchased the whole property and not merely the mortgagee rights from the mortgagee in 1873, the

KRISHNAJI SONJI GAWADE *v.* SADANAND MAHADEV THAKUR

suit was barred by Article 134 of Schedule I to the Limitation Act: [p. 764, col. 2.]

(4) that, in any case, as the existence of the mortgage was in dispute, a suit under section 15 D of the Agriculturists' Relief Act was not maintainable. [p. 764, col. 2.]

Appeal from the decision of the First Class Subordinate Judge, A. P., Satara, in Appeal No. 2 of 1921, reversing the decree of the Subordinate Judge, Devgad, in Civil Suit No. 13 of 1919.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *S. R. Bakhale*, for Mr. *B. V. Desai*, and Mr. *T. N. Walavalkar*, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiff sued for an account of the amount due under the mortgage referred to in the plaint to the mortgagees under the Dekkhan Agriculturists' Relief Act. The property was originally held in equal shares, one of which belonged to Ram Naroji and the other to two brothers, Jivaji and Kusaji, Jivaji being the elder brother of the joint family consisting of two brothers. Ram Naroji and Jivaji together mortgaged both shares to one Anant Laxman on March 17, 1868. Ram Naroji's share in the equity of redemption was sold subsequently at a Court sale and purchased by one Joshi who conveyed the same to the grandfather of defendants Nos. 1 and 2 by Exhibit 58 in 1872. Jivaji within two or three months of the mortgage sold his share in the equity of redemption to the mortgagee Anant. Anant's son by Exhibit 55 in 1873 sold Jivaji's and Kusaji's share in the equity of redemption to the grandfather of defendants Nos. 1 and 2. The Trial Court held that the plaintiff had obtained a sale-deed in respect of the whole property belonging to Ram Naroji, and Jivaji and Kusaji, from the son of Ram Naroji and from Kashi widow of Shivram Babaji, the grandson of Kusaji Babaji. This purchase was in 1914. The Trial Court held that Ram Naroji's share in the equity of redemption having been sold through the Court his rights were extinguished. He held, however, that Kusaji was not bound by his brother's sale of the equity of redemption and declared that Rs. 399 8-0 was the amount due under the mortgage of the other half belonging to Jivaji. In appeal that decision was set aside. The Appeal Court held that in the absence of any pleading as to the validity of the sale by Jivaji to Anant the Court could not enter into that question. The learned Judge also held that if the pleadings of the plaintiff had challenged the validity of Kusaji's share, a suit of that nature under section 15 D of the Dekkan Agriculturists' Relief Act could not lie. Accordingly he dismissed the plaintiff's suit.

On a consideration of these facts it would be strange if a purchaser from the heirs of Kusaji in 1914 could now file a suit for an account of the mortgage of 1868 on the ground that his brother having sold the equity of redemption in the same year without his consent he was entitled to disregard that sale and plead that his share never passed at all. Kusaji would have had a right to dispute the alienation as soon as it came to his knowledge, and his suit challenging the alienation would be barred after twelve years from the date of his knowledge. We have to presume for the purpose of the appellant's argument that Kusaji had no knowledge of the alienation and I see no reason why at this distance of time we should make that presumption. Apart from that, the ancestors of defendants Nos. 1 and 2 having purchased from the mortgagee the whole property and not merely the mortgagee's rights, clearly Article 134 of the Indian Limitation Act would apply and the purchaser would be entitled to retain the property if no suit was brought to set aside the sale within twelve years of the transfer. That point does not seem to have been considered in either of the Courts below but it does seem to me to be an absolute answer to the plaintiff's case.

There is a further point that this suit does not lie under section 15 D of the Dekhan Agriculturists' Relief Act which merely provides that "Any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount." Then by sub-section (3) "at any time before the decree in the suit is signed the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage." It will be seen, therefore, that a suit of that kind will only lie on the presumption that there was a mortgage in existence by an agriculturist and that an issue whether

or not a mortgage was in existence could not be entertained. In *Chandabhai* v. *Ganpati* (1) "the plaintiffs filed a suit to redeem a mortgage under the provisions of the Dekkhan Agricultrists' Relief Act, 1879, praying that a sale-deed subsequently executed by their mother of some of the mortgaged lands to defendants be cancelled as fraudulent. It was held that the suit was outside the scope of section 3, cl. (*z*), of the Act, because the suit was not a mere suit to redeem, but was a suit primarily for the setting aside of a fraudulent deed of sale." In this case if the plaintiff could disregard entirely the alienation by Jivaji the suit would certainly come within the provisions of section 15 D of the Dekkhan Agriculturists' Relief Act. He contends that there is no necessity for him to ask for a declaration that the alienation did not affect his interest in the equity of redemption. But it seems to me that it will be impossible for the plaintiff to succeed until he can satisfy the Court that the alienation was bad as far as his share in the equity of redemption was concerned, and that he was entitled to consider his rights as mortgagor under his sale deed from the descendants of Kusaji were still in existence. Therefore, on all these grounds it seems clear that the appellant has no case and the appeal must be dismissed with costs. In this case there will be two sets of costs.

Shah, J.—I concur.

Z. K. *Appeal dismissed.*

(1) 36 Ind. Cas. 517; 18 Bom. L R. 763.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 75 OF 1922.

January 18, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fforde.

ALI MUHAMMAD KHAN—PLAINTIFF—APPELLANT

versus

ALI AKBAR KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Dedication, proof of*—*Burial of saint in plot of land*—Sajjadanashin *without* wakf, *status of*.

The mere burial of a saint in a plot of land and the performance of his *Urs* for some years does not convert the plot of land into trust property. [p 766, col. 1.]

Where a person asserts that certain property is *wakf* the *onus* is on him to establish a dedication of the property, express or implied, to public religious uses. [p. 766, col. 1.]

In the absence of a *wakf*, the title of *Sajjadanashin* must be regarded as a mere courtesy title. [p 766, col. 1.]

Zinat Bibi v. *Emma*, 40 Ind Cas 240 : 107 P. R. 1917 ; 92 P. W. R. 1917 ; 111 P. L. R. 1917, followed

Letters Patent Appeal from the judgment of Mr. Justice Martineau, dated the 6th February 1922.

Messrs. *Tek Chand* and *Niaz Ali*, for the Appellant.

Messrs. *Badri Das* and *Abdul Rashid*, for the Respondents.

JUDGMENT.—The circumstances which have given rise to this appeal under clause 10 of the Letters Patent are briefly as follows:—

Mian Mahomed Khan, a *Pir* of the *Chishti* sect, lived in the defendants' village, Bassi Nau, in the Hoshiarpur District. The second defendant was married to one of his daughters, and the plaintiff is the son of another daughter. The *Pir* died in May 1914 at Bassi Nau, and was buried in a grove belonging to the defendants in the neighbouring village of Kakkon. On the 23rd June 1914, the fortieth day after his death, a large number of persons including his disciples and representatives of the leading shrines of the *Chishti* sect, assembled at the tomb, and the plaintiff was installed by a majority of the congregation as *Sajjadanashin*. The plaintiff claims that the defendants dedicated 16 *kanals* of land to the shrine as *wakf* and he has brought the present action for a permanent injunction restraining the defendants from interfering with the shrine and with his management thereof.

Now, the Courts below have concurred in holding that the plaintiff was duly appointed a *Sajjadanashin*, but that the alleged appropriation of the land to religious purposes has not been established. The question, which has been argued before us by the learned advocate for the plaintiff-appellant is that the land on which the tomb of the saint was erected is trust property, and that the plaintiff is entitled to a free access thereto. It is

admitted that the defendants, who were undoubtedly the owners thereof, did not expressly dedicate the land under or around the tomb to religious uses, and the only question is whether a presumption of implied dedication arises from the fact that the saint was buried there, and that *urs* has since been held at the tomb four or five times on his death anniversary.

Now, it is true that on account of the saintly character of the deceased the parties intended that his tomb should be regarded as a religious institution of a sort, but we are not prepared to dissent from the conclusion of Mr. Justice Martineau that the circumstances mentioned above do not justify the finding that the defendants divested themselves of their rights of ownership and appropriated the property to a religious trust. The plaintiff was undoubtedly appointed *Sajjadanashin*, but in the absence of a *wakf* this title must, as pointed out in *Zinat Bibi* v. *Emna* (1), be regarded as a courtesy title.

Mr. Tek Chand for the appellant is unable to cite any authority to support the contention that the mere burial of a saintly person in a plot of land has the effect of converting that land into trust property, and we do not think that the circumstance that *urs* was held for a few years without any demur by the defendants materially advances the case for the plaintiff. It must be remembered that the deceased was the father-in-law of the second defendant, and there is nothing improbable in the theory that he himself buried the saint in the land of which he was a part proprietor. Be that as it may, the *onus* was clearly upon the plaintiff to establish a dedication, express or implied, to public religious uses, and we consider that he has failed to discharge that *onus*.

The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 40 Ind. Cas. 240; 107 P. R. 1917; 92 P. W. R. 1917; 111 P. L. R. 1917.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 90 OF 1923.

March 18, 1924.

M. B. MEHTA & CO.—DEFENDANT—APPELLANT

versus

JOSEPH HEUREUX—PLAINTIFF—RESPONDENT.

C. I. F. Contract—Property when passes—Intention of parties—Documents against payment—Draft containing items due on other accounts—Refusal of consignee to accept draft, whether justifiable—Presidency Small Cause Courts Act (XV of 1882), s. 22—Civil Procedure Code (Act V of 1908), s 35—Suit dismissed on appeal—Costs of trial Court—Appellate Court, power of.

The question as to when property in goods sold under a c. i. f. contract passes to the purchaser is a question of fact as to the intention of the parties as appearing from the evidence. Where the consignor does not intend to deliver over the goods to the consignee until the draft is accepted, the property in the goods does not pass to the consignee on shipment. [p. 768, col. 2.]

Kronprinsessan Margareta, *The Parana*, (1921) 1 App. Cas. 486; 90 L. J. P. 145; 3 P. Cas. 803; 124 L. T. 609; 87 T. L. R. 1·9; *Bank of Morvi* v. *Buerlein Bros.*, 79 Ind. Cas. 1012; 26 Bom. L. R. 155; 48 B. 374, referred to.

Where the terms arranged under a c. i. f. contract are that the documents of title will not be delivered until acceptance of the relative draft, the draft should not include amounts which may be due to the consignor on other accounts. If the amount of the draft is in excess of the sum due for costs, insurance and freight, the consignee is justified in refusing to accept the draft. [p. 769, col. 1.]

Where a suit of a Small Cause nature tried in the High Court is dismissed on appeal, the appellate Court has power in a proper case, to refuse to allow the costs in the Trial Court to the defendant. [p. 769, col. 2.]

Appeal against the judgment of Mr Justice Mulla, in suit No. 1372 of 1923.

Mr. *Campbell*, for the Appellant.

Mr. *Ghasvala*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiffs in this case are a firm trading in London. In February 1921, they opened negotiations

with the defendants' firm in Bombay for the purpose of entering into business relations with them. Certain terms were arranged on which business was to be done. One of the terms was that each party was to defray the cost of their respective cables. All prices quoted by the plaintiffs were to be c. i. f. c. i. (c. i., that is, commission and interest) Bombay. The price was to include five per cent. commission for the defendants. The commission was to be credited to the defendants and was to be remitted to them by the plaintiffs every six months in July and January. The relative documents were to be covered by a draft at sixty days' sight, documents against payment.

On February 28, 1921, the defendants sent to the plaintiff order No. 2063 for thirty-five tons of soft steel plates of certain dimensions. The price quoted by the plaintiffs being unacceptable no immediate business resulted.

On November 3, 1921, the defendants cabled an offer relating to their order No. 2063, but the plaintiffs refused this offer and made a counter-offer to the defendants who in turn cabled in reply on November 12 making a modified offer, and eventually the plaintiffs by their cable of November 14, 1921, finally accepted the order in the following terms :—

"35 tons mild steel plates as per order No. 2063. Price £ 9-10-0 per ton c. i. f. c. i. Bombay including war risk. Shipment January-February. Draft at 60 days sight, documents against payment."

The goods were shipped by the steamer SS. *Trifels* sailing on February 23, 1922, and copies of the invoices together with a detailed account were sent by the plaintiffs to the defendants. The total invoice price was £ 334-8-11 and to this was added an independent item of 15s. making a final total of £ 335-3-11. This sum of 15s. was the cost incurred by the plaintiffs in ascertaining whether an unsigned telegram sent from Bombay on November 3, 1921, was as a matter of fact sent by the defendants.

There had been correspondence between the parties with regard to these 15s. as the defendants had refused to pay the whole amount. The plaintiffs drew a bill of exchange for £ 335-3-11 and sent that together with the relative shipping documents to the Eastern Bank. The bank duly presented the bill to the defendants for their acceptance, but they refused to accept the bill on the ground that the bill was irregular.

The defendants cabled to the plaintiffs on April 14, 1922 :—

"Order No. 78 (35 tons mild steel ptates). Shipment late. Draft irregular. Refused acceptance. We offer £50 less including commission. If you agree ask bank. Receiving accordingly. Without prejudice your rights contention if any."

The plaintiffs replied :—

"Referring to your telegram of 14th decline to act as suggested. If you do not pay in full I will sell elsewhere. Suing you loss on."

On April 19, 1922, the plaintiffs wrote to the defendants with regard to this exchange of cables:—

"I beg to enclose copies of telegrams exchanged and I note from your telegrams of 14th instant your flippant remarks with regard to your order No. 78. You state that the shipment is late, which statement I entirely repudiate, as these goods were booked for shipment January-February, *viz*, it was in my option to ship the goods any time between January 1 and February 28. Shipment was duly effected and bill of lading dated February 21 so that the contract time was duly complied with.

Then with regard to your statement that the draft is irregular I do not follow same and as for my allowing you £ 50 same is too ridiculous to comment upon."

The defendants wrote to the plaintiffs on April 20, also with regard to the cables that passed :—

"You might possibly like to know the reason why we had to refuse your draft. It was an irregular draft. The amount that you wanted us to pay was more than you are entitled to adding to your draft some amounts which we are not bound to pay and which we never agreed to pay. When we sent you our cable dated 14th instant the steamer was then expected in our harbour, and in order that no extra charges might run against the goods we at once notified to you that we are not legally bound to pay the draft which was presented to us by the bank as it was an irregular

draft and in order that there may not be any extra charges on the goods we requested you to instruct the bank to deliver us the documents against the said goods by accepting from us the market rate of the day namely the amount of the draft less £ 50."

It was owing to the unfortunate dispute with regard to these 15s. that the defendants refused to accept the draft, and eventually the plaintiffs sold the goods, and then filed this suit to claim the difference. The first issue at the trial was whether the plaintiffs were entitled to include the amount of 15s. in the draft. The learned Judge found that in the affirmative. But it is difficult to find in the judgment the reasons for that conclusion. The Judge said :—

"I think that the cable of inquiry which the plaintiffs instructed the Eastern Telegraph Company to ascertain from Bombay and the cable which the company received in reply must be treated as supplemental to the defendant's unsigned cable of November 3, 1921."

As a matter of fact the plaintiff's inquiry was not with regard to the telegram relating to the thirty-five tons of steel plates, but with regard to another telegram which appears at p. 24 of Part III of the printed book, which was a telegram containing a general inquiry as to prices. The Judge, however, found that the real reason why the defendants refused to accept the draft was because they wanted an abatement of £ 50 which included the item of 15s. and their commission of £ 13-7-7. Consequently the Judge found that the defendants were wrong in refusing to accept the draft, and the plaintiffs were entitled to succeed. He held the property in the goods has passed to the defendants immediately the goods were shipped, and on that finding it was agreed between the parties that the compensation to be paid to the plaintiffs should be Rs. 1,500. If the property had passed, then the plaintiffs were entitled to sue for the price and not for compensation. But in our opinion on the facts of this case it is clear that the property did not pass when the goods were shipped, as the shipper had not parted with the control of the shipping documents. Those were sent to his bank in Bombay to be delivered only on acceptance of the draft.

This question was discussed in *Bank of Morvi* v. *Baerlien Bros.* (1) At that time the decision of the Privy Council in *Kronprinsessan Magareta, The Parana,* (2) was not cited to us. But the passage in the judgment at p. 511 is directly in point :—

"The passing of property being a question of intention is ultimately a question of fact. There is no evidence of the intention of these parties beyond the inferences to be drawn from their situation and interests and from the mercantile operations which they conducted."

And at p. 514 :—

"Two things are quite plain. The consignors did not propose at any time to rely for payment on the mere personal credit of the consignees, and they carefully kept the bills of lading in their own agents' hands until the draft was met...But for the absence of a policy of insurance they strictly pursued the same course of dealing with the documents, as if their had been a. c. f. and i. sale.

In these circumstances what can be inferred as to the passing of the general property? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention? The appellants, Messrs. Lundgren and Rollven, have to show that it passed to them and passed, too, before the beginning of the voyage. If it did, then the consignors no longer owned the goods and had nothing to show against them except a draft of their own, which could not be enforced, and a bill of lading, which would not entitle them to delivery of the goods, though its retention might seriously inconvenience the new owners, the consignees."

Really, therefore, in each case it is a question of fact what was the intention of the parties as would appear from the evidence, and in this case it is obvious that the consignor did not intend to deliver over the goods until the draft was accepted. But with all respect we cannot agree with the decision of the learned Judge that the plaintiffs were entitled to include the amount of 15s. in the draft. In the

(1) 79 Ind. Cas. 1012 ; 26 Bom. L. L. 155 ; 48 B 374.

(2) (1921) 1 App Cas. 486 ; 90 L. J. P. 145 ; 8 P. Cas. 803 ; 124 L. T. 609 ; 37 T. L. R. 199.

first place it was one of the terms of the business that the parties should pay the cost of their respective telegrams. Secondly, there was a dispute with regard to these 15s. so that the plaintiffs were wrong in including that amount in the draft of thirty-five tons steel plates, and lastly that charge, even if they were entitled to recover from the defendants, did not relate to this particular consignment of goods, so that the draft was not in order and the defendants, therefore, were not bound to accept it.

It is quite true that no case has been cited to us in which a draft in respect of goods, which have been consigned on c. i. f. terms has been refused, because it was in excess of the sum due for costs, insurance and freight. But it seems obvious to me that when the terms arranged are that the document will not be delivered until acceptance of the relative draft, that draft should not include amounts which may be due to the consignor on other accounts. The defendants had already objected to pay these 15s. so that the plaintiffs were not entitled to add this amount to the amount properly due for the cost, insurance and freight for the goods ordered and then in effect compel the defendants to pay the disputed amount if they wanted to get possession of the shipping documents. We think, therefore, that the defendants were entitled to refuse to accept the draft as it did not comply with the terms of the contract. That being the case the plaintiffs cannot succeed on the ground that there had been a breach of the contract, and the proper order which should have been made in the Court below was to dismiss the plaintiff's suit. At the same time it cannot be said that the defendants' conduct was justified by the facts of the case. The reasons given in their cable for refusing to accept the draft cannot be supported and they only succeed now because the amount of the draft was in excess of what it should have been. If the case had been before me, I should have dismissed the suit without costs.

Mr. Campbell has argued on the question of costs that as we have dismissed the plaintiffs' suit, the defendants must be entitled to their costs as between attorney and client under section 22 of the Presidency Small Cause Courts Act, and that we are not justified in dismissing the plaintiffs' suit without costs. The question is : what are our powers in appeal with regard to costs, when we set aside a decree which has been passed by the lower Court, before which the question whether section 23 of the Presidency Small Cause Courts Act applied would not be relevant owing to the decision being in favour of the plaintiff? In ordinary circumstances we should be justified in exercising our discretion with regard to the costs in the lower Court under section 35, Civil Procedure Code. But if it is contended that section 22 deprives the Court in certain circumstances of its discretion when the plaintiff's suit is dismissed, it is still open to the Court to certify that the case was one fit to be tried in the High Court, in which case the previous provisions of section 22 cease to be applicable. I think if Mr. Justice Mulla had taken the view which we have now taken of the plaintiffs' case and dismissed the plaintiffs' suit, he would have certified that the case was one fit to be tried in the High Court, and I think we are entitled, as we now dismiss the plaintiffs' suit, to take that view. Otherwise our powers with regard to the question of costs would be fettered in a way which has not been contemplated by the legislature. Therefore the suit is dismissed without costs in the lower Court. The appellants to get their costs of the appeal.

Shah, J.—I agree.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 383 OF 1921.

December 11, 1923.

Present :—Mr. Kinkhede, A. J. C.

NARBADAPRASAD—PLAINTIFF—APPELLANT

versus

AKBAR KHAN--DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908) Sch. I, arts. 39,49—Cutting lac trees and removing them—Suit for damages, nature of—Nature of claim, how determined—Compensation payable.

NARBADAPRASAD v. AKBAR KHAN

In determining the nature of the claim, or finding out the Article by which it is governed, it is the nature of the cause of action rather than its form which has to be looked to and which determines the applicability of the particular Article of the statute of limitation. [p. 770, col. 2.]

A right in the trees standing on the land as well as a right to the future crops of trees is a right in immoveable property, and any infringement of such a right is an infringement of a right to or a wrong done to immoveable property. [p. 771, col. 2.]

Ruttonji Edulji Shet v. *The Collector of Tanna*, 11 M. I. A. 295 at p. 313; 10 W R. P. C. 13 ; 2 Sar. P. C. J. 292 ; 20 E. R. 118; *Raja Biji Bahadur* v. *Ganoolal*, 5 C. P. L. R. 6 ; *Sakharam* v. *Gopal*, 9 C. P. L. R. 53, referred to.

A suit for damages sustained by the plaintiff on account of the defendant cutting plaintiffs' valuable lac producing trees and removing the same is primarily a suit for compensation for "trespass upon immoveable property" and is governed by the three years' rule laid down in articles 39 and 49 of the Limitation Act Schedule I. [p. 772, col. 1.]

Jadu Nath v. *Hari Kar*, 1 Ind. Cas. 788; 36 C. 141 at p. 147 ; 12 C. W. N. 1090 : 9 C. L. J 109 ; *Moideenkutti* v. *Koman Nair*, 17 Ind Cas. 605 ; 23 M. L. J. 618 ; 12 M. L. T 538 ; (1912) M. W. N. 1229 ; 23 M. L. J. 618 ; *Kotagiri Venkataramanujam* v. *Basavayya*, 21 Ind. Cas. 213 ; 25 M. L. J. 447 ; 14 M L T. 225 ; (1913) M. W. N. 869, followed.

The compensation payable to the plaintiff has to be determined with reference to the rights which he, as proprietor of the trees has lost for ever. [p. 772, col. 2.]

Appeal against the decree of the District Judge, Jubbulpore, dated the 13th April 1921, confirming the decree of the Subordinate Judge, Mandla, dated the 23rd December 1920.

Sir *B. K. Bose* and Messrs. *W. R. Puranik* and *P. N. Rudra*, for the Appellant.

Mr. *P. C. Dutt*, for the Respondent.

JUDGMENT.—The only question to be decided is one of limitation for this suit. Both the Courts dismissed the suit as barred by the two years rule prescribed by Article 36 of Schedule 1 of the Limitation Act (IX of 1908). They held that Articles 48 and 49 did not apply to the case. The plaintiff's case as set forth in the plaint and the pleadings is that the defendant first trespassed upon his land in 1917, and in the course of that trespass, in 1918, he cut plaintiff's valuable lac producing trees on the land and removed the same, and thus caused damage to him. He puts down his damage at Rs. 2,500 but for the purposes of this suit he limits it to Rs. 1,800 by adopting the loss of income from the lac produce which he sustained in respect of the five lac crops which he might have gathered during the period prior to the date of suit as the measure of damages. It is common ground that there are two lac crops in the course of each year.

The plaintiff put down his cause of action as having accrued on 1st July 1918, and filed the suit on 12th July 1920. Previous to this, he had instituted a suit for the recovery of the possession of the land encroached upon, and got a decree for the same The present suit is, therefore, confined to the damages sustained on account of the five lac crops of which he says he was deprived by reason of the defendant's illegal act of trespass in cutting down the trees and in removing them. In determining the nature of the claim, or finding out the Article by which it is governed, it is the nature of the cause of action rather than its form which has to be looked to and which determines the applicability of the particular Article of the statute of limitation.

Both the Courts below have held, and I think rightly, that the present is not a suit purely for the value of the wood cut and removed, as if it were fire-wood or wood of miscellaneous growth, which may be of little or no present worth to the owner, or which may not even fetch any income to him. According to the plaintiff's pleadings the trees were cut in Baishak 1918 by the defendant, whereas the defendant denies having cut them at all. Thus although the fact of cutting was one of the points which was necessary for the proper determination of the suit, and the question as to when they were cut was also material in order to determine the number of lac crops of which the plaintiff complained he was deprived by the defendant's wrongful act, still as the defendant had not urged any plea of limitation on the ground that the trees were cut more than three years prior to the institution of suit it was not material from that point of view. Consequently there was no issue on the point of limitation much less as to the specific Article by which the suit as framed could be said to be governed. From the evidence of plaintiff's witnesses it however appeared to the Trial Court that the trees were cut in May 1917, which was more than

three years before suit. That Court consequently dismissed the suit on the ground of limitation—a point not taken up by the defendant.

The lower Appellate Court, without first giving its findings on the facts necessary for a decision on the point of limitation, or confirming the finding of the first Court that the trees were cut in May 1917, it appears, merely assumed that the cutting took place more than three years prior to the suit, and held on the authority of the judgment of Rampini, J., in *Surat Lall Mondal* v. *Umar Haji* (1), and in *Mangun Jha* v. *Dolhin Golab Koer* (2), that Article 36 applied to the case. It observed as follows :—

> "We are not here concerned with Article 39, and, on the other hand, Articles 48 and 49 referred to specific moveable property. In my opinion these latter two Articles can only refer to moveable property which has *ab initio* been moveable and not to immoveable property which is only converted into moveable property by the act of tortfeasor."

It is argued before me that the nature of the claim has not been properly considered by the Courts below and that Article 36 has been wrongly applied. It is said that trees are immoveable property and the infringement complained of is on account of wrong done to the immoveable property. Neither the terms "moveable property" used in Article 39 and "immoveable property" used in Articles 48 and 49, have anywhere been defined in the Limitation Act. We have, therefore, to look to section 3 of the General Clauses Act for the definition of both these terms. Section 3, clause (25), of the said Act defines "immoveable property" as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." Clause (34) defines "moveable property" as "meaning property of every description except immoveable property." According to this definition of "immoveable property" the right in the trees as also the right to the future crops of trees would be a right in immoveable property, and any infringement of such a right would be an infringement of a right to, or a wrong done to, immoveable property, if the term immoveable property includes "trees standing on land." In *Ruttonji Edulji Shet* v. *The Collector of Tanna* (3) the trees are said, by the Privy Council, to be part of the land on which they stand, and right to cut them down and sell them, is said to be incidental to the proprietorship of the land.

Even in this Court it has been held on the principle laid down in *Raja Bije Bahadur* v. *Ganoolal*(4) and *Sakharam* v. *Gopal* (5) that the right to enjoy the lac crop is a right to enjoy immoveable property. The nature of the lac as explained in *Hiria* v. *Mahomed Sirajuddinkhan* (6), shows that "the *Parsa* or *Palas* tree is in itself practically worthless except for fuel and that lac when adherent to it can only be collected by lopping off the twigs. The tree then is not timber, its sap furnishes the *coccus lacca* with food and the removal of its twigs is an essential feature of each lac harvest. The existence of the tree is thus necessary to the formation alike of the resin (seed-lac) which the female insect excretes and of the brilliant dye (lake-lac) obtained from the actual body of the female:" *Parmanand* v. *Birkhu* (7).

This being the nature of the right which the plaintiff had been enjoying in the lac producing trees standing on his land, I entertain no doubt that, if such a right is infringed by a trespasser, it will be an infringement of a right to, or a trespass upon, "immoveable property" within the meaning of Article 39 of Schedule I of the Limitation Act. As soon as the trees are cut and severed from the soil they become moveable, but not till then. What the plaintiff complains of is not merely the removal of the trees, but even of the cutting itself as having involved the infringement of his right, and he claims compensation with reference to such infringement. If the trees

(1) 22 C. 877 ; 11 Ind. Dec. (N. S.) 580.
(2) 25 C. 692 ; 2 C. W. N. 265 ; 18 Ind. Dec. (N. S.) 454.
(3) 11 M. I. A. 295 at p. 313 ; 10 W. R. P. C. 13 ; 2 Sar. P. C. J. 292; 20 E. R. 113.
(4) 5 C. P. L. R. 6.
(5) 9 C. P. L. R. 53.
(6) 4 N. L R. 104.
(7) 1 Ind. Cas. 903 ; 5 N. L. R. 21 at p. 23.

had not been cut, and only the lac crop had been enjoyed by the defendant, plaintiff's claim would have been governed by Article 109 of the Schedule. So long as the wrongful enjoyment of the profits continued each receipt of profits would have given plaintiff a recurring cause of action so long as the wrong and trespass continued. Where, as here, the trees, to the profits of which the plaintiff was entitled, have themselves been cut, there was an infringement once for all and for ever, and such an infringement would have to be compensated by awarding to the plaintiff the money equivalent of the rights in the property he is deprived of at the date of such infringement or deprivation. I consider that this suit is therefore primarily a suit for compensation for "trespass upon immoveable property" and, not one for "specific moveable property.....or for compensation for wrongfully taking.....the same," within the meaning of Article 48 or a suit for "other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same" within Article 49 of the Limitation Schedule. These latter Articles are not applicable to the claim laid as a whole. If the claim had been purely for compensation for removal of trees cut then possibly the case would have fallen under any of those Articles.

It has been conceded by the respondent's Counsel that Article 36 is a residuary Article and will not apply so long as the case comes under any other Articles. The question as to the trespass so far as it related to the lac producing trees, and as to the date of the cutting thereof, has not been definitely decided by the lower Appellate Court. A finding on that point is absolutely necessary as it is the date of the trespass which gives the starting point of limitation. A trespass upon land is not neeessarily a trespass which would involve infringement of the right of enjoyment of the lac produce of the trees standing thereon so as to give rise to a cause of action to the owner to sue for an infringement of the right to the trees. Similarly the analogy of the standing crop does not necessarily apply to the case of trees because the potentialities of the rights in the two properties differ. The standing crops have only an ephemeral existence, and are, from their very nature, severable from the land, and become of value when severed from the land in time, *i.e.*, after they have attained their full growth. Any loss in respect of them could be measured with reference to the particular crop cut and removed. While in the case of trees which, from their age, growth, size, and the purpose for which they are planted, as also the use which the owner makes of them, are of special value to the owner, different considerations prevail and the standard of damage is also to be determined on a quite different footing if by cutting down such trees the plaintiff's rights are infringed; then again, compensation payable to plaintiff has to be determined with reference to the rights which he, as the proprietor of the trees, has lost for ever. In *Mangun Jha* v. *Dolhin Golab Koer*, (2) Maclean, C. J., seemed inlined to the view that the case before him, which was a case of cutting of standing crops, was governed by Article 39. But he left that question undecided as he thought it immaterial or of very little importance whether the case fell under Article 39, or under Articles 49 or 48, as every one of those Article gave three years from the date of the cause of action to bring the suit, and the claim, in that view, was within time.

This view of Maclean, C. J., was also accepted as correctly laying down the law on the point in another case *Jadu Nath* v. *Hari Kar* (8) by Doss, J., who observed :—

"If the defendants, after entering on the plaintiff's land had cut the standing crops and left them there, the wrong thus done would have been a trespass upon immoveable property coming within Article 39, the act of cutting the crops being an aggravation of the wrong committed by the bare entry on the land and calling for substantial damages. By the act of cutting the crops a portion of the immoveable property (standing crop before it is severed from the land being manifestly immoveable property) is transmuted into specific moveable property, the right to which is vested in the owner of the land, albeit the transmutation is effected by the act of the tortfeasor..... It seems therefore that the subsequent act of carrying away the severed crop is in the words of Article 49, 'wrongful taking away specific moveable property' and

(8) 1 Ind. Cas. 788; 36 C. 141 at p. 147; 12 C. W. N. 1090; 9 C. L. J. 109.

falls within the first portion of that Article." He, therefore, held that the wrongful cutting and carting away crops amounted to a "trespass upon immoveable property" and to "wrongfully taking specific moveable property" within the meaning of Articles 39 and 49, Schedule I of Limitation Act.

In the case *Moideen Kutti* v. *Koman Nair* (9), which was a suit for compensation for damages sustained by the plaintiff by reason of the defendant's unlawful setting fire to and destroying plaintiff's vines on plaintiff's land, Article 39 of the Limitation Schedule was held applicable. It was observed there that "trespass does not consist merely of an unlawful entry on another man's land, but includes mischief which the trespasser commits after entering on the land. . . . . It would be curious that the limitation for a suit for compensation for trespass on immoveable property should be less than that for compensation for injury to moveable property. We entertain no doubt that the Article 39 is the proper one to be applied in this case." The case in *Jadu Nath Dandput* v. *Hari Kar* (8), was followed in *Kotagri Venkataramanujam* v. *Basavayya* (10), and Article 39 was held applicable to a trespass on immoveable property even though it was under colour of legal process.

The balance of authority, therefore, seems to be in favour of holding that the two years period of limitation prescribed by Article 36 is not applicable to such a case, but that a suit of this nature is governed by three years rule laid down in Articles 39 and 49 of the Limitation Schedule. This case must, therefore, go back for a fresh decision on the question of fact as to when the trespass upon the immoveable property was aggravated by the defendant's subsequent act of cutting down the trees, and as to when the same were removed from the land. A decision on these points is necessary for fixing the starting point of limitation for the purposes of Article 39 as also of Article 49. It will be open to the lower Appellate Court to take the pleadings of the parties as regards the plea of limitation, and to frame the necessary issues, and then send them down for recording evidence and for fresh decision, to the Court of first instance, unless the parties express their willingness to have the matter decided upon the evidence already on record, in which case, after recording the necessary pleadings and framing the necessary issues, the Appellate Court will decide the appeal before it in accordance with law with advertence to the above remarks. The appeal is allowed with costs. The costs in the lower Courts will abide the result.

K. S. D. *Appeal allowed.*

(9) 17 Ind. Cas 605 ; 23 M. L. J. 618 ; 12 M. L. T. 538 ; (1912) M. W. N 1229 ; 23 M. L. J. 618.

(10) 21 Ind. Cas. 213 ; 25 M. L. J. 447 ; 14 M. L. T. 225 ; (1913) M. W. N. 869.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 42 OF 1923.

February 13, 1924.

ADIVEPPA SHIDLINGAPPA HANCHIMAL—PLAINTIFF—APPLICANT
versus
PRAGJI MOHANJI LOHANA—DEFENDANT—OPPONENT.

Limitation Act (IX of 1908) Sch. I, Art. 164—Civil Procedure Code (Act V of 1908) O. IX, r. 13, O. XXI, r. 50, O. XXXI, rr. 1, 3, 6—Suit against firm—Ex parte *decree—Application to set aside decree—Limitation—Decree against firm—Liability of partners—Dissolution of firm* pendente lite, *effect of.*

Where a suit is brought against a firm and an *ex parte* decree is passed against the Firm, the only way in which such a decree can be set aside is on the ground that the summons was not served on the Firm. An application to set aside such a decree must be made within thirty days of the date of the decree, within the meaniug of Article 164 of Schedule I to the Limitation Act. [p. 774, col. 2.]

Per *Macleod, C. J.* :—It can never be said that a decree against a firm is *ex parte* against one of the partners in the firm because he has not appeared. [p. 774, col. 2.]

In answer to a suit against a firm a partner in the firm can enter appearance in his own name and can file a written statement, and each partner can file a different written statement taking up different defences, but the proceedings continue against the firm, and it can only be decided in execution proceedings, whether a particular partner can be personally liable to satisfy the decree. As soon as a decree is passed against the firm, the assets of the firm

ADIVEPPA SHIDLINGAPPA HANCHIMAL *v.* PRAGJI MOHANJI LOHANA

are liable to satisfy it, but a partner's own private property is not liable to be seized in execution unless the plaintiff served the summons on him, or unless he can be brought within the provisions of O XXI. r. 50 of the Civil Procedure Code. [p. 775, col. 1.]

Where a suit is brought against a firm and the firm is dissolved during the pendency of the suit, the plaintiff can still proceed against the firm, but he cannot proceed against any partner individually, if he knew the firm had been dissolved before proceedings had been taken. [p. 775, col. 1.]

Application against an order passed by the First-class Subordinate Judge, Dharwar, in Miscellaneous Application No. 69 of 1922 in Suit No. 409 of 1920.

Mr. *B. J. Desai*, with Mr. *R. A. Jahagirdar*, for the Applicant.

Mr. *G. N. Thakor*, with Mr. *J. G. Rele*, for the Opponent.

JUDGMENT.

Macleod, C. J.—Suit No. 409 of 1920 was filed in the Court of the First Class Subordinate Judge, Dharwar, by certain plaintiffs against the firm of Shivji Kuverji & Co. to recover Rs. 42,604-12-0 which it was alleged was due to the plaintiffs in their account with the defendant firm. The five partners in the defendant firm were mentioned in the title to the plaint, and attempts were made to serve the summons on all of them. The record of the case shows that defendants Nos. 1 to 4 were absent though duly served, while defendant No. 5 at the first hearing raised certain contentions which were dealt with as preliminary issues. After those issues were decided, the Judge proceeded to hear the case on the merits when no one appeared on behalf of the defendants, and, on January 11, 1922, a decree was passed for Rs. 42,604-12-0 and costs against the firm of Shivji Kuverji & Co. Under O. XXX, r. 3, the summons could be served either upon any one or more of the partners, or at the principal place at which the partnership business was carried on within British India upon any person having, at the time of service, the control or management of the partnership business there, as the Court might direct; and such service would be deemed good service upon the firm so sued, whether all or any of the partners were within or without British India.

Apart, therefore, from the case of the first defendant who says that he never received service of the summons, it is perfectly clear that service of the summons on the firm had been properly effected and the decree properly passed against the firm. Under Article 164 of the Indian Limitation Act an application to set aside the decree, assuming it was an *ex parte* decree, would be barred after thirty days from the date of the decree.

On May 31, 1922, the first defendant made an application to the Court through his attorney to have the *ex parte* decree set aside. He described himself as partner and receiver of the firm of Shivji Kuverji & Co. Before that litigation had commenced between the partners of the firm and the first defendant had been appointed receiver of of the partnership assets. As such receiver he would be entitled to defend suits against the firm, and he would also be entitled to apply to have an *ex parte* decree passed against the firm set aside, provided he made the application in time. But he has mixed up his position as an individual partner and as receiver in a most inexcusable way. The Judge on various grounds allowed the application and set aside the decree passed against the firm. Various questions of law arose in the course of the argument on this application, but without going into these it seems to me the Judge has committed material irregularities in the course of his decision by exercising jurisdiction which was not given to him by law.

For the purposes of this application it is only necessary to say that the suit was against the firm and the decree passed was against the firm, and the only way in which that decree could be set aside, assuming it to be *ex parte*, would be on the ground that the summons had not been served on the firm. Assuming that the summons had not been served on the firm, and that an *ex parte* decree was passed against the firm, the firm had thirty days from January 11, 1922, to make an application for setting it aside. It can never be said that a decree against the firm is *ex parte* against one of the partners because he has not appeared. A partner undoubtedly can enter appearance in his own name and can file a written statement, and as the Judge rightly points out, each partner can file a different written statement taking up different defences, but the proceedings continue against the firm, and it can only be decided in execution pro-

ceedings whether a particular partner can be personally liable to satisfy the decree. As soon as a decree is passed against the firm, then the assets of the firm are liable to satisfy it, but the partner's own private property is not liable to be seized in execution unless the plaintiff served the summons on him, or unless he can be brought within the provisions of O. XXI, r. 50.

It was suggested that as the defendant firm had been dissolved before the decree was passed, and that as the plaintiff knew of such dissolution, they could not proceed against the firm. But that is an error. The plaintiffs could still proceed against the firm, but they could not proceed against any partner individually if they knew the firm had been dissolved before proceedings had been taken. We must make the rule absolute and set aside the order of the learned Judge of the Court below. The plaintiffs are entitled to their costs of the proceedings.

Shah, J.—I concur in the order proposed. I desire to make it clear that I base my conclusion upon the ground that the application made to have the *ex parte* decree set aside was beyond time under Article 176 of the Indian Limitation Act. The decree was passed against a firm, and it cannot be contended in this case that the firm was not properly served. Therefore under Article 164 any person seeking to get this decree set aside, assuming it to be *ex parte* against the firm, would have to make an application within thirty days from the date of the decree. The application to set aside the decree was made admittedly long after the expiration of thirty days from the date of the decree, and, is clearly beyond time. As an appeal from this decree is pending I do not desire to say anything with regard to the various other points which have been argued before us.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL NO. 38 OF 1922.

December 21, 1922.

Present :—Kanhaiya Lal, J. C.

AKHTAR HUSSAIN AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

QUDRAT ALI—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (*IX of* 1908), *s.* 6. *Sch. I, Art.* 181—*Execution of decree—Application, dismissal of—Revival, application for — Minor applicant —Extension of time—Death of decree-holder, whether default.*

An application for the continuance or revival of a previous execution proceeding struck off or suspended for no act or default of the decree-holder is governed by Article 181 of Schedule I to the Limitation Act. Such an application is substantially an application for the execution of a decree within the meaning of section 6 of the Limitation Act, which protects a minor applicant so long as the disability continues, and postpones the commencement of the period of limitation till the date on which such disability ceases.

Rungiah Goundan v. *Nanjappa Raw*, 26 M. 780; 13 M. L. J. 412; *Kurgodigauda* v. *Ningangauda*, 41 Ind. Cas. 238; 41 B. 625; 19 Bom. L.R. 683, referred to.

Rati Ram v. *Nadar*, 49 Ind Cas. 990; 41 A. 435; 17 A. L. J. 649, distinguished. [p. 776, col. 1.]

The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, and is inapplicable to the case of a party who is dead, for death cannot be ranked under the category of default. [p. 776, col. 2.]

Debi Bakhsh Singh v. *Habib Shah*, 19 Ind. Cas. 526 (P. C.); 35 A. 231; 40 I. A. 151; 16 O. C. 194; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148, followed.

Appeal against the order of the District Judge, Lucknow, dated the 26th August 1922.

Mr. *B. N. Srivastava*, for the Appellants.

Mr. *G. N. Misra* and *K. P. Misra*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is whether the application for execution filed by the legal representatives of the original decree-holder on the 21st January 1922 was barred by time. The previous application for execution was made

on the 13th May 1918 for the sale of the mortgaged property and a date was fixed for the sale. Meanwhile an objection was filed on behalf of the judgment-debtor, but before it could be heard the decree-holder died on the 21st October 1918 leaving present appellants who are minors as his legal representatives. As no steps were taken by the legal representatives to get themselves substituted in the place of the deceased decree-holder, the execution proceeding was struck off on the 14th December 1918.

A succession certificate was subsequently obtained by them on the 31st August 1920. The Court which granted that certificate was incidentally the same Court whose duty it was to execute the decree. On the 19th December 1921 an application was made by the appellants for the substitution of their names in the place of the deceased decree-holder which was granted. On the 21st January 1922 they applied for execution by the sale of the mortgaged property, stating that the market-value of the property had already been determined in the previous execution proceeding and that the execution might be continued from the stage at which it was left in the previous proceeding.

The Court of first instance held that the application was protected by section 6 of the Indian Limitation Act, though it was beyond three years from the date of the previous application for execution. The lower appellate Court held otherwise.

It is obvious that an application for the continuance or revival of a previous execution proceeding struck off or suspended for no act or default of the decree-holder is governed by Article 181 of the Indian Limitation Act. Such an application is substantially an application for the execution of a decree within the meaning of section 6 of that Act, which protects the minors, so long as the disability continues, and postpones the commencement of the period of limitation till the date on which such disability ceases. In *Rungiah Gounden* v. *Nanjappa Raw* (1) it was held that Article 179 of the old Limitation Act was not exhaustive of all classes of execution proceedings. In *Kurgodigauda* v. *Ningangauda* (2) an application for the restitution of property, obtained under a decree which had been reversed on appeal, was held to be governed by Article 181 and not by Article 182 of the Indian Limitation Act. As pointed out by their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Habib Shah* (3) the principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death under category of default, does not seem to be very stateable.

The application in question was clearly governed by Article 181 of the Indian Limitation Act; and reading that Article with Section 6 of that Act, there can be no doubt that the right to apply accrued to the appellants on the death of their father on the 21st October 1918; and the present application, which has been filed during the subsistence of the disability, is not barred by time.

On behalf of the judgment-debtor respondant, reliance is placed on the decision in *Rati Ram* v. *Nadar* (4) but in that case the deceased decree-holder had left two legal representatives, only one of whom was a minor, and an application had been made within time by both of them for the substitution of their names in the place of the deceased decree-holder which was dismissed for default owing to the subsequent death of one of them who was an adult and the guardian of the minor. The minor had chosen his remedy by applying within time of the death of his father but could not prosecute it owing to the death of his guardian a situation which was by no means analogous to that which has now arisen.

The appeal is, therefore, allowed, the order passed by the lower Appellate Court set aside and that of the Court of first instance restored with costs throughout.

Z. K. *Appeal allowed.*

(1) 26 M. 780; 13 M. L. J. 412.

(2) 41 Ind. Cas. 233; 41 B. 625; 19 Bom. L. R. 688.

(3) 19 Ind. Cas. 526; 35 A. 331; 40 I. A. 151; 16 O. C. 194, 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148 (P. C.).

(4) 49 Ind. Cas. 990; 41 A. 435; 17 A. L. J. 649.

MOTIBAI HORMUSJEE KANGA *v* JAMSETJEE HORMUSJEE KANGA

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE BRITISH RESIDENT IN MYSORE, CIVIL AND MILITARY STATION OF BANGALORE.

November 30, 1923.

Present:—Lord Dunedin, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

MOTIBAI HORMUSJEE KANGA
—APPELLANT
versus
JAMSETJEE HORMUSJEE KANGA
—RESPONDENT.

Will—Capacity of testator, proof of—Undue influence—Burden of proof—Succession Act (X of 1865). ss. 46, 48.

In probate proceedings the *onus* of establishing the capacity of the testator lies on the propounder. If the caveator impugns the Will on the ground that it was obtained by, the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish that case by legal testimony. The Court will not, in such a case, rest its decision upon mere suspicion. [p. 781, col. 1.]

Tyrrell v. *Painton*, (1894) P. 151; 6 R. 540; 70 L. T. 453; 42 W. R. 343; *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty*, 11 M.I.A. 28 at p. 44; 7 W.R.P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11, referred to.

A man may act foolishly or even heartlessly in making his Will, but if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition. [p. 781, col. 1.]

Appeal from the judgment of the Resident of Mysore, reversing a grant of Probate of the District Judge, Bangalore, dated the 29th December 1921.

Messrs. *G. Lowndes, K.C.* and *Raikes*, for the Appellant.

Mr. *Bucknill*, for the Respondent.

JUDGMENT.—This appeal arises out of an application by the petitioner, a Parsee lady named Mrs. Motibai Kanga, in the Court of the District Judge of Bangalore for the Probate of a Will which she alleges had been executed by her husband shortly before his death, on the 17th August, 1920. The probate was granted by the District Judge, Mr. de Rozario, on the 19th December, 1921. His order was, however, reversed by the Resident of Mysore, Mr. Barton, who appears to have exercised, in his official capacity, the appellate jurisdiction over the Civil Court in Bangalore; hence the appeal to His Majesty in Council.

The testator, Mr. Hormusjee Rustomjee Kanga, resided in Bangalore, and he is described as having been a turf accountant. He became ill on the 2nd August, 1920, and his medical attendant, a doctor named Mylvaganam, diagnosed his complaint as malaria; but as he became gradually worse, his wife and friends became anxious and called in two other doctors in consultation with Dr. Mylvaganam. They were of opinion that it was not malaria but septic poisoning, and they prescribed accordingly. The Will is alleged to have been executed in the evening of the 16th August, and was registered by the Sub-Registrar of the Civil and Military Station, Bangalore, shortly after its execution. From his name (Mr. Burby) the Sub-Registrar appears to be an Englishman. As his evidence, in their Lordships' opinion, is of the utmost importance in the determination of this appeal and is very short in substance, they propose to quote it in full:—

> "I am Sub-Registrar of Assurances, C. and M. Station, Bangalore. I was so in August, 1920. I remember the 16th August, 1920. I was called to the residence of Mr. Kanga and a Will was there given to me for registration. I registered it. Exhibit A is the Will. It was signed by Mr. Kanga in my presence unaided. I had no suspicion whatever that anything was wrong with the Will. I satisfied myself that Mr. Kanga was perfectly right in his mind."

He was not cross-examined at all on behalf of the caveator, the eldest son of the deceased, Mr. Kanga. His case was, in the first place, that his father was not competent or in such a condition, mentally or physically, as to make a valid disposition; in the second place, that if it was competently made, it was made under the undue influence of his wife, the petitioner. The petitioner is the second wife of the deceased. He appears to have married her in

1917, and it is in evidence that they lived harmoniously and on good terms.

The attesting witnesses to the Will are Aga Abbas Ali, a Mohammedan gentleman, residing in Bangalore; a Mr. W. H. Thomson, an Englishman carrying on business in that city; and Dr. Mylvaganam. The facts connected with its execution are testified to by two Hindu gentlemen of the names of Mr. C. Sundara Raja Naidu and Mr. C. N. Suryanarayana Rao; a Parsee of the name of Mr. K. D. Belgaumwala; and a Mr. F. D'Souza, a furniture dealer.

As the deceased became gradually worse, it was considered advisable he should execute a Will. It is not clear from the evidence from whom the proposition emanated, but there is nothing to show that it was not with his approval. Mr. Suryanarayana Rao, a prominent pleader of the Bangalore Bar, was asked by Mrs. Kanga to draft the Will. He excused himself on the ground that he was a close friend of the deceased and apprehended a dispute; he would rather it was prepared by some other lawyer. He accordingly introduced Mr. Naidu, another pleader, as a fitting man for the purpose. Mr. Naidu states that he came to the house on the 16th August and obtained Mr. Kanga's personal instructions about the Will. His statement on this point is as follows:—

> "Mr. Kanga asked Mrs. Kanga to take some bank-books and title-deeds from an almirah and a chest of drawers. She took out some documents from each and handed them over to Mr. Kanga, who took up the books and documents one after another and gave me instructions. As he gave instructions I took down notes, which I have with me. I first asked Mr. Kanga whom he wished to appoint as executor. He said that his wife Motibai Kanga, should be the sole executrix."

Mr. Naidu produced the notes of his instructions at the trial. They are short and direct. This witness states further in his evidence that a Mr. Godfrey, to whom the deceased owed some money, was present at the time in the room in which Mr. Kanga was lying, and that there was some discussion between the two regarding the amount of money due; that Mr. Godfrey stated it was something like Rs. 7,000. whilst the deceased said it was not so much but only about Rs. 4,000; and that thereupon he looked into the books, and it was found that he was correct: the amount thereupon was put down in the deponent's notes, Rs. 4,526. Mr. Naidu's statement regarding a discussion at the time about Rs. 7,000 or Rs. 5,000 is to a certain extent corroborated by Mrs. O'Neil, the nurse who attended the deceased for the last two days of his life, and who was called as a witness for the caveator. She does not remember exactly the details of the discussion, but says the amount spoken of was something between Rs.4,000 and Rs.7,000. There can be little doubt that she was referring to the same incident as Mr. Naidu deposes to. This witness (Mr. Naidu) says further, "Mr. Kanga was quite of sound mind when he gave the instructions." After he had taken down the notes he says he made a fair copy, which was completed by 7 or 7-30 P.M. Mr. Kanga signed the Will and shortly after Mr. Burby, the Sub-Registrar, arrived and registered it. In cross-examination with regard to the physical condition of the deceased the witness stated: "His voice was a little weak. His wife was not talking to him in Gujerati: she was fanning him and using an endearing term—the same term right through." And he added: "Neither Mrs. Kanga nor myself made any suggestion to the testator to recall to his mind the various items in my notes." In re-examination he stated that the Will was read over to the deceased twice—once by himself (the witness), the other time by Mr. Burby, the Sub-Registrar. It is to be remarked that the Will itself is simple and short, and not requiring any great mental strain on the part of a sick man to grasp its meaning. Save the preliminary part, which is in ordinary form, it leaves everything to the wife.

Mr. Thomson (who describes himself as a director of the firm of Barton, Son and Co., Ltd.) states that he lived next door to the deceased:—

> "On the 16th August, about 6-30 in the evening I saw Mr. Suryanarayana Rao and Dr. Mylvaganam in the compound of Mr. Kanga's bungalow. I dropped in to ask how Mr. Kanga was. I had heard

Mr. Kanga was down with enteric. I asked the doctor. He said it was some kidney complaint and blood poisoning had set in. I asked him whether Mr. Kanga was in a critical state. He said 'No', and he might get over it if he were a younger man. At all events, the doctors said, he would last four or five days. Mr. Suryanarayana Rao then asked me whether I would attest Mr. Kanga's Will: he said it was being prepared at the time. I first objected, saying I was a perfect stranger, but afterwards consented. Mr. S. N. Rao represented that I was a disinterested party and I would do. I asked the doctor whether Mr. Kanga was in a fit condition to sign a Will—I meant mentally. Dr. Mylvaganam said 'Certainly' and Mr. S. N. Rao 'Very much so.'"

The next witness to the will is Aga Abbas Ali, who describes himself as a landholder of Bangalore. The material part of his evidence is as follows :—

"I stepped in at Mr. Kanga's to enquire about his health. I casually dropped in. Mr. Thomson, Dr. Mylvaganam and Mr. Suryanarayana Rao were there. Mr. S. N. Rao asked me to wait, saying I was wanted : he did not say why. I went into the sick room, and then I learnt I was required to attest a will. The Will was read out to Mr. Kanga. Mr. Kanga signed the Will. The nurse lifted him up. I do not know whether anybody else helped the nurse. The doctor signed first. I don't remember who asked me to sign. After I attested the Will I stayed on. Then the Registrar came. I was in the room when he came. The Registrar read out the Will to Mr. Kanga. He asked Mr. Kanga whether it was right. Mr. Kanga shook his head (nodded ?), by which I understood that he thought it all right. The Registrar registered the Will and we all left."

Mr. Suryanarayana Rao's evidence is important. He is a man of position and of twenty-eight years' standing at the Bar of his province ; a prominent pleader in the Bangalore Court and appears to have absolutely no interest in the dispute, and knew the family well. He describes how the Will came to be executed, the condition in which the testator was at the time, and the circumstances connected with its execution. The following passage in his evidence deserves notice :—

"Just after the execution of the Will Mr. Burby came. Somebody went and brought him. After execution and before Burby came the Will was brought to me. I read it and was surprised that no provision had been made for the children, and I expressed myself to that effect to Mr. Abbas Ali and to Mr. Burby and to others. I remarked that it was an unjust Will. Kaiku, the younger son, who understood what we were discussing, began to cry. I felt it and the others also felt it. They asked me to approach Mr. Kanga and ask him to make some provision for the younger boy. Meantime Mr. Burby went in and registered the Will. He was standing by Mr. Kanga's bedside. I then went into the room. Mr. Kanga was lying in bed and appeared to be exhausted. I took up his hand and asked Mr. Kanga how it was he had made no provision for any of his children. He replied, 'My wife will look after everything.' Then I said he might at least make provision for the minor boy. He replied, 'My wife is a good woman. She will look after him.' Then I came out remarking, 'What is to be done ? The man is obstinate.' When I put the question he understood me and gave me a rational answer. I cannot depose about his mental state."

Mr. D'Souza and Mr. Belgaumwala gave similar testimony.

Mrs. Kanga in her evidence gives a clear account of what took place from the time the deceased became ill until his death. Her story tallies in every material particular with that told by the other witnesses. She was cross-examined at great length, but nothing appears to have been elicited to discredit her testimony. If all this evidence is accepted the validity of the Will would be conclusively established, but Dr. Mylvaganam, although an attesting witness, has given evidence of a character which requires consideration. He states, in fact, that the deceased when he put his signature to the document could not understand what he was doing. He says in one place in his examination-in-chief ;—

"I saw him sign. I attested the Will. I was behind him. Mr. Abbas Ali and Mr. Thomson also attested. From his mental and physical condition I did not think that Mr. Kanga was able to make a detailed Will. He was not comatose or imbecile. At times he used to be quite listless and we had to shake him to get a reply."

He also was present at the time when the Registrar came. In cross-examination, referring to the Will Ex. A., he says :—

"It is a long document. I do not think that Mr. Kanga would have understood all that in his then condition."

The Judge before whom the evidence was given was apparently astonished at the fact that although Dr. Mylvaganam had attested the Will, he was now giving evidence to the effect that the testator could not have executed it with comprehension. The District Judge accordingly asked him certain questions, to which he makes the following answers :—

"When I attested the Will I thought that the details had been arranged previously. I regarded my responsibility to extend only to the witnessing of the signature. Mr. Kanga did not appear to me to be following the reading of the Will with intelligence. Somebody asked him to sign, saying that his signature was required, and put a pen in his hand. He was lying with his eyes closed, and when he was propped up he was sufficiently alert for the signing. After the signing Mr. Kanga collapsed. On the 16th August I do not think Mr. Kanga would have been in a fitting state of mind to be able to scrutinise accounts." At the instance of petitioner's Counsel : "After the Will was read out I do not remember asking Mr. Kanga why he had left out his son in the Will. To my knowledge there was no conversation with Mr. Kanga after the Will was signed. He was not in a fit state for conversation. I do not remember anybody else asking Mr. Kanga about having left out his son—I do not think so."

The nurse, Mrs. O'Neill, says that the whole work of opening the iron safe and taking out the books, etc., for the purpose of noting the details in the will was carried out by Mrs. Kanga ; and that Mr. Kanga gave no instructions to the lawyer. She adds that the patient was very weak and his life seemed to be going ; he took no interest in what was going on.

Their Lordships do not think it necessary to refer to the nurse's evidence in detail ; it is sufficient to say that her statements are in direct contradiction to all the witnesses on behalf of the petitioner and even contradicts some of the statements made by Dr. Mylvaganam. Upon this balance of testimony the District Judge came to the conclusion that Mrs. O'Neill could not be relied on, and having regard to the fact that the capacity of the testator had been established by overwhelming testimony and no undue influence had been proved, he made a decree for the grant of the probate to the petitioner.

On appeal the Resident has set aside the order of the District Judge chiefly, as it appears, on suspicion.

The rules for the establishment of the capacity of the testator and the circumstances which would lead to the invalidation of a will are embodied in sections 46 and 48 of the Indian Succession Act (X of 1865), which practically embody the principles of the English law on the subject.

Counsel for the respondent invited their Lordships' attention to what he called the suspicious circumstances in the case : the delay in sending information to the eldest son of the critical condition of the father, the exclusion of the children from the will ; and he relied on the dictum in *Tyrrell* v. *Painton* (1). That case, however, differs in all its circumstances from the present. In this connection it may be useful to refer to the observations of Lord Westbury in the case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* :—(2).

". . . in matters of this description" (he was dealing with a charge of fraud in connection with a sale in execution of a decree) "it is essential to take care that the decision of the Court rests not upon

(1) (1894) P. 151 ; 6 R. 540 ; 70 L. T. 453 ; 42 W. R. 343.

(2) 11 M. I. A. 28 at p 44 ; 7 W. R. P. C. 10 ; 1 Suth. P. C. J. 651 ; 2 Sar. P. C. J. 215 ; 20 E. R. 11.

suspicion, but upon legal grounds, established by legal testimony."

It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that case. The evidence, however, that the deceased signed it with full comprehension of its meaning and contents is overwhelming and explicit. It is impossible to suppose that persons like the pleader, Mr. C. N. Suryanarayana Rao, Mr. Abbas Ali, the Sub-Registrar and Mr. Thomson, not to speak of the others, entered into a conspiracy with Mrs. Kanga to foist upon a moribund man a will which he did not understand and which he signed without comprehension. It is in evidence that the deceased had not been for some time on good terms with his eldest son; it appears also that he had adequately provided for him. The deceased's son-in-law, Mr. Khambata, who has apparently no interest in the dispute, says that the deceased had full confidence in his wife. Evidently relying on his trust in her, Mr. Kanga left her his whole estate, observing to the persons who were interesting themselves on behalf of his youngest son that she would look after him and do what was necessary. A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition. The evidence, which consists of the testimony of respectable and wholly disinterested witnesses, excludes the hypothesis of its having been obtained by undue influence. Their Lordships refuse to accept the testimony of Mrs. O'Neill and Dr. Mylvaganam. Their conduct does not seem to be consistent with what they stated in Court.

On the whole, their Lordships have come to the conclusion that the order of the Resident must be set aside and that of the first Court restored. The respondent will pay the costs in the Appellate Court and of this appeal. Their Lordships will humbly advise His Majesty accordingly. But they, at the same time, feel it desirable to say that they fully trust the petitioner will carry out the wishes of her husband with regard to his minor son. She herself stated in her evidence that she proposed to make a handsome provision for the boy, and their Lordships trust that she will give effect to it.

Z. K. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 361 OF 1922.
August 2, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

NAROTAM DAS AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Shcik MOHAMMAD RAZA AND OTHERS —DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 111, 11?, 233 (k)—Partition, modes of initiation of—Question of title—Procedure—Jurisdiction of Civil Courts, bar to, extent of.

To oust the ordinary jurisdiction of Civil Courts by virtue of the bar created by section 233 (*k*) of the U. P. Land Revenue Act, it must be shown that the alleged bar is perfect and is in accordance with the provisions of the law which create that bar. [p. 782, col. 2].

Where a collector proceeds to enquire into a question of proprietary title raised in partition proceedings he must strictly follow the procedure laid down in the Code of Civil Procedure for the trial of original suits, and the effect which his decree will have depends upon the observance of the formalities prescribed by section 111 of the U. P. Land Revenue Act. [p. 783, col. 1].

Mahbub Ali v. *Sheikh Muhammed Hussain*, 57 Ind. Cas. 497; 23 O. C. 125; 7 O. L. J. 319, followed.

The partition of a *khata* can be initiated either by an application for partition of the *khata* or by an application by way of an objection in response to a call made by the proclamation contemplated by the provisions of chapter VII of the U. P. Land Revenue Act. A partition made without either of these two conditions being complied with cannot be given the effect of operating as a bar to the determination of a question of title in a Court of Civil Jurisdiction. [p. 785, col. 1].

Shambha Singh v. *Daljit Singh*, 33 Ind. Cas. 19; 38 A. 213; 14 A. L. J. 293 (F.B.); *Kalka Prasad* v.

NAROTAM DAS *v.* MOHAMMAD RAZA

Mammohan Lal, 33 Ind. Cas. 86; 38 A 302 ; 14 A. L. J. 373 (F.B.), relied on.

Liaqat Husain v. *Narotam Das*, 65 Ind Cas. 780; 8 O. L. J. 516; 4 U. P L. R. (O.) 1, distinguished.

Appeal against the judgment of the Sub-Judge, Sultanpur, dated the 23rd August 1922, confirming the judgment of the Munsif, Sultanpur, dated the 30th July 1921.

Messrs. *M. Wasim* and *Daya Kishen Seth*, for the Appellants.

Mr. *Hyder Husain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellants for possession of four plots of land situate in village Daryapur in the district of Sultanpur. These plots are specified in the plaint. The plaintiffs have based their title to the plots in suit on a purchase at an auction sale in 1863. There were several defences to this suit with the result that as many as 15 issues were settled for decision. These issues one and all were decided by the Court of first instance on their merits. The decision of that Court went against the plaintiffs on issues 11 and 12 and in consequence thereof the suit was dismissed. The plaintiff appealed. The appeal was also dismissed by the learned Subordinate Judge of Sultanpur on the 23rd August 1922. This is a second appeal by the plaintiffs from the decree of the learned Subordinate Judge. The decision of the lower Court is based on a determination of the question involved in issue 12. Other questions have not been decided by the Court of first appeal. The defence which has succeeded is that there was a partition of the village in which the plots in suit are situate in the year 1918 and under that partition the plots in suit ceased to belong to the plaintiff in consequence of their having been alotted to other co-sharers in the village than the plaintiff. The construction of the documents bearing on the partition is the question in appeal. The bar arising out of the partition was resisted by the plaintiffs also on the ground that the nature of the interest which they held in the plots in suit was not one which was or could be the subject-matter of the partition. This point also has been decided against the appellants by both the Courts below but is reiterated in the appeal before me.

The argument advanced by the learned Counsel for the appellants in support of the first point taken in appeal is that the documents evidencing the partition, if properly construed, lead to the conclusion that the partition was limited to *khata* (or *thok* or *patti*) No. 1 and partially to *khata* No. 9 and did not include lands or determination of title of the proprietors of lands situate in *khata* No. 5 within which the plots in suit lie. The Courts below have held that the partition embraced all the *khatas* of the lands in the village. If that is true it is difficult to escape the conclusion that the present suit is barred by the provisions of section 233 (K) of the U. P. Land Revenue Act (III of 1901). I am however, not satisfied that the Courts below have properly construed the documents bearing on the question of partition. It is obvious that the plaintiffs must succeed if the bar set up in defence is not strictly proved.

To oust the ordinary jurisdiction of Civil Courts to grant relief of the nature sought for in this suit, it must be shown that the alleged bar is perfect and is in accordance with the provisions of the law which create that bar. The provisions of section 233, clause (k) of the Act, just now mentioned are clearly founded upon the provisions of Chapter VII of that Act relating to partition and union of mahals. The jurisidiction of the Revenue Courts to initiate proceedings for partition commences with the receipt of an application for partition under section 107 of that Act. Unless the partition is refused on a preliminary ground stated in section 109 the Collector shall issue a proclamation under section 110 of the nature required by that section. In the event of a question of proprietary title arising out of the pleadings in the proceedings and such question being one which has not been already determined by a Court of competent jurisdiction three alternative courses are open to the Collector to adopt, either (*a*) to decline to grant the application until the question in dispute has been determined by a competent Court, or (*b*) to require any party to the case to institute within three months a suit in the Civil Court for the determination of such question, or (*c*) to proceed to inquire into the merits of the question. It is common ground that the first two alternatives were not adopted by the Collector in relation to

the partition under consideration. It must, therefore, follow that the Collector adopted the third alternative; and when he decides to adopt that alternative he is under an obligation to follow the procedure laid down in the Code of Civil Procedure for the trial of original suits (*vide* sub-section (3) of section 111). Section 112 gives the decree passed by the Collector in cases where he has adopted the third alternative the effect of decrees of a Court of the Civil judicature of the first instance and such decrees shall be open to appeal to the District Judge or High Court or the Judicial Commissioner as the case may be under the rules applicable to appeals to those Courts. The language of section 112 giving the effect mentioned above to the decrees passed by the Collector on questions of proprietary title involved in the partition proceedings makes it perfectly clear that the effect depends upon the observance of the formalities prescribed by section 111. If authority were needed in support of such an obvious conclusion I should refer to a very exhaustive, if I may respectfully say so, judgment of Mr. (Now Mr. Justice) Lindsay in the case of *Mahbub Ali* v. *Mohammed Husain* (1). Two questions therefore, arise in this connection. Was there a partition of any *khata* other than *khatas* 1 and 9. If not, the defence fails. If there was, was it in conformity with the provisions of law.? If it was not the defence equally fails.

The documents bearing on the question under consideration are these. 1. The application for partition dated the 21st February 1916 (Exhibit A 33). 2. The proceedings recorded by the Court of Revenue (Exhibit 50). 3. A document described as a *chitthi* (Exhibit A 34). Before dealing with these documents, it is necessary to describe with some precision the nature of the tenure which the owners of the village held in the lands situate in that village.

Exhibit 4 is the *khewat* of the last settlement, the date of which may fairly accurately be fixed as 1894-1895. This *khewat*, therefore, will reveal the condition in which the village was held by the several proprietors of it previous to the partition but subsequent to the acquisition of the plots in suit by purchase at the auction sale by Jawahir Lal, the ancestor of the plaintiffs. It shows that the village was divided into 10 *thoks*. These *thoks* are earmarked by numericals and by the name of the holder of the *thok* as against the numericals. The majority of the *thoks* are owned by several co-shares. *Thok* No. 1 is described as Jawahir Lal's, the extent of which is indicated in two ways. 13 annas, 9 pies. 2. 75 *bighas* 9 *biswas*, 12 *dhurs*. It would thus appear that Jawahir Lal had a solid interest in the village representing the entirety of a *thok* consisting of one-third of the whole of the village besides the insignificant interest which he acquired in the four plots by purchase. As I have said before it is common ground that these four plots were and are not included in the *thok* of Jawahir Lal just now mentioned but that they are included in *thok* No. 5 which is described as Ghasi Khan's, the extent of which also is shown to be 3 annas, 9 pies and further by an area of 75 *bighas*, 18 *biswas* and 1 *dhur*. With the other *thoks* in the village we are not directly concerned except *thok* No. 9 which is *shamilat deh*, comprising an area of 27 *bighas* 17 *biswas*. There is evidence in the case and in fact it is agreed that the proprietors of the village had enjoyed their shares by means of possession on the basis of *khetbat*, in other words, each proprietor held specified number of plots of land in the village accurately or approximately corresponding to the extent of his share. This, therefore, was the nature of the interest which the proprietors held on the date of the partition.

Now I come to the consideration of the documents mentioned above. Exhibit A-33 is the application for partition made by Narain-das and Musammat Tulsha'as against every other co-sharer in the village. In the latter group the person first mentioned is Narotam Das. The applicants and Narotam Das on the date of the application represented the entire *thok* No. 1 belonging to Jawahir Lal, who had died before the application. One observation need be made here before I proceed further. It is not contended that besides the three persons mentioned above any other co-sharer in the village had any interest in *thok* No. 1. It follows that the primary interest of the applicants was to secure a partition of this *thok* from the rest of the village by means of a partition under the United Provinces Land Revenue Act. It is agreed that the partition was to be imperfect and when eventually carried out it was imperfect. The entire village is

(1) 57 Ind. Cas. 497 ; 23 O. C. 125 ; 7 O. L. J 819

held in an under-proprietary tenure and that is mentioned in column 1 of the application. The rest of the columns give the extent of the share, the Government Revenue and the last but one column describes the area which the applicants say they are entitled to on partition and, that is, 52 *bighas* 14 *biswas* 6 *biswansis*. This is significant. The object of the application must, therefore, be taken to obtain a partition which will sever specifically this area from the rest of the village and it need hardly be said again after what has been said before that this area was to come out of *thok* No. 1 above. The last column of this application is the column of remarks and contains what may be called specific prayer of the application. It is as follows:—"That an imperfect partition may be made and *chitthis* as mentioned below may be prepared: Lala Narotam Das applicant, one *chitthi*; *Musammat* Tulsa, applicant mortgagor, Lala Narotam Das mortgagee, one *chitthi*; the defendants, one *chitthi*, and the Government, one *chitthi*. On the question of the construction of this application the best that can be said in favour of the defendants-respondents is that it stands far from showing that anything other than *thok* No. 1 was contemplated by the applicants to be the subject matter of partition. To my mind, however, the value of this document is more than merely negative in its character. The construction which I place is that the applicants asked for partition of Jawahir Lal's *thok* and of no more. This conclusion is not only supported by exhibit 50, the *tarz taqsim*, but may safely be rested upon that document alone:—The copy before me is on a printed form usually used for preparation of *tarz tuqsim*. It is divided into several paragraphs and each paragraph has a heading indicating the nature of the entry or entries which should be made therein. The copy produced contains these entries. At the top the whole village is mentioned of course. The first paragraph is intended to denote whether the proposed partition is to be perfect or imperfect and also the *patti* of which partition is intended. The copy retains the ordinary printed words "perfect and imperfect" both and leaves blank the name of the *patti*. The area of the whole village is certainly given but when we proceed along with details given in separate paragraphs no or little doubt is left that only one *patti*, that is, Jawahir Lal's, is proposed to be partitioned. Paragraph 2 is significant. *Patti* Jawahir Lal is shown as sub-divided into three portions, one for each of the two applicants and the third one for the defendant No. 1. These portions are equal in extent and cover up the whole of the area of *patti* Jawahir Lal less by 4 *bighas* which, as it appears from the subsequent paragraphs, was made good by taking a slice out of *thok* No. 9, that is, *mushtarka*. The significance of the entries mentioned above is brought into prominence by a contrast with the entries relating to the other *thoks* of the village. I will take, for illustration, *thok*, No. 5, that is Ghulam Ali's. All the co-sharers of that *thok* are mentioned in a group without any specification of the share, to which each would be entitled under the proposed partition. Not only the fraction representing the whole of the share, that is, 3 annas, 9 pies but also the area 79 *bighas* 8 *biswas* and 19 *biswnasis* representing the whole of the area appertaining to Ghulam Ali's *thok*, is mentioned in gross and so is the revenue. On the other hand, Jawahir Lal's *patti* has been split up in all these respects. Each of the three co-sharers is shown to possess 1 anna 3 pies with an area of 26 *bighas* 9 *biswas* and the corresponding amount of revenue, that is, Rs. 36-14-6. Similar result is attained by looking to the entries under other paragraphs, for instance, paragraph 5. With a view to avoid any possible confusion arising out of several entries in this document referring to *pattis* 1, 2 and 3, it is to be noted that the reference is not to the *pattis* as they stood in the *khewat* but to the *pattis* proposed to be made under the contemplated partition which are defined in paragraph 2 of this document; in other words, under the heading '*nam patti*' the first one mentioned is of Narain Das, the second one of *Musammat*. Tulsha and the third one of Narottam Das, who together represent the entire proprietary interest in *khata* No 1.

Next we have to consider the evidential value and the legal effect of Exhibit A34. If my construction of Exhibits A 33 and 50 is correct, as in my judgment it is, it follows that Exhibit A34 is inconsistent with that construction. What is the nature of this document? It purports to be the copy of an abstract of *chitthi batwara* in an imperfect *mahal* in case No. 9 *in re Narain Das* v. *Narotam*

Das and others of village Daryapur, decided on the 19th September 1918, for the share of Ghulam Ali Khan. In the first column is given the name of tenant, who is shown to be holding the 4 plots in suit. On these meagre indicia it is difficult to connect this document with the partition initiated with the application (Exhibit A33) but the best that the respondents can ask for is to so connect it. I am prepared to do that. I have already found that the application of the 21st January 1916 (Exhibit A33) and the *tarz taqsim* (Exhibit 50) evidence no more than the prayer and proposal respectively of the partition of *khata* No. 1. This being so an attempt to deal with any other *khata* in the village and thereby impliedly to adjudicate the questions of title in relation to the lands comprised in that *khata* must be held to be *ultra vires*.

I have taken pains to point out what conditions the law attaches as precedent to give finality to the decisions of Revenue Courts on the questions of proprietary title. If this *chitthi* is intended to show, as the learned Counsel for the respondents wishes it to show, that the Revenue Court partitioned *khatas* of the village other than the *khata* for the partition of which the application was made and the proposal (Exhibit 50) was prepared it must be shown that this action of the Court of Revenue was in accordance with law. On the materials before me, it is impossible to predicate of it as having been in accordance with law. The partition of any *khata* other than the one covered by the application of the 21st January 1916 must initiate in either of the two ways. (1) A fresh application relating to the partition of that *khata* or *khatas*, or (2) by an application by way of an objection in response to a call made by the proclamation contemplated by the provisions of Chapter VII already referred to. I have no hesitation in holding that a partition without either of the two conditions being complied with is a partition which cannot be given the effect of operating as a bar to the determination of title in a Court of civil jurisdiction. I am glad that the conclusion at which I have reached in this case is supported by two Full Bench decisions in the cases of *Shambhu Singh* v. *Daljit Singh* (2) and *Kalka Prasad* v. *Manmohan Lal* (3).

(2) 33 Ind Cas. 19; 38 A. 213; 14 A.L.J. 293 (F.B.).
(3) 33 Ind.Cas. 86; 38 A. 302; 14 A.L.J. 373 (F. B.)

My decision in a previous case in *Liaqat Husain* v. *Narotam Das* (4) was hard pressed on me by the learned Counsel for the respondents. I have no desire to shirk the responsibility of that decision but I do certainly protest to its being used as evidence of a fact in the present case more so when the fact as to whether the partition of 1818 covered the whole village area or only related to *thok* No. 1 depends on the construction of certain documents which documents were not either produced in that case or discussed before me at the hearing of that appeal. It may be mentioned that the parties in that case so far as can be gathered from the judgment had agreed on the fact that there was a partition of the whole village. I do not, therefore, think that my decision just now referred to can legitimately affect the conclusion at which I have reached in the present case on the materials now before me. In this view of the matter, it is unnecessary to decide the second point taken by the learned Counsel for the appellants in support of his appeal.

I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and as the appeal before that Court was decided on a preliminary point I direct that the record be sent back to that Court under O. XLI r. 23 of the Code of Civil Procedure with the direction that the case be tried according to law. The appellants will get their costs in this Court. The costs in the Courts below will abide the event.

Z. K. *Appeal allowed.*

(4) 65 Ind. Cas. 780; 8 O. L. J. 516 ; 4 U. P. L. R. (O.) 1.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 2 OF 1918.

May 5, 1924.

Present :—Sir Lancelot Sanderson, Kt., K. C., Chief Justice, and Mr. Justice Walmsley.

KAILASH CHANDRA NAG AND OTHERS —PETITIONERS

versus

BEJOY CHANDRA NAG AND OTHERS —OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Review of judgment—Appeal—Time spent in review, when excluded.

An appellant is entitled to exclude time spent in prosecuting with due diligence a proper application for review of judgment. [p. 787, col. 1.]

Brij Indar Singh v. *Kanshi Ram*, 42 Ind. Cas. 43 ; 45 C. 94 ; 33 M. L. J. 486 ; 22 M. L. T. 362 ; 6 L. W. 592 ; 126 P. W. R. 1917 ; 15 A. L. J. 777 ; 19 Bom L. R. 866 ; 3 P. L. W. 313 ; 26 C. L. J. 572 ; 104 P. R. 1917 ; (1917) M. W. N. 811 ; 22 C. W. N. 169 ; 127 P. L. R. 1917 ; 44 I. A. 218 (P. C.), referred to.

Where, however, an application for review does not state the real reason on which it is based and where it is not shown that there was reasonable ground for seeking the review, the application cannot be regarded a proper one, prosecuted with due diligence, and the mere fact that it was made, does not entitle the appellant to an extension of time under section 5 of the Limitation Act. [p. 786, col. 2.]

Application for leave to appeal to His Majesty in Council against the judgment of a Division Bench of the High Court, dated the 29th August 1922.

Babu *Phanindra Lal Moitra*, for the Petitioners.

Babu *Ram Chandra Mazumdar*, Babu *Govinda Chandra Dey Roy*, Babu *Monomuhan Banerjee* and Babu *Prya Nath Dutta*, for the Opposite Party.

JUDGMENT.

Walmsley, J.—This is an application for leave to appeal to His Majesty in Council, and it is directed against a judgment passed by a Division Bench of this Court on the 29th August 1922.

A preliminary objection has been taken before us that the application is filed out of time and that it should be rejected on that account. It is necessary, therefore, to give certain dates. As I have stated, the judgment was delivered on the 29th of August 1922. The decree was signed on the 31st of August 1922. On November 27 of the same year an application was presented for review of Judgment. This application was rejected on July 30, 1923. The present application was filed on August 3, 1923.

It was at first suggested to us, that, even if the whole period during which the application for review was pending be deducted, this present application is out of time. This suggestion, however, appears to be due to a mistake in an office note : the application for copy of the judgment was made on November 22, and not on November 27.

The question then is whether the time during which the application for review was pending should be deducted. It is conceded that the petitioners must show that that application was of such a nature as to entitle them to an extension of time under section 5 of Limitation Act. It is necessary, therefore, to examine their application for review. It has been shown to us that of the seven grounds mentioned therein four are identical word for word with four of the grounds set out in the memorandum of appeal, while the remaining three summarize other grounds in the memorandum. Not one of them mentions any fact or advances any argument, such as might be expected in an application under the provisions of O. XLVII of the Civil Procedure. The application, therefore, was very similar to the one mentioned in the case of *Ashanulla* v. *The Collector of Dacca* (1) in which it was held that the mere presentation of an application for review, where it is not shown that there was reasonable ground for making the review, is not a sufficient ground for not presenting an appeal within time. The decision in the case of *Brij Indar Singh* v. *Kanshi Ram*, (2) recognises the same principle

(1) 15 C. 242 ; 7 Ind. Dec. (N. S.) 746.

(2) 42 Ind. Cas. 43 ; 45 C. 94 ; 33 M. L. J. 486 ; 22 M. L. T. 362 ; 6 L. W. 592 ; 126 P. W. R. 1917 ; 15 A. L. J. 777 ; 19 Bom. L. R. 866 ; 3 P. L. W. 313 ; 26 C. L. J. 572 ; 104 P. R. 1917 ; (1917) M. W. N 811 ; 22 C. W. N. 169 ; 127 P. L. R. 1917 ; 44 I. A 218 (P. C.).

and their Lordships of the Privy Council endorsed the view that an appellant was entitled to exclude time spent in prosecuting with due diligence a proper application for review of judgment.

In view of what I have said already about the contents of the application for review, and still more in view of what has been stated before us in Court to-day, namely, that the application for review did not set out the real reason on which it was based, it appears to me that the application for review cannot be regarded as a proper one, prosecuted with due diligence and that consequently the fact that it was made does not entitle the petitioners to an extension of time under section 5 of the Limitation Act.

The result is that in my judgment this application for leave to appeal to His Majesty in Council must be refused with costs—5 gold mohurs, 3 gold mohurs to Mr. Mazumdar's client and 2 gold mohurs to Mr. Dutt's client.

Sanderson, C. J.—I agree.

S. D. *Application refused.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 52 OF 1923.

February 11, 1924.

Present :—Mr. Justice Walsh and
Mr. Justice Ryves.

FIRM KEDAR NATH DURGA PRASAD—PLAINTIFF—APPELLANT

versus

FIRM BISHWANATH LAKSHMI CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XI, r. 18—Inspection of documents not mentioned in pleadings or affidavit of documents—Procedure—Counter-affidavit, whether conclusive.

Under O. XI, r. 18 of the Civil Procedure Code, when a party applies to inspect documents which are not in the pleadings or in a previous affidavit of documents, and makes an affidavit for that purpose, the Court ought not to make an order for inspection without giving the other side an opportunity of replying on affidavit. If the latter reply on affidavit that the documents of which inspection is sought are not in their power or possession, that affidavit is conclusive and the Court cannot go behind it, unless there is something like an answer in cross-examination or some other documentary evidence showing conclusively that the documents are in the power or possession of the party. [p. 787, col. 2 & 788, col. 1.]

Appeal from an order of the Subordinate Judge, Cawnpore.

Messrs. *Surendro Nath Sen* and *Kailas Nath Katju*, for the Appellant.

Messrs. *G. W. Dillon* and *Saila Nath Mukerji*, for the Respondent.

JUDGMENT.—We think that this order has arisen out of a misunderstanding. In some ways the defendants are to blame. If they wanted to pin the plaintiffs down to a statement on oath of the relevant documents in the plaintiffs' possession relating either to this case, or the contract of August, 1918, or the damages claimed in the suit, they ought to have applied to the Court without making any affidavit at all for an order directing the plaintiffs to state on oath the documents in their possession under O. XI, r. 12. This they have not done. They omitted this step. They wished to go beyond O. XI, r. 15, and applied to inspect under O. XI, r. 18 documents not mentioned in the pleadings or in the affidavit of documents. They had to found such an application upon an affidavit showing of what documents inspection was sought. We are of opinion that the affidavit which was filed with that object was totally insufficient. Carefully examined, it did not comply with the rule. More important still, we are of opinion that under O. XI, r. 18, when a party applies to inspect documents which are not in the pleadings or in a previous affidavit of documents, and makes an affidavit for that purpose, the Court ought not to make an order for inspection without giving the other side an opportunity of replying on affidavit. If the other side in this case had replied on affidavit, in all probability this trouble would never have arisen. But an atmosphere of suspicion and distrust has grown up. The plaintiffs put in an application, which was not on affidavit, in which they stated that certain books are not

in their shop. It is contended that is the ordinary expression for "are not used in 'their business.'" Mr Dillon naturally says it is consistent with their being in their house. The learned Judge complains that the plaintiffs did not support their application by an affidavit, and after throwing a cloud of suspicion over the plaintiffs' conduct, he has actually dismissed their suit, apparently because it was the only remedy which he could find in the Code. We think that there is a better remedy than that. The plaintiffs are desirous of making an affidavit, which they ought to have been called upon to do long ago stating exactly the books—identifying them by a precise description which will be understood by everybody—which are now or have been in their possession since August 1918, and which contain anything relating to the case in question or the contract in dispute. In addition they are desirous of stating on oath that the four books which they previously said were not kept in the shop and which the defendants now say they want to see, never have been kept in their business and do not exist. We think they ought to be allowed to make this affidavit which must cover both the past and the present of their own position or that of anybody under them. If they do this according to the well established practice—at any rate in England from which these rules are derived—that affidavit is conclusive and the Court cannot go behind it unless there is something, as Mr. Dillon suggests, like an answer in cross-examination or some other documentary evidence showing conclusively that there is such entry or book. We give the plaintiffs an opportunity of filing such an affidavit before us at 11 a.m. to-morrow, and Mr. Dillon accepts that on behalf of his clients. It will be placed upon the record which will be returned to the lower Court, and the order of the Court below will be modified by substituting this order, and the costs of these proceedings here and in the Court below will be costs in the suit, which must be presented without delay.

Z. K. *Order modified.*

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

January 29, 1924.

Present :—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

LAJWANTI AND OTHERS—APPELLANTS

versus

SAFA CHAND AND OTHERS—RESPONDENTS.

Adverse possession—Hindu Law—Widow, adverse possession by—Property acquired, nature of.

Where a Hindu widow, who is only entitled to maintenance out of a certain estate, takes possession of the estate as against the reversioners who are immediately entitled to it, her possession is adverse as against the reversioners and after the lapse of the statutory period the title of the latter is destroyed. [p. 790, col. 1.]

A Hindu widow is not a life renter but has a widow's estate, that is to say, a widow's estate in her deceased hubsand's estate. If possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan*, but she makes them good to her husband's estate, and after her death the parcels pass to her husband's heir. [p. 790, col. 1.]

Messrs. *L. De'Gruyther*, *K. C.* and *W. Wallach*, for the Appellants.

Messrs. Sir *G. R. Lowndes*, *K. C. Sen* and *Bishen Narain*, for the Respondents.

JUDGMENT.—Jawahara Mal, a Datt Brahmin, living in the Punjab, died in 1852. He was survived by three wives, but at the time of his death had no children. Shortly after his death, as alleged, his eldest wife had a posthumous son named Hira Nand, who died after a few months. He undoubtedly had a posthumous daughter by his second wife, who is plaintiff in this action. He had three brothers, the eldest Bhim Sen, who in turn had two sons Hem Raj and Jamiat Raj. The other two brothers were Ram Bhuj and Gowhur Sen, who both had sons and grandsons who are some of the respondents in this case. He and his brothers were possessed of considerable property, ancestral and otherwise. After his death his widows were entered in the settlement records as proprie-

tors of a fourth share of certain *Mouzahs*. In 1865 a new settlement was being made, and in furtherance of the entries to be made therein an action was raised by Hem Raj in 1867 asking that the entries of all parties except himself should be deleted in respect of certain *Mouzahs*. Hem Raj raised the action in two capacities. He was sole heir of his father Bhim Sen, his brother Jamiat Raj having renounced all his rights in his favour, and he was also, he alleged, the adopted son of Jawahara Mal and as such his heir. He cited all the members of the joint family and the two widows of Jawahara Mal, the eldest widow having died in 1862. The first question that had to be determined was whether the *Mouzahs*, as to which he made exclusive claim, were the separate property of Bhim Sen and Jawahara Mal, or whether they were family property. As to certain of the *Mouzahs* it was determined that they were the separate property acquired by Bhim Sen and Jawahara Mal. That being so, he was entitled to one-half as sole heir of his father. His claim to the exclusive possession of his other half depended upon whether he could make out adoption and this was found against him. Appeals were taken as to different *Mouzahs* by all the parties concerned. The case went to the Chief Court and the Chief Court finally decided as follows :—

His claim to the one-half was confirmed. As regards his claim to the other half it was said that he had abandoned his claim in virtue of adoption, and it was pointed out that his uncles, on Jawahara Mal's death, would always be preferable to him. That disposed of his claim, but the judgment then went on to deal with the questions that had arisen on the various appeals between the different defendants. The judgment continued thus :—

> " The only other question for decision with regard to these *Mouzahs* is whether the widows are entitled to hold the half-share left by Jawahara Mal for their lives. They clearly are so entitled as, according to the facts as found above, the fathers of the appellants who took the inheritance were separate in food and estate from Jawahara Mal at the time of his death."

This final judgment was given in 1869, and the widows were duly entered as proprietors of certain *Mouzahs* in respect of their widows' estate of the estate of their late husband Jawahara Mal. They entered into possession. The elder of the two —that is to say, the original second widow—lived till 1900, when she died. The *Mouzahs* were then possessed by the third and surviving widow till her death in 1910. On her death the daughter of the second wife raised the present suit to have declared her right to the *Mouzahs* as heir of her father Jawahara Mal. Her claim is opposed by various descendants of Jawahara Mal's brothers who claim as heirs of Hira Nand, to whom the property went on his birth after his father's death, they alleging that the long possession of the widows was only by reason of an arrangement that they should hold the *Mouzahs* as maintenance. Certain persons who might have been respondents backed up the plaintiff and were added as plaintiffs, a very unnecessary proceeding, as no decree could pass in their favour. As already stated, the plaintiff denied that Hira Nand ever existed. The District Judge held that Hira Nand never had existed. He then decreed half the property to the plaintiff and half to certain of the respondents on grounds which no one supports and which need not here be specified. Both parties appealed. The learned Judges of the Chief Court reversed that judgment and found that Hira Nand did exist, and that in consequence the respondents are entitled as heirs to his estate. They mention a question as arising on adverse possession of the widows, but they did not really deal with the argument that arises thereon. Appeal has been taken from that decree.

Their Lordships will assume that the judgment is right in saying that Hira Nand did exist, but if he existed, then, in the litigation which arose in 1867 and was finished in 1869, his heirs who either are, or are represented by, the various respondents in this case, were entitled totally to exclude the widows from the *Mouzahs* in question. All that the widows were entitled to was maintenance. The allegation that they were allowed to possess the *Mouzahs* in name of maintenance was not admitted to be proved and further it is straight in the teeth of the judgment of the High Court of 1869 already quoted. It is clear, therefore, that though the judgment may have been wrong, there has been adverse possession by

the widows from 1869 to 1910, and the respondents' title is destroyed by section 28 of the Limitation Act. It was then argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiff were the hairs of Devi. This is quite to misunderstand the nature of the widows' possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. The result is the *Mouzahs* are Jawahara Mal's estate, the respondents having no title to attack them, and as such the plaintiff is entitled as heir to her father to take them.

An attempt was made to say that the result as above being founded on the *Mitakshara* Law a different result should be arrived at because of a custom in the Punjab. Their Lordships are not able to consider any such plea because the record was void of averment and of proof of the precise custom which would lead to a different result from that obtained under the *Mitakshara* Law. The result is that the appeal must be allowed and judgment pronounced in favour of the plaintiff, with costs here and in the Courts below, and their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal allowed.*

Solicitor for the Appellants—Mr. *Hy. S. L. Polak.*

Solicitors for the Respondents—Messrs. *Ranken, Ford* and *Chester.*

CALCUTTA HIGH COURT.

APPLICATION IN APPEAL FROM ORIGINAL DECREE No. 58 OF 1921.

August 17, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

GOBIND DAS NATH—APPELLANT

versus

NRITYA KALI DASI—RESPONDENT.

Appellate Side Rules of Calcutta High Court, Ch. IX, r. 25—Costs of paper-book—Documents common to lists of parties—Apportionment of costs.

Where there are papers common to the appellant's list and the special list of the respondent with reference to his cross-objection, under rule 25 of chapter IX of the Appellate Side Rules of the Calcutta High Court, the costs of preparation of the paper-book must to that extent be apportioned between the parties. [p. 791, col. 1.]

Application by the respondent for apportionment of costs.

Babu *Samatul Chunder Dutt*, for the Appellant.

Babu *Kalikinkar Chuckerbutty*, for the Respondent.

JUDGMENT.—This application made by the learned Vakil for the appellant raises a question as to the true effect of the second paragraph of rule 25 of chapter 9 of the rules of this Court in the Appellate Side. The first paragraph of the rule provides as follows: "Every such respondent shall within two weeks after service upon him of the notice required by rule 23 deliver to the Deputy Registrar a list, in the form in rule 16, of the papers, other than those inserted in the appellant's lists and relevant to the subject-matter of the appeal, to which such respondent desires that reference shall be made by the Court at the hearing of the appeal, and which shall be inserted in the paper book at such respondent's expense. Such list shall be termed 'The respondent's List.'" The second paragraph provides that when the respondent intends to take any objection to the decree which he could have taken by way of appeal and the taking of it is subject to the proviso contained

in O. XLI, r. 22, Civil Procedure Code, any papers relevant to maintain this objection shall be included in such respondent's list. In the case before us the appeal is approximately valued at Rs. 1,000. The cross objection taken by the respondent is valued approximately at the same figure. The appellant has filed a list of papers as required by the rules and the estimated costs for preparation of paper book on this basis exceeds Rs. 3,000. The respondent has filed a list which apparently is the respondent's list, namely, the list of papers which he considers necessary for reference at the hearing of the appeal. But as he has taken a cross-objection he is, under the rules, bound to include in his list all papers which are relevant to maintain the cross-objection. The first paragraph of the rules makes it clear that there are no papers common to the appellant's list and the respondent's list. The second paragraph, which requires the respondent to include in his list, any papers relevant to maintain his cross-objection, shows that there may be papers common to this list and the appellant's list. It has been urged that even if this were carried out, the respondent would not be liable to bear the costs of translation and printing of such common papers under r. 38 which, it has been suggested is applicable only to distinct appeals. If that be the correct view of the scope of r. 38, the contingency which has happened is not expressly provided for, and the Court is clearly competent to give such directions as are justified by the circumstances of this case. The obvious course to pursue, when there are papers common to the appellant's list and the special list of the respondent with reference to his cross-objection, is that the costs must to that extent be apportioned. We accordingly direct the respondent to comply with the requirements of the second paragraph of r. 25 and to put in a list of all papers relevant to maintain the cross-objection. If such list contains papers already included in the appellant's list, in respect of papers common to both lists, there will be an apportionment.

The appellant has stated that he is not in a position to spend Rs. 3,000 on paper book in support of an appeal valued at Rs. 1,000. He has expressed a desire to abandon many of his grounds of appeal and to have a less costly paper book. He has further pressed for leave not only to put in a revised list of papers requisite for an appeal so restricted, but to file in Court on the day the Court reopens after the long vacation type-written copies of the necessary papers for the use of the Court and the respondent. In the circumstances of this case we permit the appellant to adopt this course. The revised list will be put in on Monday and the paper book on that basis will be filed on the day the Court re-opens after the long vacation.

A copy of the revised list will be furnished by the appellant to the respondent on Monday so as to enable her to decide what course she should adopt. The appellant will present to the Court on Monday next not merely the amended list but also an application setting out the grounds in the memorandum of appeal which will be abandoned.

If the appellant fails to file in Court on the first day after the long vacation the paper book as undertaken the appeal will automatically stand dismissed with costs and in that event the costs will be assessed at two gold mohurs.

Z. K. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

May 30, 1924.

Present :—Lord Dunedin, Lord Phillimore, Lord Carson and Sir John Edge.

RAI RADHA KISHUN AND OTHERS—APPELLANTS

versus

JAG SAHU AND OTHERS—RESPONDENTS.

Pleadings—Mortgage, suit on—Plea of legal necessity, scope of—Rate of interest—Burden of proof.

A plea in general terms as to the mortgage-bond in suit being illegal and without consideration and necessity opens the defence that there was no necessity to borrow at a high rate of interest, and the question being raised the onus is on the lender to prove that the necessity included borrowing on such terms. [p. 798, col. 1.]

RADHA KISUN *v.* JAG SAHU

Nazir Begam v. *Rao Raghunath Singh*, 50 Ind. Cas. 434 ; 41 A. 571 ; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700 ; 21 Bom. L. R. 484 : 26 M. L. T. 40 ; 30 C. L. J. 86 ; (1919) M. W. N 498 ; 1 U. P. L. R. (P. C.) 49 (P. C.) ; *Hurro Nath Roy* v. *Randhir Singh*. 18 C. 311 ; 18 I. A. 1 : 15 Ind. Jur 34 ; 5 Sar. P. C. J. 642 ; 9 Ind. Dec. (N. S.) 207 (P. C.) ; *Nand Ram* v. *Bhupal Singh*, 13 Ind. Cas. 5 ; 34 A. 126 ; 8 A. L. J. 1294 ; *Munna Lal* v. *Karu Singh*, 56 Ind. Cas. 766 ; 1 P. L. T. 6 ; 13 L. W. 652 ; 30 C. L. J. 256 (P. C.) ; *Ram Bujhawan Prosad Sing* v. *Nathu Ram*, 71 Ind Cas. 988 ; (1923) A. I. R. (P. C.) 37 ; 4 P. L.T. 29 ; 32 M. L. T. 120 ; 44 M. L. J. 615 ; 25 Bom. L. R. 568; (1923) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25; 18 L. W. 767 ; 1 P. L. R. 445 ; 23 C. W. N. 446 ; 50 I. A. 14 (P. C.), referred and followed.

As in all questions of onus, a certain amount of evidence may cause the onus to shift, and evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail. But when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. [p. 793, col. 1.]

Mr. *K. Brown*, for the Appellants.

Messrs. *A. M. Dunne* and *S. B. W. Ramsay*, for the Respondents.

JUDGMENT.—The present action was brought to enforce a mortgage on the family estate which had been executed by a *pardanashin* lady, now deceased, who had had a widow's right in the said estate. The mortgage bore to be for Rs. 775 with compound interest at 24 per cent., with half-yearly rests. The Subordinate Judge held that the mortgage was enforceable only as to Rs. 329. Necessity as to the remainder not having been proved, he decreed for Rs. 329 as principal and for interest at only 24 per cent. simple. This brought out the interest at Rs. 1,178-12-9. The High Court agreed as to the principal but held that compound interest should be charged, which brought out the total sum at Rs. 8,545-11-4

The view of the learned Subordinate Judge is concisely expressed in his finding on the 5th issue. He says :—

'*Issue No.* 5.—The amount covered by both the handnotes (Exts. 1 and 2 (*a*)) carried interest at 2 per cent. per month. The bond in suit was executed only a month or so after the execution of these handnotes and there is absolutely no evidence adduced by the plaintiff to show that pressure for repayment of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 2 per cent. with six monthly rests. Compound interest at this rate seems to be very high and the extent of its exorbitancy can be well gauged by the fact that Rs. 775 has run to Rs. 14,500 from October 1902 to November 1915. To make the defendants liable for such exorbitant interest the plaintiffs were bound to prove that Bachu Kuar could not get money at a lower rate but this they have not done (6 C. L. Journal, p. 462). I would, therefore, allow simple interest at 24 per cent. per year as stipulated for by the notes (Exts. 1 and 2).

The learned Judges of the High Court reversed because, in their opinion, there was no specific statement in the defendants' pleading raising the question of the necessity for the rate of interest and that, therefore, the Subordinate Judge was wrong in going into the matter.

This point has, in their Lordships' view, been clearly decided by the Board. Turning to the pleadings in this case the defendants, in their written statement, allege as follows:—

"The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity."

Now in the case of *Nazir Begam* v. *Rao Raghunath Singh*, (1) the judgment of the Board is as follows, at p. 148 :—

"In the written statement filed on behalf of the defendants one of the points taken was that the property mortgaged was ancestral property and that there was no legal necessity to execute the document sued upon. In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the the defendants to contend that though the necessity for borrowing the principal sum was accepted there was no necessity to borrow on the very onerous terms of this mortgage. This line of defence being thus open to the defendants the pleas laid down by this Board in

(1) 50 Ind. Cas. 434; 41 A. 571; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P.C.) 49 (P. C.).

Hurronath Roy v. *Rundhir Singh* (2) and in *Nand Ram* v. *Bhupal Singh* (3) apply."

This makes clear two points. First that a plea in general terms opens the defence that there was no necessity to borrow at the high rate of interest and, second, that the onus of showing there was necessity lies on the lender. But there is further and subsequent authority. In the case of *Munna Lal* v. *Koru Singh* (4) [29*th July* 1919, *not reported*,] the passage just cited is repeated and affirmed and lastly, in the case of *Ram Bujhawan Prosad Singh* v. *Nathu Ram*, (5) there is this passage:—

"It is not possible to say, after the decision of the Board in the case of *Nazir Begam* already referred to, that a plea of no legal necessity for a loan and that the property is not at all liable for the payment of the amount claimed does not open the door for a defendant to say that the rate of interest is excessive and place on the plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made."

In view of these authorities their Lordships cannot consider the question as still open. A plea in general terms as here raises the question and the question being raised the onus is on the lender to prove that the necessity included borrowing on such terms. As in all questions of onus, a certain amount of evidence may cause the onus to shift, and evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail. But when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. For these reasons their Lordships are of opinion that the judgment of the High Court cannot be supported on the grounds given.

The plaintiff's Counsel urged that if this view should prevail the judgment of the Subordinate Judge should not be restored *simpliciter* but the case should be remitted for further enquiry and he called attention to the fact that certain evidence proffered was refused by the Subordinate Judge as unnecessary and that a petition to the High Court for allowance of this evidence was not dealt with as, in view of the High Court, it became unnecessary to deal with it.

Now, the evidence in question consisted of the production of two bonds granted by the same widow borrowing at a high rate of interestand decree obtained on one of the bonds, and the tender of a witness to speak to the execution of one of the bonds. Their Lordships do not think that a remit is necessary. Evidence simply that on one other occasion the widow had borrowed at high interest is not in any way conclusive as of what she might have done on the occasion in question, and as no other evidence was tendered their Lordships think, that the Subordinate Judge was justified in saying, as he did that "there is no evidence adduced by the plaintiffs to show that pressure for repayment of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 24 per cent. with a six monthly rest."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the decree of the Subordinate Judge restored, the appellants to have their costs here and in the Courts below.

The petition of the respondents for the admission of further evidence will be formally dismissed with costs.

K. S. D. *Appeal allowed.*

Solicitor for the Appellants—Mr. *H. Polak.*

Solicitors for the Respondents—Messrs. *Barrow Rogers* and *Nevill.*

(2) 18 C. 311; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar P. C. J. 642; 9 Ind. Dec (N. S) 207 (P C.).
(3) 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294.
(4) 56 Ind Cas. 766; 1 P. L. T. 6; 18 L. W. 652; 39 C. L. J 256 (P. C).
(5) 71 Ind Cas. 939; (1923) A. I. R. (P.C.) 37; 4 P. L. T. 29; 32 M. L. T. 129; 44 M. L. J. 615; 25 Bom. L. R. 568; (1923) M. W. N. 382; 5 Pat. 285; 38 C. L. J. 25; 18 L. W 767; 1 P. L. R. 445; 28 C. W. N. 446; 50 I. A. 14 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE NO. 143F OF 1922.

July 10, 1923.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

NOWRANG SINGH —PETITIONER
versus
JANARDAN—OPPOSITE PARTY.

Court Fees Act (VII of 1870), s. 14, Sch I. Arts. 4, 5—Review, application for—Presentation, what amounts to—Presentation to Stamp-Reporter—Application presented on 90th day—Delay in signing decree—Refund of half fees.

The presentation of an application for review of judgment to the stamp-reporter is a presentation within the meaning of Articles 4 and 5 of Schedule I to the Court Fees Act. [p. 794, col 2.]

When a decree of which review was sought was not signed till more than six weeks after the date of the judgment and the application for review was presented on the 90th day after the date of the judgment,

Held, that this was a fit case in which a certificate ought to issue under section 14 of the Court Fees Act, and that the applicant ought not to be deprived of the benefit of Article 5 of Schedule I to the Act. [p. 794, col. 2.]

Soyera Bibi v. *Bhutnath Halder*, 15 Ind. Cas. 455 : 15 C. L. J 505 ; *Gangadhar Karmakar* v. *Shekhar Basini Dasya*, 35 Ind. Cas. 348 : 24 C. L. J. 235 ; 20 C. W. N. 967, referred to.

Application for review in appeal from Original Decree No. 191 of 1919.

Babus *Satindra Nath Mukerjee* and *Rama Prasad Mookerjee*, for the Petitioner.

Babus *Ram Charan Mitra*, *Narendra Chandra Bose* and *Satyendra Nath Mitter*, for the Opposite Party.

JUDGMENT.—This is an application for review of judgment and decree in an appeal from original decree. The judgment was delivered on the 7th June, 1922. The decree was signed on the 21st July 1922. The application for review was presented to the stamp reporter on the 6th September 1922. The Court-fee paid on the application was one-half of the Court-fee paid on the memorandum of appeal. The application was returned by the stamp reporter on the very day it was presented. It thereupon became incumbent on the petitioner to present the application by way of motion in open Court to the Division Court of whose decision the review was sought, within seven days of the return of the application. If the Judges of such Division Court were not sitting together, the application had to be presented to the senior of the Judges who might be then attached to the Court and present. On the 6th September 1922, when the application was returned by the stamp reporter, the Court was closed for the long vacation. The senior member of the Division Court was not sitting and the junior member had ceased to be a Judge of the Court. In these circumstances the application was presented to the senior Judge on the 13th November 1922, when the Court reopened after the long vacation. The question arises, whether, in these circumstances the application should be entertained.

Article 4 of Schedule I of the Court-Fees Act prescribes that an application for review of judgment, if presented on or after the 90th day from the date of the decree, shall bear Court-fee payable on the plaint or memorandum of appeal. Article 5 provides that an application for review of judgment, if presented before the 90th day from the date of the decree, shall bear one-half of the Court-fee leviable on the plaint or memorandum of appeal. In our opinion, the presentation to the stamp reporter was presentation within the meaning of Articles 4 and 5 of schedule I to the Court-fees Act. The question, consequently, arises whether this entitles the petitioner to have the application heard upon payment of half of the fee. The date of the decree, under O. XX, r. 7 of the Civil Procedure Code, is the date of the judgment, and consequently on the 6th September 1922, when the application was presented to the stamp reporter the 89th day from the date of the decree had already elapsed. But it is plain that, under section 14 of the Court-Fees Act, this is precisely a case where the applicant cannot be blamed for the delay, for the decree itself was not in existence till the 21st July 1922. We are of opinion that it would be unjust to deprive the petitioner of the advantage conferred by Article 5 of Schedule I of the Court-Fees Act. The position thus is that if the strict

letter of the law be followed, the applicant should be called upon to pay one-half of the court-fee in addition to what he has paid before, and we should then forthwith grant a certificate under section 14 for a refund of this sum. This would be an idle formality and would needlessly delay the consideration of this application on the merits. We accordingly direct that this application be heard as if the full fee had been paid and one-half had been returned. The view we take is not affected by the decision in *Sayera Bibi* v. *Bhutnath Holdar* (1), which was decided under very different circumstances and merely affirmed the proposition that an application for review of judgment, presented on the 90th day, the previous day being a Sunday should bear the full amount of court-fees ; see also *Gangadhar Karmaker* v. *Shekhar Basini Dasya* (2).

We now proceed to consider the case on the merits. We are of opinion that this application for review should not succeed. The petitioner has not disputed the accuracy of the propositions of law enunciated in our judgment, which is reported as *Nowrang Singh* v. *Janardan* (3). He has not contested the position that the injury sustained by him owing to the trespass on the part of Myer & Co. cannot be urged as a defence against the claim put forward by the plaintiff, unless such act was directly or indirectly authorised by the plaintiff. He has urged, however, that there is a provision in the lease dated the 22nd April, 1897, which is the root of the title of Myer & Co. and supports the contention that the action of Myer & Co. was in essence authorised by the landlord. The passage is as follows: "If you raise out coal by joining the gallery of the khad of this land settled hereby with the gallery of anybody else's khad, or if you raise out coal by digging beyond the boundary of this mouza and treating it as part of another mouza, then you will have to pay and will pay compensation for the quantity of coal which will be proved to have been misappropriated by the aforesaid deceitful means, at the rate of one anna per maund." This clearly did not contemplate an authorisation by the landlord, so as to enable Myer & Co. to commit acts of trespass on adjoining lands. What this does in substance is to impose on them a heavy penalty, if they should commit such unlawful acts. This is made clear by an earlier passage in the lease, which runs to the following effect : "After digging khad in the said settled land, you will not be entitled to dig across and encroach upon any land beyond the same. If you dig across the same or take the coal thereof then you will be liable for the entire loss which will be sustained by reason thereof." These two clauses taken together plainly indicate that the landlord did not authorise any unlawful act on the part of the lessee. He imposed a penalty on him if he should commit an unlawful act, and, at the same time, warned him that he would be liable to pay the entire loss which might be caused by reason of such act. In these circumstances, it is impossible to sustain the position that what happened in this case might be imputed to the plaintiff as landlord. In this view, it is not necessary for us to consider whether the petitioner was entitled to take this point in support of his application for review, not withstanding the decision of the Judicial Committee in *Chhajju Ram* v. *Neki* (4).

The Rule is discharged with costs—two gold mohurs.

Z. K. *Rule discharged.*

(1) 15 Ind. Cas. 455 ; 15 C. L. J. 505.
(2) 35 Ind. Cas. 348 ; 24 C. L. J. 235 ; 20 C. W. N. 967.
(3) 70 Ind. Cas 161 ; 36 C. L. J. 28 ; 27 C. W. N. 71 ; (1923) A. I. R. (C) 41; 5 O. C. 68.

(4) 72 Ind. Cas. 566 ; 49 I A 144 ; 36 C. L. J. 459 ; 30 M. L. T. 295 ; 26 C W. N. 697 ; 41 P. L. R. 1922 ; 3 P. L T. 435 : (1922) A. I. R. (P. C.) 112 ; 16 L. W. 37 : 17 P. W. R. 1922 ; 3 L. 127 ; 43 M. L. J. 332 ; 24 Bom. L. R. 1238 ; 4 U. P. L. R. (P. C.) 99 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 212 OF 1922.

September 15, 1923.

Present :—Mr. Dalal, J. C.

Bibi BATUL KHANAM—DEFENDANT—APPELLANT

versus

SAITANAT BAHADUR KHAN—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877) s. 22—Specific performance—Suit to recover under executed contract of lease, nature of—Discretion of Court.

A lease granted by a co-sharer contained a covenant that should partition take place between the co-sharers and the leased land be allotted to a co-sharer other than the lessor, the lessee would be entitled to take possession of an equal area of land of the same quality as the land leased out of the area allotted to the lessor. The lessee got into possession of the leased land but subsequently on partition the land was allotted to another co-sharer and the lessee sued for possession of an equal area of land from the area allotted to his lessor ;

Held, that the suit was one for recovery of possession under an executed contract and not one for specific performance of an executory contract and no question, therefore, of the exercise of the Court's discretion under section 22 of the Specific Relief Act could arise. [p. 797, col. 2., & p. 798, col. 1.]

Kalka Singh v. *Himyat Ali*, 10 O. C 218; *Wolverhamptom and Warsall Ry* v. *London and North West Ry*, (1872) 16 Eq. 433 ; 43 L. J. Ch. 131 ; *Sheo Narain* v. *Beni Madho*, 23 A. 285 ; A. W. N. (1901) 88 ; *Tacwar Singh* v. *Bahori Singh*, 26 A. 497, referred to.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 7th March 1922, modifying the decree of the Munsiff, Sultanpur, dated the 3rd January 1921.

Mr. *Bisheshar Nath Srivastava* for the Appellant.

Mr. *Niamatullah* for the Respondent.

JUDGMENT.—The defendant, Bibi Batul Khanam, was one of the proprietors of the Taluqa, Maniarpur, in the Sultanpur District. The estate was encumbered and attached by the Collector for non-payment of revenue. During this attachment the defendant lady, to obtain ready cash, executed a perpetual lease in respect of 90 *Bighas* and 17 *Biswas* of land in village *Rankidih*, in favour of the plaintiff, Saltanat Bahadur Khan. She was not the sole owner of this specified area of land but was proprietor thereof along with other owners of the Taluqa. The lessee paid a premium of Rs. 1,000 and an annual rent of Rs. 150 was reserved. The other conditions of the lease were, that the lessee was to acquire heritable and transferable rights in the land, that the amount of rent was to be perpetual and incapable of enhancement in case of revenue being enhanced, that the lessee would obtain possession on release of the land from attachment by the Collector and finally that should partition take place between the co-sharers of the Taluqa and the leased land be allotted to a co-sharer other than the lessor lady, the lessee would be entitled to take possession of the land of the same area and quality as the land leased, in any other village allotted to the lessor. There were various defences put forward by the lady defendant, but in this appeal only one point as to the applicability of section 22 of the Specific Relief Act remains to be decided. The other pleas put forward in the two Subordinate Courts are not urged here. It was argued on behalf of the appellant here as in the lower Courts, that the suit was one for specific performance of a contract, that the contract was a hard bargain and that, therefore, the Court should exercise its discretionary powers under the Statute referred to above in refusing specific performance and should only grant a money compensation. Both the lower Courts have held that the suit was one for possession on the basis of a deed of transfer and not one for the specific performance of a contract. This finding is correct. The plaintiff has come to Court on breach of one of the stipulations of an executed contract. The property was released by the Collector in March 1918 and subsequently on a partition between the co-sharers of the Taluqa, the village Rankidih was allotted to a co-sharer other than the defendant lady. Under such circumstances, under one of the stipulations of the lease, the plaintiff was entitled to take possession of 90 *Bighas* and 17 *Biswas* of land of similar quality to that described in the lease in any other village allotted to the defendant. In accordance with this right of the plaintiff, he desired to take possession of lands detailed in the plaint,

But the defendant resisted possession. Whereupon he brought the present suit. It was admitted on behalf of the defendant appellant by her learned Counsel that the contract was an executed one as regards lands in village Rankidih and the suit would have been one for possession of that land and not one for specific performance if that village had been alloted to the defendant. It is, therefore, difficult to see how a subsequent partition between the co-sharers can make any difference in the nature of the contract between the parties. It was also admitted that the plaintiff was not required to obtain any other document of transfer from the lady as his title to the lease. The sole argument was, that the land now decreed to the plaintiff was not described in the lease and it was necessary for the plaintiff to come to Court to get the lands specified. The necessity for seeking the aid of a Court of law does not distinguish an executed from an executory contract. Even in the case of Rankidih being allotted to the defendant, if the defendant had refused possession! thereof to the plaintiff, he would have been put to the necessity of seeking the Court's aid to obtain possession of land specified in the lease and situated in that village. As I have already pointed out, the appellant's learned counsel admitted that as regard Rankidih land the contract was an executed contract. The distinguishing principles are laid down in a ruling of this Court referred to by both the lower Courts (*Kalka Singh* v. *Himayat Ali* (1). Certain observations of Lord Selborne are quoted there ; they explain the difference between the specific performance of an executory agreement and the performance of certain stipulations of an executed contract and point the confusion which naturally arises from the etymological meaning of the words' specific performance' signifying " any direction given by the Court for the doing of anything whatever in specie" (*Wolverhamptom and Walsall Railway* v. *London and North West Railway*, (2) Out of the other cases quoted by the learned Judge, two cases of the Allahabad High Court may be mentioned to contrast the two classes of contract. In both cases the question was whether Article 113 or Article 144 of the Limitation Act was to apply according as the suit was considered one for specific performance or for recovery of possession. In both cases the claims were based on an award. In the case reported in *Sheo Narain* v. *Beni Madho* (3) an award specifically granted certain lands to the plaintiffs of that case and the award was their title deed. In that case it was held that the suit was one for possession on foot of a title deed. In the other case reported in *Talewar Singh* v. *Bahori Singh* (4) the award gave directions that the parties should transfer the one to the other different portions of the property which was in dispute. In this case the award was not the title deed of the plaintiff but necessitated the execution of certain documents of title. So it was held that the suit on the basis of the award was one for the specific performance and not one for possession. I think that the distinction is very clearly brought out in these two rulings. These authorities are sufficient for the decision of the point in controversy between the parties. As the matter, however, is one of interest, it may be permitted to quote one more ruling of the Madras High Court quoted by the learned counsel for the plaintiff respondent. The principles of that ruling appear to be apposite here. In 1903 a deed of exchange was executed between the plaintiffs' father and some of the defendants and contained covenants that, should there arise any dispute in the matter of enjoyment of the property specified in the deed of exchange, each shall enjoy as before their respective lands. In 1908 the plaintiff was dispossessed of the lands given by the defendants in execution of decree passed against the defendants. In 1916 the plaintiff sued to recover the lands given by his father under the deed of exchange and the plea of the bar of limitation under Article 113 of the Limitation Act was raised. It was then held that the suit was not one for the specific performance of an executory contract but one for possession under the title deed of 1903. I think the same principle will apply here and the present suit must be considered

(1) 10 O. C. 218.
(2) (1873) 16 Eq. 433 ; 43 L. J. Ch. 2. 1312.
(3) 23 A. 285; A. W. N (1901) 83.
(4) 26 A. 497.

to be one for possession on the basis of the lease.

Holding this view, the question of discretion, to be exercised under section 22 of the Specific Relief Act does not arise. I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 335 OF 1922.

December 18, 1923.

Present:—Mr. Justice Rankin and Mr. Justice Page.

SAHEBZADA MAHAMMAD MUNWAR SULTAN—PETITIONER—APPELLANT

versus

SAHEBZADI SHAMSUNNESSA BEGUM—OPPOSITE PARTY—RESPONDENT.

Lunacy Act (IV of 1912), ss. 38, 62—Inquisition, application for—Procedure—Court, duty of.

To have an inquisition into the state of health, the state of mind, the state of property and general capacity of a person under section 38 or section 62 of the Lunacy Act, is a thing which affects that person so prejudicially that it ought not to be taken except it be first ordered upon a careful consideration of evidence. [p. 798, col. 2.]

Nothing is contained in the Act itself to direct or guide a Judge as to how he shall consider applications for an inquisition and probably no rules exist for dealing with the matter; but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, an inquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses. [p. 978, col. 2.]

Mohammad Yaqub v. *Nazir Ahmad*, 58 Ind. Cas. 617; 42 A. 504; 18 A. L. J. 577, relied on.

Appeal against the order of the District Judge, 24-Pargannas, dated the 8th July 1922.

Babu *Mahendra Nath Roy* and *Harendra Kumar Sarbadhikary*, for the Appellant.

Babu *Mritunjoy Chattapadhaya*, for the Respondent.

JUDGMENT.—I am of opinion that the course taken in the Court below affords not a little just grievance to the lady against whom the proceedings were taken but it affords none whatever to the present appellant. The smallest attention to the words of the Indian Lunacy Act whether they be the words of section 62 or the words of section 38 shows this that the Legislature appreciates that to have an inquisition into the state of health, the state of mind, the state of property and general capacity of a person is a thing which affects that person so prejudicially that it ought not to be taken except it be first ordered upon a careful consideration of evidence. It was said in a case, which is, I think, the case to which some reference is made in the judgment of the Court below [*Muhammad Yaqub* v. *Nazir Ahmad* (1)]. "It is true that nothing is contained in the Act itself to direct or guide a Judge as to how he shall consider applications for an inquisition and probably no rules exist for dealing with the matter; but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, an inquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses." Now, in this case, an application was presented to the learned District Judge and was registered on the 31st of March 1922. In May of that year the lady against whom it was made who appears to be an old lady and a *purdanashin* lady filed a sworn statement in reply and certain documents having been filed, the first

(1) 58 Ind. Cas. 617; 42 A. 504; 18 A. L. J. 557.

order made is Order No. 5 of the 15th of May. "Pleader for Petitioner appears and states that a very lengthy written statement has been filed by the Opposite Party and that until he has had time to consider the objections, it will not be possible for issues to be framed." Now, that shows that the pleader for the Petitioner had entirely omitted to notice that, before anything like an enquiry involving framing of issues should be undertaken, the learned Judge had a most important duty to perform as regards this lady. He had no business whatever to tumble into an inquisition. His business was carefully to consider whether there were any grounds for holding an inquisition. The order goes on: "It is desirable, however, that the hearing of this case should be expedited as much as possible. Issues will be settled on the 22nd of May." That seems to me to show that the learned Judge had entirely omitted to notice what the duty was that rested heavily on his shoulders. On the 22nd May, in pursuance of the attitude disclosed by the order of the 15th an issue was framed being no less than a complete issue as to whether the lady was of unsound mind and incapable of managing herself and her affairs. Accordingly the Judge said: "It will now be necessary to have a report of the mental capacity and condition of the alleged lunatic"; and then, after some little time, on the 31st, two eminent medical practitioners were appointed to make an examination. Thereupon, the lady filed an application and it is rather interesting to see the attitude of mind disclosed by this application. I propose to take the narrative as regards this from the judgment of the learned Judge himself. "Therefore, on the 16th June last, an application was filed on behalf of Shamsunnessa Begum praying that the inquisition which had been ordered to be held by two medical officers"—this may be a mere quotation but it shows a considerable confusion of mind on the part of somebody—"might not be proceeded with on the ground that it would involve considerable expense and inconvenience and praying that instead thereof the Court would be pleased to fix a date for personal examination of the alleged lunatic in camera with a view to ascertaining whether she is, in fact, a lunatic and whether there is any need for holding an inquisition." A more proper application than that I find it difficult to conceive. I should have thought that the lady was entitled to apply to this Court in revision to have the proceedings in the Court below stopped. She applied, however, to the Trial Court asking it to do its duty to consider whether there was any need for holding an inquisition and, in support of that application, she called attention of the Court to the case of *Muhammad Yaqub* v. *Nazir Ahmad* (1) which rightly or wrongly advises the Judges before ordering an inquisition to take steps, if possible, to see the alleged lunatic in person. The learned Judge in the present case appreciated the force of the lady's application and accordingly an order was made directing that she should be examined in camera and the learned Judge's order says: "In these circumstances," he has referred to some matters of suspicion, "it is the more desirable that the Court should see the alleged lunatic and satisfy itself whether there are any grounds for ordering the inquisition formerly prayed for." Those are the words of the learned Judge's own order. He did see the alleged lunatic and her answers are in the paper-book. He came to the conclusion having regard to the allegations in the petition that the whole application of the applicant was a piece of oppression and was *mala fide*, and he dismissed the application then and there. It is said that the learned Judge had begun the inquisition. I quite appreciate the force of the criticism that is made in this connection but here the learned Judge had slid into the proceedings proper to an inquisition without knowing it and without making any order or coming to any decision which would entitle him to commence it. It is arguable that the power conferred by section 41 of the Indian Lunacy Act is a power which only arises when an inquisition has been ordered. The present case is not a case of the Court exercising a power to require the lunatic to come before it personally. This is a case where the alleged lunatic herself asked to be examined and the learned Judge had at any rate some authority in his support in examining the lady in the presence of the parties, even on the assumption that there was no inquisition. In these circumstances, what happened was that owing to the lady's taking a very reasonable step in making her well-founded application on the 16th of June, the learned Judge saw his error. He came to the conclusion

that there was no ground for ordering an inquisition and he must have, I think, repented of the fact that he had not with sufficient care followed the statute and let himself slide into holding an inquisition which he had no jurisdiction to hold. In these circumstances it seems to me that while the alleged lunatic may have some grievance in the matter, the present appellant has none, and that his appeal should be dismissed with costs, hearing fee two gold mohurs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 33 OF 1923.

April 2, 1924.

Present :—Mr. Neave, A. J. C. and Mr. Kendall, A. J. C.

HARI KISHUN DAS, LALA—PLAINTIFF —APPELLANT

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CHOUDHRI MOHAMMAD SAFI JAN—DEFENDANT—RESPONDENT.

Court of Wards Act (*III of* 1899), *ss.* 8, 9, 15, 26. 41, 46—*Contract Act* (*II of* 1872), *ss.* 11, 65—*Jurisdiction of Court of Wards—Wards, position of—Abandonment of Jurisdiction—Failure to assume management, effect of—Disqualified proprietor and Voluntary Wards, whether distinguishable—"Shall be presumed", meaning of—Disqualified proprietor, mortgage by—Mortgage, whether void* ab initio—*Compensation—Erroneous representation of law—Estoppel.*

Under sections 9 and 41 of the U.P. Court of Wards Act, it is only with the sanction of the Local Government that the Court of Wards can either assume or abandon the superintendence of any person or property. Once a notification under section 14 of the U. P. Court of Wards Act has been issued, the property of the ward is considered to be under the Court's superintendence and the mere fact that the Court does not take over the management of the property in fact cannot affect the legal character of the Ward and of his property. These remain under the Court's superintendence with all the consequences arising therefrom until a further notification is published under section 46 of the Act. [p. 803, col 2.]

There is no distinction between the proprietors disqualified under section 8 of the U. P. Court of Wards Act and proprietors whose estates are taken over on their own application under section 9 of the Act. Both classes of proprietors are brought under the common denomination of Ward and labour alike under the disabilities imposed on all wards. [p. 802, col. 2.]

The words "shall be presumed" in section 15 of the U. P. Court of Wards Act cannot be construed as allowing any evidence in rebuttal. [p. 803, col. 1.]

A mortgage executed by a proprietor whose estate has been notified as under the superintendence of the Court of Wards is void *ab initio* notwithstanding the fact the Court has never taken over the actual management of the estate. [p. 803, col. 2.]

The failure of the Court of Wards to take over management of an estate notified to be under its superintendence had not the effect legally of removing the ward and his property from its superintendence. [p 803, col 1.]

Section 26 of the U. P. Court of Wards Act empowers the Court of Wards to appoint a manager for any property under its superintendence, and though normally such managers are specially qualified officers there is nothing in the Act itself to prevent the Court of Wards from allowing a ward to carry on the duties of a manager. [p. 803, col. 1.]

Section 11 of the Contract Act puts minors and persons disqualified by law from contracting, on the same footing. [p 804, col. 1.]

There are many cases in which equity will give relief against frauds perpetrated by infants. Whereever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Whereever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But he cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud. [p 804, col. 2]

Mahomed Syedol Ariffin v. *Yeoh Ooi Sarki*, 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678; 43 I. A. 256 (P.C.), relied on.

Section 65 of the Contract Act starts from the basis of there being an agreement or a contract between competent parties and has no application to a case in which there never was and never could have been any contract. [p. 805, col. 1.]

Mohori Bibee v. *Dharmodass Ghose*, 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R 421; 8 Sar. P.C. J. 374 (P.C.), relied on.

Therefore where an agreement is void because the party entering into it was incapable from contracting as where the agreement is by a disqualified proprietor under the superintendence of the Court of Wards no compensation can be allowed under section 65 of the Contract Act [p. 805, col. 1.]

HARI KISHUN DAS LALA v. CHOUDHRI MOHAMMAD SAFI JAN

A representation of a question of law cannot operate as an estoppel. A representation by a proprietor, whose estate has been notified as under the superintendence of the Court of Wards, that he is competent to transfer the estate does not operate as an estoppel. [p. 804, col. 1.]

Appeal against the decree of the Subordinate Judge, Unao, dated the 11th April 1923.

Messrs. *Bisheshar Nath*, *J. N. Chak* and *Bishambhar Nath Srivastava*, for the Appellant.

Messrs. *Niamat Ullah* and *E. R. Qidwai*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for the recovery of Rs. 26,147-2-0 principal and interest on foot of a mortgage-deed dated 10th April 1912 for Rs. 17,000 and a deed of further charge dated 9th October 1916 for Rs. 3000. Both carried interest at 0-7-6 per cent. per mensem with 6 monthly rests. There was a further plea that after the date for payment had expired the defendant respondent agreed to pay enhanced interest at 10 annas 8 pies per cent. per mensem but as this agreement was not embodied in any registered deed it has been given up in appeal.

The execution of the deeds and receipt of consideration was admitted but the defence was that the defendant was on the dates when the documents were executed a disqualified proprietor, as his estate had been taken under the superintendence of the Court of Wards, and was, therefore, not competent to enter into these transactions. The lower Court has accepted this defence and dismissed the plaintiff's suit.

The defendant-respondent Chaudhri Safi Jan is one of the younger brothers of the late Chaudhri Mohammed Jan who succeeded his father as taluqdar of the Kakrali estate. In 1902 a dispute as to the succession to the estate was settled, Mohammad Jan being recognised as the taluqdar, and alloting to his younger brothers and sisters certain villages as *guzara*. These villages they were to take as full proprietors. As the estate was considerably in debt it was further agreed that cerain other villages should be set apart for payment of the debts. These were entered in Schedule B attached to the agreement and it was settled that Mohammad Jan was, if possible, to pay off the debts from the income derived from them. If this could not be done he was to sell all or any portion of them. Any of the property in Schedule B. which might be left over after payment of the debts was be divided between the brothers, Mohammad Jan taking half and the rest dividing the remaining moiety.

Not only did Mohammad Jan find himself unable to pay off the debts already subsisting but he incurred heavy debts himself and eventually applied under section 9 of Act III of 1899 to have his estate taken over by the Court of Wards. The Board of Revenue found on investigation that it would be impossible to pay off the debts without selling some portion at least of the property entered in Schedule B; and in a letter dated 17th February 1910 (Ex. 38) the Joint Secretary to the Board wrote to the Commissioner that "the Board are prepared to recommend the assumption by the Court of Wards of charge of the Kakrali estate in the Hardoi district, provided an application under section 19, Act III of 1899 be submitted by all Chaudhri Mohammad Jan's brothers as they have an interest in the property mentioned in Schedule B to the agreement of the 5th February 1902." The respondent and the other brothers of Chaudhri Mohammad Jan consented to this and a registered agreement (Ex. P-1) was executed by them on the 25th February 1910 to the effect that the estate should be taken under the superintendence of the Court of Wards, which should be empowered to sell any portion of the property which it thought fit. On the 16th of April 1910 the following notification was published in the United Provinces Gazette :—

"Notification No. 1396—X 607 of 1909, Dated, Allahabad the 15th of April, 1910.

Under section 14 of the United Provinces of Agra and Oudh, Court of Wards Act, 1899, it is hereby notified that Chauduri Mohammad Jan, Mohammad Ahmad Jan and Mohammad Safi Jan, sons of Chaudhri Mohammad Azim, proprietors of the estate known as the Kakrali estate in the Hardoi, Lucknow and Unao districts, having been disqualified under section 9 of the said Act by Government Order No. 676, dated the 11th April 1910, the Court of Wards has accordingly assumed the superintendence of their property, with effect from the 11th day of April 1910, and the Deputy

Commissioner of Hardoi has been put in charge.

By order of the Board of Revenue, United Provinces of Agra and Oudh.

As will be seen this notification clearly states that Safi Jan has been disqualified under section 9 of the Court of Wards Act and that the Court of Wards has assumed superintendence of his property. This notification was issued under section 14 of the Act and embodied the declaration made by the Local Government under section 9 on the application of the proprietor. It is not disputed that after such a declaration the proprietor became a ward as defined in section 3. It is provided in section 15 that "The whole of the moveable and immoveable property of a ward shall be deemed to be under the superintendence of the Court of Wards from the date of the declaration of the Local Government, in the case of proprietors disqualified under section 8, clause (*b*) or clause (*d*), or in regard to whose property a declaration has been made under section. 9. It is further provided in section 34 that "A ward shall not be competent (*a*) to transfer "or create any charge on or interest in any part of his property which is under the superintendence of the Court of Wards or to enter into any contract which may involve him in pecuniary "liability." Section 10 lays down that "Every declaration made by the Local Government under section 8 or section 9 shall be final and shall not be questioned in any Civil Court." On behalf of the appellant, however, it is contended that he is entitled to go behind the notification and to show that it does not mean what it appears to mean and that Safi Jan was never disqualified. His learned Advocate argues that actually the Court of Wards never assumed superintendence of his property and never intended to do so. He further pleads that the words "shall be deemed" in section 1[illegible] import nothing more than a rebuttable presumption and that section 10 refers only to the expediency of the declaration. Another line of argument taken is that the defendant having obtained the consideration for the deeds by inducing the plaintiff to believe that he was competent to enter into the transactions is estopped from disputing the plaintiff's right to enforce his mortgage. In this connection it is maintained that the plaintiff is certainly entitled to recover so much at all events of the mortgage-money as was applied by the defendant in discharging the previous mortgage held by the Allahabad Bank and entered into long before the issue of the Government notification.

The appellant draws a distinction between the proprietors disqualified under Section 8 and proprietors whose estates are taken over on their own application under section 9 and maintains that all wards are not disqualified proprietors. This distinction, however, is nowhere recognised in the Act itself. As has already been pointed out both classes of proprietors are brought under the common denomination of ward and labour alike under the disabilities imposed on all wards.

There is abundant evidence on the record to show that the Court of Wards never took over the management of the *guzara* villages. As early as the 10th October 1910, the Deputy Commissioner reported to the Commissioner of Lucknow (Ex. 44) "Chaudhri Safi Jan's debts are increasing but it is doubtful whether he will agree to have his estate taken under the management of the Court of Wards, and I do not recommend it." In his letter forwarding this report to the Board the Commissioner remarked "There seems no necessity for the estate to undertake the responsibility of managing these villages" and the recommendation was accepted by the Board of Revenue (Ex. 43). Chaudhri Safi Jan went on managing his own *guzara* villages, sued and was sued in his own name and even advertised some of the villages for sale. This last act, however, resulted in inquiries from the Special Manager who had been appointed to look after the *taluqa* and a reminder that the sanction of the Board was necessary (Ex. A-16). In this connection it is worth noting that the Special Manager's attention had been drawn to the matter by a would-be purchaser of Lucknow city who evidently realised that before dealing with Safi Jan he must obtain the permission of the Board. This fact is of importance as evidence that the position of Chaudhri Safi Jan was generally understood in Oudh.

The question whether the neglect of the Court of Wards to perform in respect of the younger brothers and their *guzara* property the duties imposed upon it by Chapters IV and V, Act III of 1899 can be held legally to have had the effect of removing these wards and their property from its superintendence is the most important one in the case. The sections of the Court of Wards Act which have been quoted prescribe that once the necessary notification has been published all the property of the wards shall be deemed to be under the superintendence of the Court of Wards. The learned Advocate for the appellant asks us to hold that the history of the case and the conduct of the Court of Wards both indicate clearly that neither the younger brothers of the taluqdar nor the Board of Revenue intended that any property should be taken under the Court's superintendence except the *taluqdari* property and that he is entitled to use evidence to rebut the presumption arising from Section 15. He referred particularly to section 3 of Act 26 of 1919 in support of his theory as an instance of the use of the word "deemed" to mean no more than "presumed." That section, however, seems to be against him for it has been necessary to employ in it the words "unless the contrary is proved." Under the definition of "shall presume" in the Indian Evidence Act, section 4 these additional words are superfluous. The word "deemed" does not seem to have been defined in any Statute but it is certainly a stronger word than "presumed" and does not imply as that word does a provisional assumption. In our opinion the words "shall be deemed" cannot be construed as allowing any evidence in rebuttal. Again superintendence is clearly distinguished in Act III of 1899 from management. Section 26 of that Act empowers the Court of Wards to appoint a manager for any property under its superintendence, and though normally such managers are specially qualified officers there is nothing in the Act itself to prevent the Court of Wards from allowing a ward to carry on the duties of a manager. The learned Advocate for the appellant has referred to *Mohummad Zahoor Ali Khan* v. *Thakooranee Rutta Kuar* (1) as a case in which their Lordships of the Privy Council held that there might be circumstances in which a female whose estate is under the control of the Court of Wards was not to be considered a disqualified female and that she had power to contract bond debts. In that case, however, the facts were quite different. Though the estate had been taken under the superintendence of the Court of Wards this had been done when it belonged to the sister of the lady whose transactions were then in question. The latter had inherited on her sister's death but had herself not been declared to be disqualified. It has repeatedly been held that the disqualification under the Court of Wards Act is a personal one, *e.g.*, *Lachmi Narain* v. *Fateh Bahadur Singh* (2).

Under sections 9 and 41 of the Act it is only with the sanction of the Local Government that the Court of Wards can either assume or abandon the superintendence of any person or property. The mere fact that the Court of Wards does not take over the management in the manner laid down in Chapter IV and V of the Act cannot affect the legal character of the ward and of his property. These must remain under the Court's superintendence with all the consequences arising therefrom until a further notification is published in the Gazette under section 46 of the Act. In the present case such a notification was published in the Gazette on the 3rd of July, 1920, and in this it was declared that the property of Chaudhri Safi Jan part proprietor of the *Kakrali* estate in the Hardoi, Lucknow and Unao districts had been released from superintendence with effect from the 28th June 1920. From the 11th of April 1910, therefore, until the 28th June 1920, Chaudhri Safi Jan was a disqualified proprietor, incompetent under section 31 of Act III of 1899 to transfer or create any charge on any part of his property which was under the superintendence of the Court of Wards or to enter into any contract which might involve him in pecuniary liability. The mortgage in suit was, therefore, void *ab initio*.

The next question is whether the respondent is estopped from pleading that the deed is void. The appellant's case was that the

(1) 11 M. I. A. 468; 9 W. R. P. C. 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 E. R. 177.

(2) 25 A. 195; A. W. N. (1903) 8.

respondent had assured him that he was competent to transfer and had shown him a *parwana* from the Court of Wards to the effect that the *guzara* villages would not be taken over and that it was on the assurance of this representation that the plaintiff took the mortgage. The learned Subordinate Judge has discussed the evidence adduced by the appellant and has disbelieved that the alleged representation was made. In any case such a representation would be no more than the putting forward by the respondent of a certain view of the law and a representation of a question of law cannot operate as an estoppel. The respondent's disqualification had been published in the Gazette. Though the appellant asserts that he was unaware of this, it is clear that he must have known of it otherwise there would have been no necessity for the respondent to represent that these villages had been left unaffected ; and there is other evidence already referred to that the respondent's position was a matter of common knowledge. The appellant's own witness states "I do not think any attempt was made on behalf of the defendant to conceal the fact that 40 villages had been taken over by the Court of Wards." Once the plaintiff knew that the respondent was a ward he ought to have known that he was incompetent to contract. Any ward of the Court who executes a mortgage must be taken to have represented by implication that he was entitled to do so and if such a plea as this were to be admitted it would be possible to get round every void contract by making use of the principle of estoppel. Section 11 of the Indian Contract Act puts minors and persons disqualified by law from contracting on exactly the same footing. It has been held by their Lordships of the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (3), that even if a minor were guilty of fraudulent misrepresentation there would be no estoppel. In the present case however the appellant has failed to prove even misrepresentation without fraud. Several cases were cited on behalf of the appellant as authority for the contention that a minor who has obtained money misrepresenting his age can be compelled to make restitution even if he were not bound by the contract. These however were all cases in which the minor appeared as a plaintiff. Not a single case has been quoted in which restitution was ordered where a suit was brought against the minor. This question has been discussed at length in *Leslie, Ltd* v. *Shull* (4), referred to by the Privy Council in (*supra*), and it was there stated that "There are no doubt many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud.

Finally it has been argued that under section 65 of the Indian Contract Act the appellant is entitled to recover his money as the agreement was only discovered to be void when the respondent set up the plea that his property was under the Court of Wards. Reference is made to a recent ruling of the Privy Council, *Harnath Kuar* v. *Indar Bahadur Singh* (5). In that case it was held that an agreement discovered to be void *was sue* discovered to be not enforceable by law and on the language of Section 55 of the Indian Contract Act would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. Also that where the agreement was manifestly void from its inception because its subject-matter was incapable of being bound in the manner stipulated but was not discovered to be void till within the period of limitation the case was covered by Section 65 of the Indian Contract Act and the plaintiff was therefore entitled to compensation. In the present case however the agreement was

(3) 39 Ind. Cas. 401 ; 21 C. W. N. 257 ; (1917) M. W. N. 162 ; 19 Bom. L. R. 157 ; (1916) 2 A. C. 575 ; 86 L. J. P. C. 15 ; 115 L. T. 564 ; 32 T. L. R. 678 ; 43 I. A. 256 (P. C.).

(4) (1914) 3 K. B. 607 ; 83 L. J. K. B. 1145 ; 111 L. T. 106 ; 58 S. J. 453 ; 30 T. L. R. 460.

(5) 71 Ind. Cas. 629 ; 26 O. C. 223 ; 9 O. & A. L. R. 270 ; (1922) A. I. R. (P. C.) 403 ; 9 O. L. J. 652 ; 44 M L. J. 489 ; 37 C. L. J. 346 ; 45 A. 179 ; 27 C. W. N. 949 : 50 I. A. 69 ; 18 L. W. 833 ; 33 M. L. T. 216 (P. C.).

void because the party entering into it was incapable of contracting. It was decided in the well-known case of *Mohari Bibee* v. *Dharmodas Ghose* (6) that section 65 of the Indian Contract Act "starts from the basis of there being an agreement or a contract between competent parties and has no application to a case in which there never was and never could have been any contract". The two cases are distinguishable and the present case seems to be governed by the ruling in *Mohari Bibeeri* v. *Dharmodas Ghose* (6). The claim for repayment of the money paid on the respondent's behalf to the Allahabad Bank is evidently barred by time if the case cannot be brought under section 65 of the Indian Contract Act.

A cross objection has been filed by the respondent on the ground that the lower Court has made parties bear their own costs. He relies on a ruling of the Allahabad High Court in *Radhey Shiam* v. *Behari Lal* (7). In the circumstances of this case, however, we are not disposed to regard the order passed as an improper one and we accordingly dismiss both the appeal and the cross objection with costs.

N. H. *Appeal and cross-objection dismissed.*

(6) 30 C. 539 ; 30 I. A. 44 ; 7 C. W. N. 441 ; 5 Bom L. R. 421 ; 8 Sar. P. C. J. 374 (P. C.).
(7) 48 Ind. Cas. 478 ; 40 A. 558 ; 16 A L. J. 592.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2601 OF 1922.

November 20, 1923.

Present :—Mr. Justice Newbould and Mr. Justice Ghose.

CHAND MIA MUNSHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TUKAMIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) ss.103 B, III A—Record-of-Rights—Entry relating to non-agricultural land—Presumption of correctness—Tank belonging to one person—Right of another person to rear fish in tank, nature of—Declaration, suit for, whether maintainable.

In the Record-of-Rights of the parties' village a tank was recorded as within the tenancy of the plaintiffs, but it was also recorded that the defendants were entitled to rear fish in the tank and use its water. Plaintiffs brought a suit for a declaratory decree under the proviso to section III A of the Bengal Tenancy Act, that the defendants had no right to rear fish in the tank ;

Held, that the entry in the Record-of-Rights, if allowed to stand would restrict the absolute ownership of the plaintiffs and disentitle them from excluding the defendants from exercising some acts of possession, and that, therefore, the plaintiffs had a cause of action to bring the suit. [p. 806, col. 1.]

Although, strictly speaking, the presumption arising under section 103 B of the Bengal Tenancy Act, is not applicable to an entry relating to non-agricultural land to the extent to which it is applicable with regard to agricultural land, yet such an entry raises some presumption with regard to the fact recorded in it. [p. 806, col. 1.]

Raja Sasi Kanta Acharjya Bahadur v. *Sandhya Moni Dassya*, 65 Ind. Cas. 4 ; 26 C. W. N. 483 ; 34 C. L. J. 504, followed

The right of one person to rear fish in a tank belonging to another person is a novel right which cannot be recognised by a Court of law. [p. 806, col. 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 20th July 1922 reversing the decree of the Munsif, 2nd Court, Lakhmipore, dated the 22nd November 1920.

Babus *Dhirendra Lal Kistgir* and *Nagendra Nath Bose*, for the Appellants.

Babu *Bhagirath Chandra Das*, for the Respondents.

JUDGMENT.—This appeal is against the judgment and decree of the District Judge of Noakhali reversing those of the Munsif of Lakhmipore. The plaintiffs are the appellants and the appeal arises out of a suit for confirmation of possession after declaration of the plaintiff's title to the *tank* in suit.

The cause of action arose in this way :—

There was a record-of-rights of the *mouza* which in the tank is situated under Chapter X of the Bengal Tenancy Act. The tank was recorded as within the tenancy of the plaintiffs but it was also recorded that the defendants would be entitled to rear fishes and

use the water of the tank. With regard to the use of the water of the tank there is no question and the plaintiffs had not disputed that right. But the plaintiffs say that the defendants have no right to rear fishes in the tank and the record-of-rights is erroneous to that extent.

The suit has been brought for a declaratory decree as provided in the proviso to section 111-A of the Bengal Tenancy Act. The defendant No. 1 contested the suit and he pleaded that he and his predecessors before him were the proprietors of 6-annas share of the tank and another person Malika Banu was the proprietor of the remaining 10-annas share and he further pleaded that he and his ancestors have been exercising possession over the 6-annas share of the tank for the last 50 years by using its water and rearing and catching fishes. The learned Judge on appeal has dismissed the suit entirely, and the first ground on which he holds against the plaintiffs is that they have no cause of action. He thinks that as the record-of-rights shows the plaintiffs' title and possession the mere fact that the record shows the defendants having got the right complained of does not give them a right to bring the present suit. We are unable to agree with him with regard to this proposition. The record, if it is allowed to stand, restricts the absolute ownership of the plaintiffs and disentitles them from excluding the defendants from exercising some acts of possession. They have, therefore, the right to complain against the entry in the record-of-rights and this gives them a good cause of action.

The next ground on which the learned Judge has decided the case is that the entry in the record-of-rights had not been rebutted by the plaintiffs. It is first urged on behalf of the plaintiffs that the entry in the record-of-rights not being an entry with regard to agricultural land, nor of any matter between landlord and tenant the presumption under section 103 B of the Bengal Tenancy Act does not apply. It has, however, been held that although strictly speaking the presumption under section 103 B is not applicable to non-agricultural land to the extent to which it is applicable with regard to agricultural lands, still such entry raises some presumption with regard to the fact recorded in it. See *Raja Sasi Kanta Acharjya Bahadur* v. *Sandhya Moni Dassya* (1). It is next urged on behalf of the appellants that the right that is recorded is too vague to give the defendants a right in law in the nature of an easement, and secondly the defendants themselves did not claim the right as recorded but claimed ownership to 6-annas share of the tank and pleaded that they exercised the right of ownership in that share of the tank; and the learned Judge having found that the plaintiffs were the sole owners of the tank and the defendants had no share in it ought to have made a decree in favour of the plaintiffs. In our opinion this contention should prevail. The right of one person to rear fishes in another's tank seems to be quite a novel right which a Court of law cannot recognize. The learned Vakil for the Respondents was unable to show us any authority for the proposition that such a right should be recognized. We are, therefore, of opinion that the plaintiffs are entitled to the declaration they have sought for that they are owners of the tank and also for confirmation of possession and they are also entitled to have the other declaration that the defendants have no right to rear or catch any fishes in the tank.

We, therefore, set aside the judgment and decree of the lower Appellate Court and restore those of the Munsif with costs in all Courts.

Z. K. *Appeal allowed.*

(1) 65 Ind. Cas. 4; 26 C.W.N. 483; 34 C. L. J. 504.

SUBHADRAYAMMA *v.* VENKATAPATI

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 5, 1924.

Present:—Lord Atkinson, Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

SRI RAJAH VATSARAYA VENKATA SUBHADRAYAMMA JAGAPATI BAHADUR GARU—APPELLANT

versus

SRI POOSAPATI VENKATAPATI RAJU GARU AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 13—Champerty, whether illegal—Money lent to finance suit for recovery of property—Suit, compromise of—Lender, whether can recover money lent—Breach of contract, effect of—Construction of documents—Subject-matter and surrounding circumstances to be considered.

A party to a contract cannot put an end to it simply by committing a breach of it. [p. 816, col. 1.]

In India, champerty or maintenance is not illegal.

There is no distinction, and can be no distinction on this point between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour. [p. 817, col. 2.]

Glegg v. *Bromely*, (1912) 3 K. B. 479 ; 81 L. J. K.B. 1081 ; 106 L. T. 825, referred to.

Defendants entered into a contract with the predecessor-in-title of the plaintiff the Raja of Tuni whereby it was agreed that the Raja would lend money to the defendants in order to finance his suit for the recovery of an expectancy. The material provisions of this contract were (1) that the suit would not be compromised without the consent of the Raja, (2) that if the Counsel conducting the case advised a compromise it would be entered into and (3) that out of the moveable and immoveable properties obtained by such compromise the defendant would repay the principal money advanced together with interest at one per cent. per mensem and that out of the properties that remained after making this payment defendant would execute and give the Raja a proper sale deed and place in his possession three-thirty seconds of a share.

The Rajah died and the suit was compromised after his death. His widow then brought a suit claiming that the money due to the Rajah should be a charge upon the amount received by the defendant under the compromise.

Held (1) that the contract entered into by the defendant, was an agreement to assign to the Rajah part of the fruits that he may acquire in an action at law, and was, therefore, perfectly legal ; [p. 817, col. 2.]

(2) that the words used in this contract were wide enough to cover every conceivable kind of property; [p. 818, col. 1.]

(3) that the main purpose and object of the contract was to finance a suit brought to establish title to an existing thing *i.e.*, an estate.[p. 816, col. 2.]

(4) that the stipulation with regard to the consent of the Rajah must be deemed to contain a term to the effect that the consent should be given when possible and that the giving of the consent by the Rajah to a compromise accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it.

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. [p. 818, col. 1.]

Appeal from the Judgment of the Madras High Court, dated the 21st March 1918, reversing the decree of the Subordinate Judge, Vizagapatam, dated the 6th December 1915.

Messrs. *W. H. Upjohn*, *DeGruyther*, and *K. Narasimham*, for the Appellant.

Mr. *K. Brown*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was instituted in the Court of the Subordinate Judge of Vizagapatam on the 4th April 1913, by the plaintiff—the present appellant—the widow of the Rajah of Tuni deceased, who died in the year 1911, against the six respondents named to recover the sum of Rs. 1,68,629 and to obtain a declaration that this sum was well charged upon a certain sum of money received by the respondents, under a certain decree dated the 12th March 1913, styled a compromise decree, made in a suit No. 18 of 1903, and also for payment of three thirty-seconds of what remained of the sum received under such compromise after payment of the sum of Rs. 1,68,629. The Subordinate Judge, on the 6th December 1915, made a decree in favour of the appellant, the plaintiff in the suit for the sum of Rs. 1,91,058, and also made the declaration asked for to the effect that this sum was well charged on the sum paid to the respondents in pursuance of the compromise decree. The learned Subordinate Judge decided against the appellant on the other matters claimed, and no appeal has been taken by her against this decree on these latter

matters. An appeal was, however, taken by the defendants to the High Court of Judicature at Madras. That Court pronounced a decree dated the 21st March 1918, reversing the decree of the Subordinate Judge and dismissing the appellant's suit with costs. From this latter decree, the appellant has appealed to this Board.

This original suit No. 18 of 1903 was decided by the first Court against the respondents Nos. 2 to 4 in 1908, and they preferred an appeal to the High Court, which was numbered as Appeal No. 114 of 1909.

In 1913 a compromise petition was filed in the above Appeal No. 114 of 1909 in the High Court, and on the 12th March 1913, a decree was passed in accordance with the compromise by which the 1st respondent in this appeal was to receive a sum of Rs. 2,50,000 on behalf of, and for the benefit of, all the respondents, the 2nd respondent was to receive an annuity of Rs. 2,400, respondents Nos. 3 and 4 were to receive an annuity of Rs. 866-10-3 each, and the 1st respondent was to get a house for and on behalf of all the respondents.

Since the admission of this appeal the appellant and respondents Nos. 3 and 4 have entered into a compromise which has been recorded and by an Order of His Majesty in Council leave was given to withdraw the appeal as against these respondents Nos. 3 and 4 and to proceed as against the other respondents on the terms, that even if the appellant should be successful in this appeal, costs in the Courts below should not be claimed by her against the respondents Nos. 3 and 4. This appeal is accordingly now proceeded with against respondents Nos. 1, 5 and 6 alone.

On the hearing of the appeal before this Board, Counsel on behalf of the appellant abandoned all claims for a decree against any of the respondents of a personal nature, and also abandoned all claim to a decree for payment of three thirty-seconds of the sum received on the compromise, and has confined the relief he asks for to having it declared that a sum of Rs. 92,000 with the accruing interest thereon, at the rate specified, is well charged upon the sum of 2½ lakhs received by the respondents in the compromise. Though this is the sole relief asked for, the facts upon which the appellant depends are of a somewhat complicated nature, and must unavoidably be unravelled at some length in order to be adequately weighed and considered and the correct conclusion drawn from them. The Maharajah of Vizianagram, who owned an estate of that name, died on the 22nd May 1897, having made a will by which he devised this estate to one Raja Chitti Babu for life. This devisee may for convenience sake be styled the tenant for life, as he would be in England, though that is not, in strictness, according to Indian Law, his true position. The testator made no disposition of the absolute interest in his estate. As to that he died intestate. Ramachandraraju, respondent No. 2, claimed to be the heir of the deceased Maharajah, as his nearest agnate, and by the joint operation of the Hindu law and the Maharajah's will claimed to be entitled to the absolute interest on the aforesaid estate subject to the life interest of the so-called tenant for life. He was confronted, however, with this difficulty in asserting his claim, namely, the fact that the mother of the deceased Maharajah contended falsely, as Ramachandraraju alleged, that she had adopted the tenant for life as the son of her deceased son, and that this adoption defeated Ramachandraraju's title, as it undoubtedly would have done, if the adoption was validly made. In this state of things Ramachandraraju resolved to assert his title, and thus to test in a Court of law the validity of the alleged adoption of the tenant for life.

He was, however, a poor man. He apparently realised that the suit would be an expensive one, and that it would be absolutely necessary for him to induce some persons to advance to him the money necessary and sufficient to prosecute the suit. To effect this purpose he took a step, the object of which is not very apparent and the result of which has undoubtedly proved embarrassing. The day before he instituted the suit to establish his title, namely, on the 12th July 1903, he executed a deed of trust, by which, after reciting the death of the Maharajah, the making of his Will, the devise to the tenant for life, the pretended adoption by the testator's mother, and alleging that it was necessary for him to take proceedings, he appointed Poosapati Venkatapatiraju Garu, (heirinafter referred to as the original trustee), trustee of all the property in which he, Ramchandraraju, claimed to have a vested interest in remainder as heir of the deceased Maharajah in

trust to administer the fifteen-sixteenths of the same for his, the settlor's, own benefit, and one-sixteenth of the same for the benefit of two persons named, namely, respondents Nos. 5 and 6 in the present suit.

There is nothing to show that these two latter beneficiaries were in any way connected with the settlor or had any claim upon his bounty. The provision thus made for them was, as far as can be seen, a voluntary gratuitous gift. It is plain that the property thus put in trust by this deed was all the property the settlor would have been entitled to as heir of the deceased Maharajah, had there been no adoption of the tenant for life, or had that adoption been invalid. Each one of these three beneficiaries, the settlor and respondents Nos. 5 and 6, had interests in the litigation identical in character though not in equal value, in this sense that each would gain his share if the suit should succeed, and each would lose everything if it should fail. In addition, powers were by the trust deed, conferred upon the trustee and upon the settlor respectively, which were both wide and important. The words conferring them run thus :—

"Therefore you (*i.e*, the Trustee) should not only manage the trust property subject to the arrangement I may make regarding the consideration for your trouble, etc., and other matters, but also full authority is given you to conduct suits, etc., either jointly with me or separately, and to manage it in such a way as you may think fit for the preservation of the properties."

Having regard to this last provision it is clearly the view of their Lordships that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it, or some of it, to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that the alleged adoption never took place or was invalid and that therefore the settlor was the lawful heir of the deceased Maharajah, and in the event of that suit being successful would have been entitled to a lien on the property gained for the sum advanced. And their Lordships further think that if the trustee, not having money of his own available, borrowed money from a third party for the purposes above mentioned, and actually used it to promote those purposes, then in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. Their Lordships are further of opinion that if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit from a third party for the purposes above mentioned and so applied it, then, in the event of the litigation being successful, the personwho advanced the money would be equally entitled, standing in the shoes of the settlor, to a lien upon the propery preserved for the trust by his out lay.

The contemplated suit was on the 13th July 1903 commenced in the District Court of Vizianagram. Its number in that Court was O. S. No. 18 of 1903. The plaintiffs in it were the original trustee and the three beneficiaries, namely, the settlor as to fifteen-sixteenths of the trust property and respondents Nos. 5 and 6 as to one sixteenth of it. These three beneficiaries were the absolute owners in equity of the trust estate if the adoption proved invalied. The relief prayed for was (1). That it might be declared that the settlor as the nearest heir of the late Maharajah, was entitled to the vested remainder in the estate of Vizianagram after the demise of the present Zemindar (*i. e.*, the tenant for life). The settlor and these two beneficiaries were therefore in the position of joint adventurers in this litigation, in which success would bring much gain for each, and failure absolute and complete loss to each. The efforts these adventurers made to obtain the necessary funds to prosecute the suit, of which they themselves were entirely destitute and were unable to supply, are detailed by the witness Lakshmi, the private secretary of the Rajah of Tuni, from whom the necessary funds were ultimately obtained The evidence of this witness, which, save as to one matter to be mentioned presently, is practically uncontradicted, is of the utmost importance. He said a body of people came to have an interview with the Rajah of Tuni, his master. That the original trustee, the settlor, and two beneficiaries, respondents Nos. 5 and 6, and the two sons of the settlor, were members of this

body, that they asked the Rajah of Tuni to help them in the suit O. S. No. 18, 1903, in the Vizagapatam District Court, that they represented that other persons who had promised to assist them had failed them that a vakil named (since deceased) had told them that the settlor had a good case, represented that unless the Rajah of Tuni advanced money to finance the suit the settlor would lose it, and that if he succeeded in the suit the Rajah of Tuni would gain as well as the whole Kshatriya community. That the original trustee and respondents Nos. 5 and 6 joined in making these requests, they were asked to sign the (*sic*) agreement. The trustee said the second defendant (*i.e.*, the settlor) was a poor man that he was plaintiff in the suit, that they were conducting the litigation for him; that fearing that he might collude with the Vizianagram estate, they got the trust deed, and so (*i.e.*, in consequence) the settlor only must enter into the agreement and that a draft of Exhibit A (*i.e.*, the agreement of the 22nd May 1906) was produced, but the witness does not know who drew it. These two beneficiaries, respondents Nos. 5 and 6 in the present suit, filed, on the 21st July, 1913, two written statements. They are identical in terms. They both deny that they had anything to do with the negotiations which lead up to the agreement of the 22nd May 1906, or with those which lead up to that of the 14th August, 1907. As to the first of these negotiations, they do not specifically deny a single statement deposed by the witness Lakshmi, who knew them all, the original trustee, the settlor, his two sons, Nos. 3 and 4, as well as Nos. 5 and 6 and said they all came to his master in a body.

Numbers 5 and 6 do not assert they did not interview the Rajah of Tuni on the occasion named. They do not deny that advances of money were prayed for from the Rajah and obtained, nor explain how it was that, as the advance of money to conduct the suit just instituted would, if successful, have secured to them one-sixteenth of the trust estate, they took no part in the negotiations to obtain the necessary money to finance their own suit. They were not examined as witnesses in the suit out of which this appeal has arisen. They were important witnesses if their allegations were true. It appears to their Lordships that there is only one rational explanation of their absence from the witness chair, namely, their well-grounded fear of cross-examination. If their statements be true, the evidence of Lakshmi must be a wicked and deliberate concoction. Their Lordships do not think it is that. They think it is a truthful account of what took place in his presence; they accept it and rely upon it, while they look upon the statement of Nos. 5 and 6 in reference to the negotiations, out of which the agreement of the 22nd May 1906, sprang, as wholly unreliable.

Upon this supposition it is well to consider what was in reality the true nature and effect of the arrangement come to by all the parties concerned on the occasion of this visit to the Rajah of Tuni. The suit recently started dealt with the whole trust property. The negotiation to have such a suit financed necessarily dealt with the whole trust property. The settlor could, *prima facie*, by signing the agreement for himself alone only bind his own interest in the trust property. That would not have sufficed, and therefore when, of the three beneficiaries only one signed the agreement designed to affect the whole trust property and by its very terms did so, this one must, in the circumstances already detailed, have signed it not only for himself, in his own right, but as agent, accredited in that behalf, of his co-beneficiaries. In all the transactions which succeeded, the advancing of the money, the accounting for the money, and the direction of the steps to be taken in the suit, the two beneficiaries do not appear to have taken any independent or active part. From May 1906, onward, the settlor was regarded as the manager the *dominus litis* in the whole business. He was never removed from his position, his authority to act as the agent of his co-beneficiaries never questioned or withdrawn. These two co-beneficiaries of the settlor make in their written statements, the case that they are not parties to the agreement of the 22nd May 1906, or that of the 14th August 1907, and are therefore not bound by either. If by this they mean that they have not each by his own hand signed and thus executed them, it is true; but if it means that those agreements were not signed by the settlor as the accredited agent of his co-beneficiaries and on their

behalf, it is in their Lordships' view quite untrue. As this point was never made until over Rs. 100,000 and odd had been advanced by the Rajah to finance the suit, in which they were co-plaintiffs, it is in addition dishonest.

The original trustee, Poosapati Venkatapathiraju, died during the progress of the suit No. 18/1903, and his nephew, the present respondent No. 1, was by a deed, dated the 17th December 1906, appointed a trustee in his place, and accordingly added as a plaintiff in that suit.

It was contended by Mr Upjohn on behalf of the appellant that the agreement of the 14th August 1907, was not a substitution for the earlier agreement of the 22nd May 1906 but a supplement to the latter. It is, therefore, necessary to examine the provisions of both to determine whether the earlier agreement is superseded by the second or only added to by it. The parties to the first are the Rajah of Tuni of the first part and the settlor and his two sons, respondents Nos. 3 and 4, of the second part. The word " we " is used throughout this agreement as well as throughout that of the 14th August 1907, to indicate, it appears to their Lordships, all the plaintiffs in the suit not merely the settlor and his two sons, the executing parties to the agreement in each case. The Rajah by the earlier agreement undertook to advance at most Rs. 1,50,000 to finance the suit started by the settlor O. S. No. 18, 1903, in consideration for which, if the suit should be successful, three-six teenths of the moveable and immoveable property in dispute should by sale deed be conveyed to him, the Rajah. Should the whole of this sum not be needed for, or not be actually applied to financing the suit in the lower Court, the unexpended balance should be deposited with a person interested in both the Rajah and the settlor to be spent by the latter in financing the suit in the Appellate Court on appeal from the District Court.

Then follows a paragraph, No. 3, clearly providing that the Rajah was not to be bound to advance the large sum of one lakh for the above-mentioned purpose, but that if he did want to spend the money claimed to conduct the suit in all the three Courts, he should only be bound to advance Rs. 50,000 for the prosecution of the suit in the original Court and was not to be bound to spend anything more than that. A further provision then followed to the effect that though the Rajah might only finance the suit in the original Court and should refuse to make further advances, and they (*i.e*, the plaintiffs) should be obliged to get financial help elsewhere and conduct the appeals themselves, they should, as soon as they should get possession sell to the Rajah by means of a sale deed, only one-third of the property agreed to be sold to him (*i.e.*, one-third of three-sixteenths) namely one sixteenth of the property recovered by the Rajah's conducting the suit in all the Courts and would put the Rajah in possession of the same. It is then further provided that should the Rajah not like to take this sale deed, they and their heirs should be bound to pay the Rajah the amount spent in the lower Court with interest at 2 per cent. per mensem from the date of the judgment of that Court, on the security of the property proposed to be sold to him. It was evidently contemplated by the plaintiffs in the suit and the parties to the agreement, that the suit might be compromised, while it was in the Appellate Court, as in fact, it, subsequently, was and accordingly elaborate provisions are introduced into the agreement dealing with that event and purporting to fix and determine what the rights of the respective parties should be, if the contemplated compromise should take place.

The first provision is to the effect that should this compromise take place while the Rajah was spending money financing the suit, then *prima facie* the plaintiffs should pay to him the sums so spent by him with interest at 1 per cent. per mensem from the respective dates at which the said sums were spent. It is then provided that these sums should be derived out of the moveable and immoveable property obtained by the plaintiffs from the compromise, and further that out of the remnant which should remain of the moveable and immoveable property after deducting the principal and interest so paid, the parties designated should be bound to give the Rajah a three thirty-second share. Here are introduced some immaterial and, for the purpose of the matter criticised, irrelevant provisions, and then follow the clauses, which it may be best to quote, *inextenso*.

" It is agreed that we should not compromise or withdraw this suit without your

consent; that, in case you think that, under the then existing circumstances, it is better to compromise we should consent to it; that, when we represent to you that it is better to compromise, you should consent to it; and that out of the amount that may be got in the said compromise we should pay you the amount advanced by you with interest at 1 per cent. per mensem from the respective dates of advance of the several sums and also give you three thirty-seconds of the property remaining after deducting the aforesaid. It is further agreed that, soon after the suit is disposed of, we should execute documents in your favour as per all the above mentioned terms and that, as soon as we get possession of the property, we should put you in possession of the property as per those documents. We and our heirs are bound by the aforesaid conditions and we execute this agreement with our free consent."

The Rajah then made the advances necessary for financing this suit. In the agreement of the 14th August, 1907, it is stated he had advanced sums upto Rs. 71,500 in all, yet it is contended by respondents Nos. 5 and 6 in their written statements that they are not liable for, nor is their share of any property liable to be charged with, any portion of this sum given to their own agent to finance their own suit, which it is inconceivable, they did not know had been so advanced and applied. If the agreement of the 14th August 1907, only supplemented but did not supersede the earlier one of May 1906, it may well be that under the latter the Rajah would have been entitled, in the event of the suit being successful, to a lien on the property recovered in the successful suit. This point does not appear to have been specifically raised in this appeal and need not be dealt with. The sum of Rs. 7,1500 so advanced was found to be insufficient, for the prosecution of the suit O. S. No. 18 of 1903, and a second agreement dated the 14th August, 1907, between the settlor and his two sons, respondents Nos. 3 and 4 and the Rajah of Tuni was entered into by which the Rajah undertook to advance a sum not exceeding Rs. 2,00,000 for its further prosecution.

This agreement contained many special provisions with which it is necessary to deal at some considerable length for reasons which will presently appear. In it after reciting at considerable length some of the steps which had already been taken in the suit, the insufficiency of the advances, and the kindness of the Rajah in undertaking to advance two lakhs of rupees including the sum of Rs. 71,500 which he had already, under the previous agreement, advanced it provided that as soon as the financed suit was decided in favour of the plaintiffs in that suit, they, the plaintiffs, would in addition to the three-sixteenths portion of the property recovered in the suit already agreed to be sold to him, sell to him another one-sixteenth, making together one-quarter of that property, and also a garden and a strip of quarry land therein described. It is then further provided that in respect of the monies, portion of these two lakhs, advanced from time to time detailed receipts of the Vakil's day fees, etc., printing, stamps, house rents should be furnished to him, the Rajah, that is, as regards the whole of the balance accounts of receipts and expenses should be furnished to him for the sums so ascertained, and for which sum receipts should be given by the settlor, and that with respect to the money that might again be required the Rajah should, at the request of of the settlor, advance the money, looking into accounts and getting detailed vouchers for money spent, and then settle accounts without giving room for any disputes.

By the figures mentioned in paragraph 2 of the agreement it is shown that a sum of Rs. 87,500 was then due to the Rajah, and it is again provided that out of the balance remaining after deducting this sum, the plaintiffs should on the receipt of the settlor receive the sums required thereafter for the expenses in the original Court or furnishing to the Rajah as above stated accounts of receipts and disbursement of the money already received by the settlor, and further that the Rajah, on the rendering to him of the debit and credit accounts as stated, would within a week of his being applied to for money required for the suit, pay the same.

In paragraph three of the agreement there are further provisions for the advance of money to finance the suit in the Appellate Court on accounts being rendered in the manner therein before described. There is then a provision that if a decree in the suit should be given in favour of the plaintiffs one-quarter of the property for which the decree would be

passed should by sale deed be conveyed to the Rajah.

And then come the three paragraphs dealing with a compromise of the suit upon the construction of which the High Court have mainly, if not entirely, founded the judgment and decree appealed from. These paragraphs run thus—

We shall not compromise with the defendant, or file razinamah or withdrawal without your consent.

It is agreed that, if Mr. Krishna-swami, ayyar, High Court Vakil, who is working on our behalf in this suit advised us from the then existing circumstances of this suit. that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.

Moreover, out of the moveble and immoveable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at Rs. 1-0-0 (one rupee) per cent. per mensem from the respective dates, and out of the moveable and immovable properties that remain after so giving away (to you) we shall at once execute and give you a proper sale deed and place in your possession three thirty-seconds of a share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail. This agreement is executed with our wholehearted consent."

(Sd) Poosapati Ramachandra Raju.
Poosapati Rama Raju.
Poosapati Buchi Appala Raju *alias* Acharya Raju.

This agreement and the previous one of 1906 are, in the main, constructed on similar lines. The maximum sum to be advanced under the first was Rs. 1,50,000 and that under the second Rs. 2,00,000 but the distinguishing feature of the second is that strict accounts of the sums advanced and spent are to be kept, receipts given for those sums when received, all disbursements duly vouched, advances of further sums required and asked are only to be made when those receipts and vouchers have been given. There is nothing whatever to indicate that the entire trust property as distinct from the settlor's share of it is not dealt with nothing to suggest that the authority already conferred upon the settlor by the negotiation out of which the first agreement to act in the matter of obtaining funds to finance the pending action had been either limited or revoked. In the absence of any provision indicating that result it must, in their Lordships' view, be held that this authority was continued. Death has been very busy with the chief actor in this business. Krishnaswami Ayyar the vakil mentioned in the attestation clause, died in the year 1911, as did also the Rajah of Tuni who is succeeded and represented by his widow. The settlor died immediately after the forwarding of the appeal to this Board and he is succeeded by his two sons. The widow according to her Counsel, does not claim that the sum of Rs, 92,000 due to her is a debt on a loan. Neither does she claim to get specific performace of any contract giving her any property obtained by the compromise. She merely claims a lien on the sum of Rs. 2,50,000 paid under the compromise, for the sum of Rs. 92,000 for principal with interest on the sum she and her husband have advanced to finance the suit. This amount is admitted to be due. The Rajah of Tuni, seeing from such accounts as were furnished to him that very large sums, as he thought extraordinarily large sums, had been paid to two vakils engaged for the plaintiffs in the suit No. 18 of 1903, objected to those items: and contended that these vakils had promised to act gratuitously and that the sum paid should be recovered by action at law. He was proved to be wrong in this. It was shown that these vakils had not undertaken to work for nothing but in addition to this he insisted that these alleged disbursements should, like every other disbursement, be vouched. In making this demand, he was, in their Lordships' view perfectly justified by the terms of the agreement of 1907.

The Dewan of the Rajah of Tuni wrote to the settlor a letter dated the 19th January, 1908, stating that from the last credit and debit account sent by the letter on the 6th instant and from the like accounts sent earlier, it was seen that a sum of Rs. 10,450 was entered as day fees to Mr. R. Ry. Bhupatiraju Raju and another sum of Rs. 2,165 was entered as fees to his brother contrary to the original

arrangement, and that this sum should be recovered and expended for the future costs of the suit. It is then added: "In your credit and debit accounts you have not given details regarding some items. I shall write a letter soon about them. As soon as further money is required I shall send it as if this account of credits and debits had been settled." On the 28th January, 1908, the Rajah writes by this same Dewan the promised letter to the settlor, It deals with numerous items of the debit and credit accounts furnished by the latter, covering the period from May, 1906 to January, 1907, and dealing with an expenditure of Rs. 49,017-10-7 including a sum of Rs. 35,000 entered as given for pleaders' fees and lodging expenses, house rents, typing charges, costs of stamps, amounts deposited in Court, interest said to have been paid by the settlor, expenses of clerks, &c. After this enumeration the ollowing passages are to be found in the letter. You have not, as per your agreement yet sent the receipts and vouchers in token of the said sum having been paid to and received by the Madras vakils already named). Please send the receipts and vouchers at once. You have also not given details regarding the amounts debited under lodging expenses, salaries, stamps, typing charges and rents. Please write details as to what period they were paid for and for what items they were paid and to whom they were paid."

A number of items including the vakils' fees appearing in the second credit and debit account for the period from January to August, 1907, are specifically mentioned, and it is expressly stated that the settlor has not sent receipts and vouchers from the persons to whom the sums mentioned are in the accounts stated to have been paid, and that unless the settlor sends these receipts and vouchers it is not possible for the Raja of Tuni to settle the settlor's account of credits and debits, and that, moreover, he has not given details of the sums taken credit for. A number of small items are then dealt with and the settlor is informed that unless he furnishes details of these sums and receipts for them it is not possible to include them in the credit and debit account and to settle that account. The accounts covering the period from August, 1907, to the end of December of that year including credits and debits for a sum of Rs. 36, 141-0-8 are then dealt with.

Credit is taken in this account for a sum of Rs. 27,000 stated to have been paid to the vakils already named. It is complained that vouchers are not sent for these alleged payments. The same applies to many named sums for which no details or vouchers have been given. Then came the following passages :—

"Therefore, not only should you immediately send us the receipts and vouchers for vakils' fees and other items in respect of the three accounts of credits and debits, but also you should immeditely furnish us with details for the items which bear no details. Though we had often requested your officials to furnish us with details, vouchers and receipts for the sums debited and though they promised to do so they have not as yet sent the same.

"Though we had sent monies from time to time owing to confidence in you and on account of the urgent telegrams sent by you and your men for money stating that the suit will be spoiled, without your furnishing us then and there full particulars for the items in your credit and debit accounts and without sending us the receipts and vouchers for the several items; you have not sent us up to date proper explanation for the items of credit and debit. This is not proper."

These demands made by the Rajah through his Dewan are not extravagant or unreasonable in their nature. They are not only those which he was by the letter of his agreement of the 14th August, 1907, entitled to make, but such as according to business methods and practices he would be entitled to make in any business transaction such as he had embarked upon.

On the same date, the 28th January, 1908, a letter is written to the settlor on behalf of the Rajah of Tuni by apparently another Dewan referring to the credits taken for the sums paid to the two vakils, and winding up thus :—

"If, before you spend this money, you give proper particulars for such of the items as regards which no details were given or with regard to which there are disputes in the credit and debit accounts sent by you, and also send receipts and vouchers for the remaining items, namely, fees for Madras vakils, etc., we shall verify them, and if we find them correct and

proper, we shall send money if any more money is still wanted for the purpose of the suit.

"Please to consider."

On the 14th February, 1908, the settlor replies to the Rajah's frequent demands for vouchers. In justice to the settlor the pregnant and important portions of this letter are set out, especially that portion of it dealing with his excuse or rather justification for not furnishing to the Rajah the vouchers demanded. After praising himself for the way he has conducted the litigation and dwelling upon the difficulties he, the writer, had to encounter, he writes :—

"While such is the case and while not even a half of the amount agreed to be expended for the suit has yet been spent and while you are liable yet to pay the entire amount for the expenses of the suit and though the arrangement is that you should not fail to spend the amount required for expenses in this Court, and though you are fully aware of the fact that, in the event of your failing to do so, the agreement would be cancelled you have, without sending money when required by us, written this letter concocting false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and debit and receipts bearing my signature have been sent. You need not question about accounts settled alredy nor is there any necessity for it. The last explanation and credit and debit accounts have been ready sent. Without questioning it these years you are questioning it now entertaining something in your mind. If you wish to know the details hereof, I have no objection. Everything is clear from the accounts already furnished. When credit and debit accounts have been sent under my signature and on my responsibility I do not see proper reasons for the transaction being stopped."

This really means that no vouchers should be required or are needed for any items of expenditure entered in the credits and debits accounts he has seen fit to forward. It does not appear to their Lordships that matters of business are ordinarily conducted with such *uberrima fides* in accounting parties; but, however that may be, it is not the manner in which, by the letter and spirit of the agreement of the 14th August, 1907, the Rajah was entitled to have their business conducted and in which the settlor was to conduct it. The letter whinds up thus :—

"If you do not send money I shall take it that the agreement has not been acted up to and make other arrangements and conduct the suit as far as possible. There I have made this fact known to you.

"Please to consider."

The vouchers demanded were in fact never sent to the Rajah of Tuni. This letter, in their Lordships' view, amounts to a refusal to send them, coupled with an intimation that if money be not sent, though they should not be furnished in the first instance, he the settlor, would treat the contract of the 14th August, 1907, as at an end and make other arrangements. The settlor was by the terms of this contract bound to send vouchers of his disbursements whether demanded by the Rajah or not. The course he adopted amounted to a distinct breach of that contract, a violation of the obligations it imposed upon him. On the 21st February, 1908, the Rajah of Tuni replied to this letter of the 14th of that month. His reply contains the following passages :—

"We think that, having received so much money from us, you have with some evil intention, written to us thus when the matter is about to terminate. According to the terms of the agreements you should furnish us with proper vouchers, receipts, and accounts for the total sum of about one lakh and odd sent to you previously. By merely stating that you have written and given explanations already that you have sent receipts to the effect that you have received the sums sent to you from time to time, you cannot be deemed to have acted according to the terms of the agreement. You have acted in violation of the terms of the agreement and the oral conditions and in an unbusinesslike way. We are even now ready to send to you future money for just and necessary expenses."

The Rajah of Tuni never was furnished with even these vouchers. Not having been furnished with them he did not advance any more money to the settlor. He was, in their Lordships' view, amply justified by the

provision of the agreement of 1907 in taking that course. The settlor being bound to furnish these vouchers, the Rajah might, if he wished, have taken this refusal to do so as a repudiation by the settlor of his contract, and have elected to treat the contract as at an end, but he did not do so ; on the contrary he states explicitly in this last letter that if the vouchers justifiably demanded were not sent and on examination found correct, he would not send any more money which might be needed for the conduct of the suit. The agreement of the 14th of August, 1907, has not been put an end to, it still exists. It is hardly necessary to point out that a party to a contract cannot put an end to it simply by committing a breach of it. The High Court had apparently supposed that this agreement no longer existed and were led into error thereby, since the Rajah never elected to treat the settlor's breach as a repudiation of the contract terminating it, as he might have done.

The only remaining point to be dealt with is the construction put at pages 299 and 300 of the record on the last three paragraphs of the agreement of the 14th of August, 1907. The judgment of the High Court runs thus:—

"The real difficulty arises from the use of the words 'moveable and immoveable properties obtained by *such* compromise' in clause 12 of Exhibit B 1. In clause 9 a right is given to a twelfth of the property in case the whole of the expenses for the litigation in the first Court is borne by the lender. The clause says, "It has been agreed that you should without fail meet all the expenses incurred in the Original Court.' Then comes clause 10 which prohibits any compromise without the consent of the lender. Clause 11 stipulates for an enforceable compromise in case Mr. Krishnaswami Ayyar gave his assent to it. Then follows the expression in clause 12 which we have quoted. The words 'such compromise' can only refer to a compromise to which either the plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Ayyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two cases. The argument, that although a compromise may be otherwise brought about, it was open to the plaintiff's husband to have accepted such a compromise because the provision for his assent and of Mr. Krishnaswami Ayyar's advice was for his benefit, does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan, in order that the lien may fasten upon the compromise amount, it must have relation to the two contingencies provided for in the agreement. The specific property or the identifiable property on which the lien is sought to be attached is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned vakil for the Respondent that the mere fact that only Rs. 93,000 out of the contemplated 2 lakhs was advanced would not derogate from the lien if it otherwise existed. . . . . But as we pointed out, the identity of the property is wanting as clause 12 creates a charge only on property secured by a compromise effected in one of the two ways suggested in the previous clause. In this view our conclusion is that no lien was created over the money given by the plaintiff's husband. The theory that a lien on specific property would attach itself to the substituted property contemplates that the contract creating the original lien subsists. Granting for argument's sake that the lien on the compromise amount contemplated in clauses 10 and 11 will fasten itself upon the new compromise amount, the fact that before that compromise was effected the parties had broken off relations would render this impossible.

The High Court treat the agreement embodied in paragraph 12 of the agreement of the 14th August, 1907, as one of those agreements dealing with property which at the time the contract was made was non-existent, which might never come into existence, but which, when it did come into existence would be operated upon by the agreement made before it existed. Their Lordships are not at all convinced that it is the true view to take of this agreement of 1907 which must be considered as a whole. The main purpose and objects of its provisions are to finance a suit brought to establish title to an existing thing, an estate extending over a large portion of the earth's surface.

The point in controversy was not the existence or non-existence of that thing, but

which of two adverse claimants was entitled to a vested interest in it, subject to a life-estate in one of them. The fruits of success in this action which would be gathered in by a decree would be this vested remainder. The fruit of it which would be gathered in by a compromise might be something different, but in essence the same. What the agreement really does is to provide that the fruit, which may be either moveable or immoveable property, shall be divided in certain shares between the parties to the agreement. The terms of the compromise might have been that one half, or some other portion of the trust property, had to be given to the defendant by the plaintiffs, or that jewels which had been the property of the defendant for years might be given to the plaintiffs : the two lakhs of rupees that he has given might all then have been in existence and in the defendant's possession, for years. No proof was given that the tenant for life was not possessed of the 2½ lakhs of rupees kept in his safe or packed in his money bags long before the year 1907. On the face of clause 12 its language points rather to existing things than to non-existing things, and the agreement embodied in it is entirely different in its nature and character from an agreement assigning for a certain sum what, for instance, some relative might leave a contracting party, but who might never leave him anything whatever. In India, of course, champerty or maintenance is not illegal. In *Glegg* v. *Bromely* (1) Mr. Justice Parker, as he then was, stated the law upon this point, as was his custom, with great clearness and precision. In that case according to the head note, one Mrs. G. was plaintiff in an action against one H for false representation. She was also plaintiff in an action for slander against Lady Bromley. She was at the time greatly indebted to her husband, and she executed in his favour a deed of assignment whereby, after reciting that he had requested her to give him further security, which she had agreed to do, she assigned to him, "all that interest sum or premises that she is or may become entitled to under or by virtue of any verdict, compromise or agreement which she may become a party in or consequent upon the said action *i., e.*, *Glegg* v. *Bromely* (1) or otherwise howsoever, under or by reason of the same to hold the same.....subject to redemption on payment of the money due to him." Both actions proceeded, that against H. resulting in a verdict for the defendant, with costs amounting to £213. That against Lady Bromley resulted in a verdict for the plaintiff Mrs. G. for £200 with costs. H. then took *garnishee* proceedings against Lady Bromley to attach this sum of £200, and Mrs. G.'s husband also claimed it under his assignment. It was held that the assignment was not an assignment of a mere expectancy or of a cause of action, but was an assignment of property that is of the fruit of an action as and when recovered, and that it was consequently not void under 13 Eliz. c. 5.

There is no distinction, and can be no distinction on this point between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour. At page 490 Mr. Justice Parker is reported to have said :—

"It is to be observed that an equitable assignee of a chose in action whether it is legal or equitable could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was in the view of the Court property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity. With regard to assignments of future property they stand, I think on a totally different footing. Nothing passes, even in equity until the property comes into present existence. Only when this happens can the assignment attach and an interest pass....Even a solicitor wno is conducting an action or suit may take a mortgage on the fruit for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty."

In their Lordships' view the agreement embodied in paragraph 12 of the agreement of the 14th August 1907, is an agreement by the plaintiffs to assign to others part of the fruits he may acquire in an action at law and, therefore, perfectly legal. Besides if even the money given to the plaintiff in the compromise was a non-existing thing at the date of the agreement and only came

(1) (1912) 3 K. B. 479 ; 81 L. J. K. B. 1081 ; 106 L. T. 825.

into existence at the date of the compromise decrees the agreement of 14th August 1907, which is still in existence, not terminated as the High Court erroneously supposes, attaches to the things so coming into existence subsequently.

It is not very clear what the High Court means by the words "identity of the property" in the last of these passages. If the consent to the compromise by the two persons named in paragraph 12 of the agreement had the effect of transfusing into the property the parties might receive under it some quality, or attached to it some quality, then this language might be appropriate enough, but obviously their consent, if given, could not have any such effect. The property mentioned in paragraph 12 is of a universal and not of a special character.

The words are "moveable or immoveable property" which may be obtained by such compromise. That includes almost every conceivable kind of property, and the words of this paragraph would be satisfied if half the estate sued for, or another estate or the jewels of the tenant for life deposited in his safe, and the money packed in his money bags had been awarded under the compromise.

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. The litigation which was to be compromised was instituted in the year 1903. It had hung fire for four years when this agreement of the 14th August 1907, was executed. The decision of the case in the original Court was not made till the year 1908. The appeal to the High Court was not lodged till the year 1909, and the compromise was not decreed till the 12th May 1913. The plaintiffs in the suit and presumably their Vakil knew all about these delays. The Rajah of Tuni, when he became a party to the agreement of 22nd May 1906, must have also become aware of the negotiations out of which that agreement sprang and by the agreement itself of these delays; unless these persons were all devoid of intelligence they must, thus forewarned, have anticipated that somewhat similar delays might occur in the future, and yet they are by the High Court taken to have provided expressly and with clearness that unless the Rajah of Tuni, if not the Vakil also, lived long enough to be able to consent to the compromise referred to in the clause, no compromise could be arrived at.

For in paragraph 10 it is expressly provided that the plaintiffs in the suit will not make any compromise "without your consent" which means of course the Rajah of Tuni's consent. In their Lordships' view, having regard to the abovementioned fact, the construction of these three clauses 10, 11 and 12 of the agreement of the 14th August 1907, which would make the giving of the consent of the Rajah of Tuni, and of the Vakil named, a condition precedent which must be performed before any compromise could be validly made, is not their true construction. Both these men died in the year 1911. Having regard to the uncertainty of human life, which contracting parties when providing for possible future events must be presumed to bear in mind, it would be unbusinesslike and indeed irrational if not absurd, for the parties in August 1907, to have entered into such a contract as the High Court have construed this contract to be. Whereas it would be quite businesslike, quite rational and perhaps prudent for them to have entered into it if the things required to be done under it should only be required to be done where it was possible to do them. In their Lordships' view it is reasonably certain that parties to this agreement intended that this is what it should mean and that, therefore, a term must be implied to exist in it, to the effect that the consent mentioned should be given when possible, and that the giving of consent of the Rajah himself to a compromise accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it. Their Lordships are, therefore, of opinion that the decree appealed from was erroneous and should be reversed with costs and the decree of the Subordinate Judge should be restored and they will humbly advise His Majesty accordingly.

The first, fifth and sixth respondents must pay the costs of the appeal.

K. S. D. *Appeal allowed.*

Solicitor for the Appellant—Mr. *Douglas Grant.*

Solicitors for the Respondents—Messrs. *Chapman, Walker & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 312 OF 1922.

May 28, 1923.

Present :—Mr. Dalal, J. C.

RAM CHARAN—DEFENDANT—APPELLANT
versus
CHAMPAT SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 127—Trespasser—Ejectment—Jurisdiction of Civil Court.

Section 127 of the Oudh Rent Act was enacted to give a landlord a swift remedy, through the Revenue Court for the collection of rent even from a trespasser. It does not deprive the landlord of his remedy to eject a trespasser through the Civil Court. [p. 819, col. 2.]

Appeal against the judgment of the Subordinate Judge, Unao, dated the 22nd July 1922, modifying the decree of the Munsif, North Unao, dated the 14th December 1921.

Mr. *D. K. Seth*, for the Appellant,

Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.—The plaintiff and the defendant were co-sharers in the same *mouza* until partition. At partition three plots in the present suit 354|1, 428|1 and 461, which were held as *khudkasht* by the defendant, were allotted to the share of the plaintiff. The plaintiff brought the present suit in the Civil Court on 23rd August 1921 for ejectment of the defendant as a trespasser and for *mesne profits* on the ground that he let this land to a tenant after the partition but that subsequently the tenant was unlawfully ejected by the defendants who took forcible possession. The defence was that the defendant was an ex-proprietary tenant of the land in consequence of the partition. Possibly this was on the strength of the provisions of sections 125 and 126 of the Land Revenue Act relating to the transfer of *sir* land. The first Civil Court held against the plaintiff that he had not let the land to any one, but that the defendant had continued in possession of the land in suit after the partition. It further held, and this was a finding against the defendant, that the latter had not acquired any ex-proprietary rights because the land in suit was not his *sir*. The suit was decreed for possession and for Rs. 36 mesne profits.

On appeal to the District Court the defendant abandoned the claim for ex-proprietary rights and urged that he was a tenant (under operation of law) of the plaintiff who could recover rent from him under section 127 of the Rent Act, but could not eject him through the Civil Court. This plea was repelled by the learned Subordinate Judge of Unao who heard the appeal. The learned Judge held that the defendant was a trespasser subsequent to the partition, and had not the rights of a tenant. On cross-objection by the plaintiff-respondent he raised the amount of mesne profits to Rs. 54.

In second appeal here it is argued that the defendant is a tenant and could not be ejected through the Civil Court. The defendant's right to be a tenant of land which has been allotted at partition to another co-sharer is not based on any provision of the Rent Act. It was argued in terms of section 127 that any person in possession of land occupied without the consent of the landlord shall be liable for the rent of that land. The argument seems to be that when such a trespasser is bound to pay rent for the land, he is presumed under the Act to be a tenant. There does not seem to be any justification for such a deduction. Section 127 appears to have been enacted to give a landlord a swift remedy through the Revenue Court for the collection of rent even from a trespasser. This provision does not deprive the landlord of the rights he may have otherwise in dealing with a trespasser of agricultural land. If a landlord chooses to eject a trespasser through the Civil Court there is nothing in the provision of section 127 to prevent him from doing so. When the defendant appeals for help to that section it may be taken that he admits himself to be a person who is in possession of

the land without the consent of the landlord. In that case he is certainly a trespasser.

All doubt has, however, now been set at rest by the amendment of section 127 of the Rent Act. This amendment came into operation on the 11th February 1922. It is laid down there that a person who retains possession of the land without being entitled to such possession may be treated either as a trespasser and ejected, or treated as a tenant and be liable to pay rent of that land. The amendment is one of procedure only. Under the present section 127 a person in the position of the defendant is clearly declared to be a trespasser who may be ejected through the Civil Court. Under the provisions of the unamended section 127, where the trespasser is treated as a tenant, he could only be ejected through the Revenue Court, the difference is only of procedure, and if it were necessary to decide the point I would hold that the present provisions of section 127, would have its retrospective effect. The proceedings in the present suit are still pending, and if the question is whether the defendant should be ejected through the Revenue Court or through the Civil Court, the new Act would give the plaintiff the option to choose his procedure. There is no change effected by the amendment in existing rights.

To sum up, in my opinion the provisions of section 127 as unamended do not save the defendant from being a trespasser, and even if they did the procedure of the amended section would attach to the present proceedings and the defendant would be liable to ejectment by the Civil Court.

As regards the mesne profits the amount is a finding of fact by the lower Appellate Court and cannot be disturbed by this Court.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

May 13, 1924.

Present:—Lord Dunedin, Lord Phillimore, Lord Carson and Sir John Edge.

GANGA RAM AND OTHERS—APPELLANTS
versus
NATHA SINGH AND OTHERS—
RESPONDENTS.

Mortgage—Interest, whether charge upon property.

The mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate. [p. 820, col. 2.]

Mr. *W. Wallach*, for the Appellants.

JUDGMENT.—In this case the plaintiffs sue for redemption of five mortgages. Two of those mortgages, the earlier two in date, were usufructuary mortgages; the other mortgages were not usufructuary, but with regard to the next two—for as to the fifth one there is no question at all—there is a recital that interest is to be paid upon the sum borrowed.

Now, the whole point of the case is whether that interest in this third and fourth mortgages does or does not form a charge upon the property. The learned Trial Judge held that it did form a charge on the property, and, therefore, granted redemption only upon terms of paying the principal sums and the interest. That decree was reversed upon appeal, and the High Court allowed redemption upon payment of the principal loan only. Their Lordships find that in the judgment of the learned Judges in the High Court they state with perfect correctness what their Lordships apprehend is undoubted law. They say: "The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate."

Their Lordships have been entirely unable to find anything in the deeds which would serve to displace that general rule. The learned Judges seem to have gone particularly upon the

case of *Alia Khan* v. *Kanshi Ram* (1), (1913, Punjab Record, Civil Judgments p. 176). It is perhaps a little difficult to follow that case, as the material parts of the deed in question are only printed in the vernacular; but it is perfectly clear from the Report even as it stands that there were various mentions of the sum to be redeemed in different parts of the deed, and that consequently the deed itself formed, so to speak, glossary for the particular meaning of the word that was used when you came to the repayment clause. Nothing of this sort is here. The mortgages are expressed with great brevity, and, indeed, if there is anything at all, it rather seems, such as it is, to point the other way, because especially in the fourth mortgage there is this expression; "I shall without objection pay the additional mortgage money with interest in the following instalments." That certainly points much more in favour of the general rule than against it, but it is quite enough to say that there is nothing to be found here which disturbs the general rule, which, it is most important, should not be shaken in any particular.

It is impossible to restore in terms the decree of the Trial Judge, because it was discovered in the course of the hearing before the High Court that the plaintiffs were not in right in the whole of the mortgages, and accordingly the judgment of the High Court ran. We give the plaintiffs a decree for redemption of whatever share in the mortgaged land is still owned by them on payment of a proportionate share of the principal debt.

There ought, therefore, to be a declaration that it is not only a share of the principal debt, but also interest that must be paid before redemption, and the case will have to go back in order that the decree may be worked out on those terms.

Their Lordships therefore think that the appeal must be allowed, with costs here and below, and they will humbly advise His Majesty accordingly.

K. S. D. *Appeal allowed.*

Solicitor for the Appellant—Mr. *E. Dalgado.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 58 OF 1923.

May 30, 1923.

Present:—Mr. Dalal, J. C.

Must. BRIJ RAJ KUAR—DEFENDANT —APPLICANT

versus

RAM NATH—PLAINTIFF AND OTHERS— —DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, para. 1—Arbitration—Defendant who admits claim, whether interested.

A person who admits the plaintiff's claim unconditionally without reference to the liability of his co-defendants and absents himself from subsequent proceedings, is not interested in the suit within the meaning of para. 1 of Schedule II to the Civil Procedure Code, and is not a necessary party to a reference to arbitration as between the plaintiff and the other defendants. [p. 822, col. 1.]

Poita Pavana Panda v. *Narasinga Panda*, 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538, distinguished.

Appeal against the order of the Munsif, Utraula, dated the 19th March 1923.

Mr. *S. N. Roy*, for the Applicant.

Mr. *Zahur Ahmad*, for the Opposite Party.

JUDGMENT.—The plaintiff Ram Nath, sued on the basis of a Chitti three persons in the Court of the Munsif of Utraula. The defendants were *Must.* Suraj Kumari and Brij Raj Kumari (co-widows of one Ram Saran) and Rattan Lal. On the date of hearing Rattan Lal and a general agent of *Must.* Suraj Kumari admitted the claim. Subsequently Ram Nath and Brij Raj Kumari entered into an agreement to refer the question in dispute between them to arbitration and an award was given by the arbitrator. A decree was passed by the Court in terms of the award. The objections made to the award in the lower Court are not repeated here. The main point urged in revision in this Court is that the agreement to refer the matter to arbitration was invalid and that therefore the lower Court had no jurisdiction to pass a decree in terms of the award. The objection is based on the words of para. 1, Schedule 2 of

the Code of Civil Procedure. It was argued that all the parties interested in the suit must agree to refer the matter to arbitration, and in the present case Rattan Lal and *Must.* Suraj Kumari had not agreed. The learned Counsel of the applicant quoted *Polita Pavana Panda* v. *Narasinga Panda* (1) where rulings in support of the view taken by that High Court are conveniently collected. The facts of that case, however, and of the case referred to in that judgment are different from the facts of the present case. The party whose agreement to a reference was wanting absented himself and had not admitted the plaintiff's claim. A person who absents himself from the proceedings in a suit is equally interested in the result of the suit as those who present themselves in Court. As regards admission also there may be cases where the interest of the parties admitting the matter in suit may continue even after the admission. In the present case, for instance, if Ratan Lal and *Must.* Suraj Kumari had admitted their joint liability with Brij Raj Kumari, or a liability to the extent only of ⅔rds of the plaintiff's claim it could have been argued that they would be interested in the result of the dispute between the plaintiff and *Must.* Brij Raj Kumari whether the latter was liable to the plaintiff or not. In the present case the admission of the plaintiff's claim was complete and without any reservation. It was not stated that these two defendants would be liable only if *Must.* Brij Raj Kumari was liable or that they were liable to pay only a proportion of the debt. The admission was such as to entitle them to a judgment under O. 12, r. 6 without waiting for the determination of any other question arising in the suit. Under the circumstances my opinion is that they were no longer interested in the suit after the manner in which they recorded their admission. They were therefore not necessary parties to the agreement to refer the matter to arbitration.

The third ground of revision has no force. The arbitrator was a pleader and has given his decision with care. He has not travelled beyond the issues referred to him. I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 51 Ind. Cas. 155 ; 42 M. 632; 36 M. L. J. 568.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

May 13, 1924.

Present :—Lord Dunedin, Lord Phillimore, Lord Carson and Sir John Edge.

MAHARU WALAD LOTU—APPELLANT

versus

KHANDU WALAD HARI PATIL AND ANOTHER—RESPONDENTS.

Registration Act (XVI of 1908), *sec.* 60—*Statement at time of registration, whether evidence—Misrepresentation, proof of.*

On the 2nd October 1913, defendant entered into an agreement to sell certain lands to the plaintiff. On the 27th October 1913, he sold these lands to a third person by two sale deeds ; and on the 6th November 1913, he made a conveyance in virtue of the first agreement. In the attestation which had to be made at registration, he in respect of the sales of the 27th October made a statement that he had signed the documents in question not as sales, but as mortgage deeds. At the trial he asserted that he was so drunk at the time that he did not knew what he was about, and gave no evidence in support of his earlier statement.

Held, that under the circumstances the mere statement of the vendor at the time of registration could not lead to the inference that the vendor's impression had been induced by the action of the other party ; that no misrepresentation having been proved the first transaction was a proper sale and could not be impeached. [p. 823, col. 1.]

Mr. *E. M. Raikes*, for the Appellant.

Mr. *J. M. Parikh*, for the Respondents.

JUDGMENT.—In this case the first respondent the owner of certain separate parcels of land, entered into an agreement to sell those lands on 2nd October 1913, to the appellant. He did not at the time follow that up by an actual sale, and on 27th October 1913, he sold the same lands to the second respondent by two sale deeds. Following upon that he also made a conveyance on the 6th November 1913, in virtue of the first agreement. In the attestation which has to be appended at registration the vendor in respect of the sales of the 27th October 1913, made a statement that he had signed the docu-

ments in question not as sales, but as mortgage-deeds. Priority of time is in favour of the two sales which happened upon 27th October, and they, therefore, must be got rid of and the way in which the defendant, whose transferee had got into possession, endeavoured to get rid of them was to asseverate that when he appended his signature to the two sale-deeds on 27th October he was so drunk that he did not know what he was about. He went to proof upon that allegation, and the statement has been held to be untrue. It was also open to him to make the case that whereas he, in fact, signed sale-deeds it had been represented by the other party that what he was really signing were mortgage-deeds, in which case he would have been entitled to be relieved against this fraudulent act. At the trial as originally conducted he really gave no evidence as to any representation of that sort; but entirely confined himself to this allegation about his state of utter drunkenness and accordingly all the evidence that was left was that there was in fact an antecedent agreement to sell; there was a certain conversation antecedent to the deeds of sale, in which he proposed to mortgage and then there was what may be called a blank as to what happened at the actual transaction. Notwithstanding that, the learned Judge in the Court of first instance gave judgment in favour of their being no proper transaction of sale. The case then went on appeal to the High Court, and the High Court, feeling that the true matter had not been enquired into, sent it down again and put upon the defendant the necessity of showing that his signature to these two sale-deeds had been obtained under a misrepresentation. He led no further evidence and, the case was then heard by a second Judge, who repeated the judgment. The second Judge seems to have gone upon the view that inasmuch as the vendor had said in his attestation as to his signature that he had signed mortgage-deeds and not sale-deeds, that showed the impression that he was under, and it must be inferred that the impression had been induced by the action of the other party. The High Court reversed. It is impossible for their Lordships to draw such an inference as was drawn by the Trial Judge, and their Lordships, therefore, think that it is quite clear that the case here is not made out, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

K. S. D. *Appeal dismissed.*

Solicitor for the Appellant—Mr. *E. Dalgado.*

Solicitors for the Respondents—Messrs. *T. L. Wilson & Co.*

PATNA HIGH COURT.

CIVIL REVISION NO. 172 OF 1922 AND ANALOGOUS NOS. 173 AND 174 OF 1922.

November 28, 1922.

Present:—Justice Sir John Bucknill, Kt., K.C.

BISHUN DAYAL SINGH AND OTHERS—PETITIONERS

versus

JAGDISH NARAYAN SINGH AND OTHERS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885) s. 170 (3)—Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Co-sharer-landlord—Money-decree for rent—Non-transferable occupancy holding, sale of—Purchaser, whether entitled to make deposit.

A co-sharer landlord who obtains a money-decree in respect of his share of the rent of a non-transferable occupancy holding and purchases the holding in execution of the decree, obtains nothing tangible by the purchase and has no *locus standi* to make a deposit under section 170 (3) of the Bengal Tenancy Act, in order to save the holding from being sold in execution of a rent-decree. Nor has such a purchaser any *locus standi* to make a deposit under O. XXI, r. 89 of the Civil Procedure Code. [p. 825, cols. 1 & 2.]

Case-law discussed.

Revision against the order passed by the Munsiff, Barh, dated the 20th February 1922.

Mr. *Siva Nandan Ray*, for the Petitioners.

Mr. *S. M. Mullick* and Mr. *Jalgovind Prosad Singh*, for the Opposite Party.

JUDGMENT.—This was an application in Civil Revisional Jurisdiction made by certain petitioners asking that an order passed by the Munsif of Barh on the 20th February 1922, should be set aside. (There are two other cases Nos. 173 and 174 of 1922 which are

analogous and my present decision is, therefore, applicable also to them).

The facts are very short. The applicants are co-sharer-landlords in a certain *mouzah*, some of the respondents are also co-sharers, others tenantry. The petitioners brought a suit againt the respondent tenantry for their share of arrears of rent for the years 1321-1324 Fs., obtained a money-decree, put the holding up for sale and bought it.

The opposite party landlords subsequently brought a suit for their share, also obtained a decree (but a rent-decree) and sought to sell the holding. The petitioners deposited the decretal amount in Court under section 170, clause 3 of the Bengal Tenancy Act but the landlords opposite party objected and applied for the release of the holding on the 11th February 1922 after the sale proclamation had been issued fixing February 20th for the sale. The Munsif upheld the objection and declared the deposit invalid. Though not perhaps here very material, it may be mentioned that, as a matter of fact, the sale proceeded and took place on February 22nd and the holdings were sold to third parties, the 23rd March was fixed for the confirmation of the sale. The petitioners applied on March 18th to set aside the sales under O. XXI, r. 90, two of these applications were however dismissed for want of prosecution on May 13, and the sales were confirmed. These last mentioned facts are deposed to in an affidavit filed before me on 24th October on behalf of the opposite party landlords.

The Munsif gave a lengthy judgment. He held that as the holdings were not transferable by custom the applicants being purchasers of entire holdings in money-decrees had not acquired even a voidable interest in the holdings on sale. He commented on certain decisions of the Calcutta High Court which appeared to uphold a contrary contention but regarded himself as bound by the decisions of the Patna High Court notably in the case of *Rameshwar Singh Bahadur* v. *Raghunandan Khabas* (1). It was contended by the learned Vakil for the applicants that the provisicns of sub-section 3 of section 170 of the Bengal Tenancy Act were not applicable at all in this case, firstly because he now alleged, that the decree obtained by the opposite party landlords was a money and not a rent-decree, and, secondly, because the section cannot be applied when the contest is between co-sharer-landlords.

The learned Vakil urges that it was a money-decree because it would appear from the execution petition filed by the opposite party that there were two *khatas* to be sold. The learned Vakil for the opposite party objected to this point being taken as it had never been raised before and that it had throughout been maintained that the deposit was being made under the very provisions of the Act which the learned Vakil for the applicants was now wishing to discard. It was, however, argued for the applicants that if the decree was money-decree the deposit could be made under the provisions of O. XXI, r. 89 of the Civil Procedure Code. The learned Vakil for the respondent points out in answer to this that because two *khatas* were to be sold it does not follow that the decree is not a rent but a money-decree as they may have and in this case did have a consolidated rent.

With regard to the second point, namely that the section could not be applied when the contest lay between co-sharer-landlords, the learned Vakil for the applicants referred to the case of *Bipra Das Dey* v. *Rajaram Bannerjee* (2) where it was held that section 170 of the Bengal Tenancy Act does not apply to a decree obtained by a co-sharer landlord for his share of rent in respect of two holdings and that, therefore, when the holdings are attached in execution of such a decree a claim under section 278 of the Code of Civil Procedure was maintainable. The rights of a landlord who purchases all the right, title and interest of a tenant in a sale by himself in execution of a money-decree obtained by him for his share of rent are not the same as those of a third party.

The learned Vakil for the respondents meets these arguments with a strong case. He points out that the applicants are not registered transferees in law, that is to say, in the sense that their transfer is not recognised as valid by the co-owners he is in precisely the same position as a third party. The case

(1) 38 Ind. Cas. 337; 1 P. L. J. 403; 2 P. L. W. 364.

(2) 3 Ind. Cas. 306 ; 36 C 765 ; 13 C. W. N. 650.

quoted by the Munsif, Maharaja Sir *Rameshwar Singh Bahadur* v. *Raghunandan Khabas* (1) clearly lays it down he contends that an unregistered transferee of an occupancy holding is not entitled to make a deposit under section 170 (3) of the Bengal Tenancy Act. The position is defined by sub-section 2 of section 22 of the Bengal Tenancy Act. See also the decision in *Mahbdeo Singh* v. *Langat Singh* (3) where a Special Bench of this Court held that a purchaser without the landlord's consent of a non-transferable occupancy holding which has been proclaimed for sale under section 163 of the Bengal Tenancy Act is not entitled to deposit the amount of the landlord's decree and costs under section 170 (3) of that Act. Quite recently it has been similarly so held also by the Calcutta High Court in *Muhammad Ismail* v. *Satyesh Chandra Sarkar* (4). A purchaser of a non-transferable holding acquires no interest as against the landlords see *Lakhi Kant Das Mahapatra* v. *Balabhadra Prasad Das* (5) and others.

The cases are no doubt rather confusing at first sight but I think it is important to try and analyze what is the real legal position of the parties. The applicants sold the holding of the tenants for their share of arrears of rent in execution of a decree obtained as a money-decree they bought whatever the tenants had *i. e.*, the tenants' right, title and interest. The applicants pursued their own remedy alone. When the opposite parties landlords brought their action they joined all the other co-landlords and obtained a rent decree. The applicants only acquired what a third party outsider would have acquired on purchase. The holding was not one transferable by custom and a third party purchaser would not as against the landlords have acquired unless he had been registered as a transferee by them, any interest which on a sale of the holding was voidable. In fact they purchased nothing tangible which they could utilize to bring themselves within the scope of the section of the Bengal Tenancy Act which they sought to invoke.

The opposite party landlords have always contended that the holding was a non-transferable one and it has not been seriously contested that it was not, no attempt was made by the applicants to prove the contrary and the Munsif definitely found it was non-transferable. There is no ground whatever for me to hold to the opposite.

The applicants must accept and do now really admit that they must accept the broad proposition laid down by this Court that if the holding is a non-transferable one a purchaser under a money-decree cannot avail himself of section 170 (3) of the Bengal Tenancy Act and they now try to set up before me a case wholly different from that put forward before the Munsif. They now suggest that the Bengal Tenancy Act does not apply at all and that the landlord opposite party's decree was a money and not a rent decree ; they wish to throw overboard what they alleged before the Munsif altogether. I do not think that in revisional jurisdiction I should countenance such a complete *volte face*. But, even so, they do not prove clearly that the landlord opposite party's decree was a money decree and even if they had I see no ground for supposing that they would have any *locus standi* to pay in the money under O. XXI, r. 89 or what good it would do them if they did and they certainly never contemplated in the very least that their proposal to pay in was made or purported to be made under the provision of any such order.

As for the proposition that when two co-owners are at loggerheads as in this case the Bengal Tenancy Act has no application, I cannot see any clear authority for such a proposition or that a co-owner in the position of the applicants is in any really stronger position than a third party purchaser.

I think the application must stand or fall by the case as it was presented to the Munsif and I have no doubt that as the law at present stands the Munsif was right in the view which he took.

I must, therefore, decline to interfere.

Z. K. *Application rejected.*

(3) 40 Ind. Cas. 257 ; 2 P. L. J. 457 ; 1 P. L. W. 504 ; (1917) Pat. 169.
(4) 26 C. W. N. notes page CLXX (170).
(5) 25 Ind. Cas. 546 19 C. L. J. 400.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

May 9, 1924.

Present :—Lord Shaw, Lord Blanesburgh and Mr. Ameer Ali.

ASHRAFI SINGH—APPELLANT
versus
BIDYA PRASAD NARAYAN SINGH AND OTHERS—RESPONDENTS.

Construction of document—Deed of gift—Gift with conditions—Disposition, nature of.

Where in the primary clause of a deed of gift these words followed the gift "and all rights appertaining thereto with the following conditions" :

Held that these words fundamentally affected the construction of the deed as a whole;

(2) that so construed the deed did not confer *maliki* rights without conditions, nor did it confer on the donee these rights of property and alienation which a bare disposition in favour of a person denominated as *malik* would have involved. [p 826, col. 2.]

Messrs. *De Gruyther* and *E. B. Raikes*, for the Appellant.

Messrs. *M. Dunne* and *K. Brown*, for the Respondents.

JUDGMENT.—Everything that could be said in favour of this appeal has been admirably said by the learned Counsel for the appellant. Their Lordships adopt the opinion of the Court below, which is appealed from, but desire only to say that they cannot see their way to acquiesce in the characterisation of the conveyance of the *malik* as occurring a preamble in the deed. When the deed is looked at it is seen that the actual gift to the donee of the *malik* is that which, although characterised as in the preamble, is in truth in the substantive disposition.

With that correction, however, full assent must be given to the proposition that the deed as a whole must be looked to. In the primary clause, called erroneously a preamble, and now referred to as the actual portion constituting the gift, these words follow the gift—"and all rights appertaining thereto with the following conditions". It appears to their Lordships that that fundamentally affects the

construction of the deed as a whole, because the whole balance of the document consists in the insertion of those very conditions under which the deed of gift is accomplished. So construed, the deed as a whole leaves no room for doubt that it did not confer the *maliki* rights without conditions, nor did it confer on the donee those rights of property and alienation which a bare disposition in favour of a person denominated as malik would have involved.

On the whole, without entering upon details, the decision arrived at appears to their Lordships to be sound in principle and in accord with authority, and their Lordships will humbly advise His Majesty that the appeal be disallowed with costs.

K. S. D. *Appeal dismissed.*

Solicitors for the Appellant—Messrs. *Watkins* and *Hunter*.

Solicitor for the Respondents—*Solicitor, India Office.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION No. 180 OF 1924.

May 7, 1924.

Present: —Mr. Wazir Hasan, J. C.

ALLAHABAD BANK LIMITED—DEFENDANT—APPLICANT
versus
SHIVA BAKSH SINGH— PLAINTIFF —OPPOSITE PARTY.

Legal Practitioner—Brief, rejection of.

A lawyer has no right to reject a brief when offered to him on payment of fee agreed upon between the parties on grounds of partisanship for a party to the litigation. [p. 827, col 1]

Application for transfer of a Civil Suit from Fyzabad, to some other district.

Mr. *Bisheshar Nath Srivastava*, for the Applicant.

Messrs. *Niamat Ullah* and *Naim Ullah*, for the Opposite Party.

JUDGMENT.—I have heard arguments twice in this case. It is an application for transfer of a suit pending against the applicant in the Court of the Subordinate Judge of Fyzabad. The applicant's grievance is that almost every one of the leading members of the Fyzabad Bar has been engaged by the opposite party, who is in the Government serivce acting as the Income Tax Officer in the District of Fyzabad. At the last hearing of this application I suggested that there were still two gentlemen of the Bar of standing and position who were not retained by the plaintiff and their services might be availed of by the applicant. With a view to enable the applicant to approach those gentlemen I had adjourned the decision of the application. I am now informed by the learned Advocate for the applicant that those gentlemen have declined to accept the brief on behalf of the applicant and the learned Abvocate has refused to disclose the reasons for the refusal to the Court. Just at present I express my extreme regret at this conduct of the members of the Bar. The noble tradition of the profession I expect to be maintained by those gentlemen. I have no hestation in saying that a lawyer has no right to reject a brief when offered to him on payment of fee agreed upon between the parties on grounds of partisanship for a party to the litigation. I do not know, as I have said above, what the grounds of refusal in the present case were. Be that as it may, this case has certainly created a sort of excitement in Fyzabad. The plaintiff, opposite party, issued letters to a large number of lawyers in Fyzabad, asking them to say whether they would appear for the applicant in the suit in the original Court. Those letters have been produced before me and each of them contains the reply on the back of the letter. This method adopted by the opposite party does not commend itself to me in the least.

On the merits of the application I am not prepared to transfer it from Fyzabad altogether. It would be highly unjust to do so. The plaintiff, opposite party, has engaged a number of pleaders and presumably must have paid them their fee or portions of it. On the other hand the applicant does not seem to have engaged any pleader so far. In the circumstances the ends of justice will be fully satisfied if I order the transfer of the case from the Court of the Subordinate Judge of Fyzabad in which it is pending at present, to the Court of the permanent District Judge of the same place for trial and disposal. I order accordingly.

N. H. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 7, 1924.

Present :—Lord Atkinson, Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

MIDNAPUR ZAMINDARY CO., LTD.—APPELLANTS

versus

KUMAR NARESH NARAYAN ROY AND OTHERS—RESPONDENTS.

Co-sharers, rights of—Exclusive use by one co-sharer, whether amounts to ouster Disagreement between co-sharers—Remedy—Co-sharer, powers of, in Bengal—Question excluded by plaintiff and not decided by Court—Appellate Court, decision by at request of defendant—Res judicata—*Civil Procedure Code* (*Act V of* 1908) s 11.

Where lands are held in common by co-sharers each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them. [p. 829, cols. 1 and 2.]

Robert Watson and Co. v. *Ram Chand Dutt*, 18 C. 10 ; 17 I. A. 110; 5 Sar. 585; 9 Ind. Dec. (N.S) 7 (P.C.) referred to.

MIDNAPUR ZAMINDARY CO. *v.* NARESH NARAYAN ROY

Even if the Midnapur Company purchased any jote rights in lands, held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all co-sharers and the jote rights so purchased would by the purchase be extinguished. [p 829, col. 2.]

In Bengal a co-sharer has no more power to confer a right of occupany on a raiyat than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. [p. 830, col. 1.]

Midnapore Zamindary Company v. *Naresh Narain Roy*, 64 Ind. Cas, 231 ; 1922 A. I. R. (P. C.) 241 ; 48 C. 460 ; 48 I. A. 49 ; 14 L. W. 265 ; 30 M. L. T. 279 (P.C.), referred to.

Plaintiff sued for partition of certain lands in which he and the defendant were co-sharers and for a declaration that the defendant had no jote rights in any of the lands of which he sought partition. In an earlier suit between the predecessors-in-title of the parties, the question of the defendants' right was also in issue but the then plaintiff had excluded it by the statement of his pleader and the first Court had therefore expressly stated that it could not decide it. The defendant had thereupon urged in appeal that the Court was wrong in not deciding it and had asked the Appellate Court expressly to decide it and the Court had done so.

Held that in so far as the Court decided the point raised it must be assumed to have also decided that the then defendants' objection that the point should be tried was a good one and that the issue was one which did arise in the suit, and that the matter was therefore *res judicata*. [p. 832, col. 2.]

Appeal against a decree of the Calcutta High Court, dated the 17th January 1921, affirming a decree of the Subordinate Judge, Nero, dated the 19th August 1915.

Messrs. *L. De Gruyther* and *K. Brown*, for the Appellants.

Messrs. *D. M. Dunne* and *W. Wallach*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants, the Midnapur Zamindary Company, Limited, which will be hereafter referred to as The Midnapur Company, against a decree, dated the 17th January, 1921, of the High Court at Calcutta, which affirmed a decree, dated the 19th August, 1915, of the Subordinate Judge of Nadia, by which the claim of the plaintiff, Kumar Naresh Narayan Roy, in Suit No. 557 of 1912, had been decreed with costs. The other parties to the litigation are Rani Hemanta Kumari Debi and the Secretary of State for India in Council, who are defendants and respondents, but they have not appeared and are not represented in this appeal.

This suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Nadia on the 8th August, 1912, by the plaintiff, who is of the Putia Raj Family, and who claimed a decree for the partition of certain lands in which he and the Midnapur Company were co-sharers, for a declaration that the Midnapur Company had no jote rights in any of the lands of which he sought partition, and a decree for possession after partition by ejectment of the Midnapur Co. and other reliefs.

By the written statement of the Midnapur Company it was denied that the plaintiff was entitled to a decree for partition. The right of the plaintiff to a decree for partition is not now disputed. Partition is the remedy which a co-owner has if he and other co-owners cannot agree as to how the lands which they hold in common should be managed. See *Robert Watson and Co.* v. *Ram Chand Dutt* (1)

There were two, and, in the opinion of their Lordships, only two, substantial defences, if proved, put forward by the Midnapur Company to the plaintiff's suit. The first of these defences was that the plaintiff had not been in possession within twelve years of the 8th August, 1912, of the lands in question in which he alleged that the Midnapur Company had no jote rights, and consequently, that his claim to eject the Midnapur Company from those lands was barred by the limitation of Article 142 of the First Schedule to the Indian Limitation Act, 1908. The other substantial defence, if made out, was that the Midnapur Company held jote rights in the lands in question. These two defences their Lordships will consider later. There were two other matters which were put forward by the Midnapur Company in the assertion of their claim to jote rights in the lands in questien. One of them was an order which was made on 20th Septeber, 1909, by Mr. Ezekiel, the Collector, that the Midnapur Company should be recorded in the settlement papers as tenants with rights of occupancy. The order applied to the lands now in question and was not appealed from. It was made in the course of a new settlement from year to year. The other matter to which

(1) 18 C. 10 ; 17 I. A. 110 ; 5 Sar. 535 ; 9 Ind. Dec. (N. S) 7 (P. C.).

their Lordships allude was the contention that the plaintiff was estopped from challenging the right of the Midnapur Company to jote rights by a Kabuliyat of the 9th February 1912, to which he was a party, and by which the plaintiff had undertaken to respect the recorded rights of *raiyats* and others. These latter two defences were carefully considered by the High Court in its judgment in this suit, and their Lordships agree with the High Court that they do not afford defences to the claim of the plaintiff.

The evidence as to the rights of the parties was carefully considered by the Subordinate Judge who tried the suit, and the High Court agreed with him in all material matters. The history of the lands in question which are *chur* lands in the alluvial plains of the river Padma, and of how those lands have from time to time been dealt with by the Government, by the plaintiff, and by the Midnapur Company and their predecessors-in-title, including Robert Watson and Co., has, so far as is material, been very fully and most carefully stated in the admirable judgment of the High Court of Sir John George Woodroffe and Hugh Walmsley, JJ., and with the conclusions expressed by those learned Judges their Lordships agree. They will, however, refer to some other matters which in their opinion bear upon the case, and will then state what is their conclusion as to the two defences which, if proved, would be substantial defences to the claim of the plaintiff to eject the Midnapur Coy.

The lands in suit are comprised in an estate which has been periodically settled under Regulation 2 of 1819. As has been mentioned, they are *chur* lands. The proprietary interest in the lands is admittedly vested in the plaintiff and the Midnapur Company as co-sharers, who hold the lands in common. Where lands in India are so held in common by co-sharers each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them. Their Lordships may refer on this subject of separate cultivations by a co-sharers of lands held in common to what Sir Barnes Peacock said in delivering the judgment of the Board in *Robert Watson and Co.*, v. *Ram Chand Dutt* (1), at pp. 120-121 (of 17 I.A.). He then said :—

"In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross-injunctions have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons."

In that case the Board made a declaration that Robert Watson and Co., who were the plaintiffs, should recover from the defendant a sum of money, calculated at a specified rate per *bighz* per year, as compensation for the exclusive use by the defendant of the *bighas* which had been occupied by him.

Their Lordships are not certain that the Midnapur Company has in recent years, if at all, been cultivating any part of the lands in question. If the Midnapur Company has been, in fact, cultivating any of these lands, it cannot by such separate use of the lands have acquired any jote rights in them. Even if the Midnapur Company purchased any jote rights in lands held in common by the co-sharers such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished. The Midnapur Company alleges as a defence to this suit that tenants of the Midnapur Company who are not tenants of the co-sharers, have acquired under the Midnapur Company

jote rights, rights of occupancy, in the lands in suit. Such rights of occupancy, if they existed would be *raiyati* jote rights, but a *raiyat* cannot acquire under section 180 of the Bengal Tenancy Act, 1885, a right of occupancy in *chur* land until he has held the land for twelve continuous years, and no evidence has been brought to the attention of their Lordships that any *raiyat* had held any of the lands in suit for twelve continuous years before suit as a tenant of the Midnapur Company, even if a holding of lands by a *raiyat* under the Midnapur Company, and not under the co-sharers, could confer a right of occupancy on the *raiyat* as against the co-sharers. In Bengal a co-sharer has no more power to confer a right of occupancy on a *raiyat* than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. See the judgment delivered by Lord Dunedin in *Midnapur Zamindary Company* v. *Naresh Narain Roy* (2). See also the cases referred to at page 116 of the commentary on the Bengal Tenancy Act 1885, by W. Finucane and Ameer Ali (Syed), edited by F. G. Wigley, Calcutta, 1904.

Their Lordships return now to the Company's substantial defences to the suit, the first of which is that the suit is barred by the limitation of Article 142 of the First Schedule to the Indian Limitation Act, 1908. This raises the question as to what was the possession of the lands in question in this suit which the plaintiff obtained on the 26th July 1902, and the 20th June 1903, under a decree for possession of the High Court at Calcutta of 1899 in a suit No. 6 of 1891, in which the plaintiff and Robert Watson and Co., who were predecessors in title of the Midnapur Company, were parties. It must be remembered that the plaintiff and Robert Watson and Co., were co-sharers of the lands now in suit, which the plaintiff and the Midnapur Company hold in common as co-sharers. Robert Watson and Co., had been denying the right of the plaintiff as a co-sharer in the lands. A commissioner was appointed to deliver possession to the decree-holders, and he delivered possession under section 264 of the Code of Civil Procedure of 1882 by the usual modes of sticking bamboos and the beating of drums, and by proclaiming aloud in Bengali, in the presence of a number of persons of the vicinity, the terms of the decree of the High Court and of the Parwana of the Court of the Subordinate Judge of Nadia. In India persons are not permitted to take forcible possession: they must obtain such possession as they are entitled to through a Court. The plaintiff was not entitled to get possession by ousting his then co-sharers, Robert Watson and Co., from possession of lands which they were entitled to hold in common as co-sharers; the possession which the plaintiff got was a possession of the lands in his proprietary right as a co-sharer. The High Court had declared that there were no jote rights in the lands. The possession which the plaintiff got in 1902 and in 1903 was within twelve years of the 8th August 1912, and the suit was not barred by the law of limitation.

As to the other material defence, which is one of *res judicata*, their Lordships feel that they cannot add anything to what Sir John George Woodroffe and Hugh Walmsley, JJ., said in their judgment on that subject, with which they agree. But to prevent the possibility of any further doubts being suggested at any time on that matter, their Lordships repeat what those learned Judges said. Referring to the litigation which began in 1891, they said :—

"We now pass to the issue of *res judicata*, the facts as to which are as follows :—

"In the plaint in Title Suit 6 of 1891 the plaintiffs, *i. e.*, members of the Putia Raj family, alleged that the Revenue authorities had been wrong in holding that Watson and Co., and not the plaintiffs, were in possession of the land that was being settled in 1887, and that Watson and Co., dispossessed them by virtue of the order of the Board of Revenue that the settlement was to be with Watson and Co. They admitted that Watson and Co., owned an undivided share of 3 annas odd with themselves in the mahal. Their prayers were as follows:—

(*a*) For a declaration that the land appertained to *towzi* No. 814;

(2) 64 Ind. Cas. 231 ; 1922 A. I. R. (P. C.) 241; 48 C. 460 ; 48 I. A. 49 ; 14 L. W. 265 ; 30 M. L. T. 279 (P. C.).

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(*b*) For a declaration that they were entitled to get settlement from the Collector ;

(*c*) For recovery of possession ;

(*d*) For mesne profits, provisionally estimated at Rs. 1,692.

"The defence was (*a*) that some of the land in suit, *viz.*, 1558 *bighas* 1 k. 10 ch. had accreted to their estates *chur* Hogulberia and Niamatpur, as held by the Revenue authorities ; (*b*) that the remainder had accreted to their estates Udainagar, Temadia and others ; (*c*) that they had acquired a right by adverse possession ; and (*d*) that the plaintiffs could not in any event obtain *khas* possession. Other pleas were raised, but we are not concerned with them.

"It was found that the plaintiffs' claim was barred as to the 1558-1-10 by adverse possession for twelve years, but that the remainder of the land was an accretion to *mahal* No. 814, and that the defendants had not been in adverse possession for the statutory period. These findings of the first Court were upheld on appeal.

"Regarding *khas* possession an issue was framed as follows :—'Are the plaintiffs entitled to recover *khas* possession of the land in suit ? Have the defendants any *jotedari* right in the land? But, on December 28th, 1893, the plaintiffs' pleader made a statement in these words : 'The plaintiffs claim only a right to the settlement of the disputed land and no other right.' On the same day the defendants' pleader made a statement, and asserted that, in any event, *khas* possession could not be given because the defendants had *jotedari* right in the land. As a result of the statement made by plaintiff's pleader the learned Judge did not decide the issue. He said : "The plaintiffs do not ask for *khas* possession. Hence it is not necessary to enquire whether the defendants have a *jotedar* right in the lands.'

"Watson and Co. preferred an appeal, and raised the question that the Judge had left open, in the eighteenth and nineteenth paragraphs of their memorandum. It will be seen from these grounds that the appellants who now contend that the decision of the issue was unnecessary, expressly invited this Court to decide it. The eighteenth of their grounds of appeal ran as follows : 'For that the learned Sub-Judge having held that it was not necessary to enquire whether the appellants have *jotedari* right in the lands in suit, has erred in giving a decree for possession of the same to the plaintiffs." The nineteenth ground was equally explicit and ran : 'For that it should have been held that the appellants are entitled to hold most of the disputed lands in *jote* rights and that the plaintiffs have no right to evict them from the same without determining their tenancy in the manner prescribed by law.' The point was pressed in argument before this Court, but it was held that there was no evidence in support of the contention.

"The decree that was drawn up in this Court made no express mention of the decision on this point in terms : it affirmed the First Court's decree with modifications intended to remove uncertainties.

"In the present suit the plaintiff says that the decree was to the effect that the Raj should get possession after ejectment of Watson and Co., that Watson and Co. were ejected and possession delivered. The statement continues : 'But the plaintiff has not in reality got possession of the decreed lands in proper order even in spite of their having obtained possession in manner aforesaid and the defendant Company have illegally and without any right been still holding possession of the whole of the decreed lands.'

"The prayers are as follows :—(*a*) For a declaration that the Company has not, never has had and never can have *jote* rights in the land covered by the decree in Title Suit No. 6 of 1891 ; (*b*) for a partition of those lands and of the land in *towzi* No. 814 as it was in 1891 ; (*c*) for possession of the separate share of 5a 16 g. 2. kr. to be allotted to the plaintiff by the ejectment of the defendant Company ; and (*d*) for an account and mesne profits, etc,

"There is no dispute about the identity of the land now in suit with the land of the previous suit.

"Now, had the matter rested where the Subordinate Judge left it, no such question as we have to discuss would have arisen. Whether the suit might and should have been properly determined without entering into the question of the tenancy right as the plaintiff apparently wished to do, we need not now enquire. For, in fact (as we have seen), the present appellants directly insisted on the point being tried, and alleged that the First Court should have done so. It was

contended before us that whatever the appellants might have done in this respect, the issue in fact was not a necessary or proper one to be tried in that suit, and that it is open to us to say so. But we must see first whether this Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much *res judicata* as the final determination of the issue on the merits. If we are of opinion that the Court did so decide, we are not concerned to see whether it did so rightly or not, and indeed cannot do so. Now this is not a case, as not infrequently happens, where incidentally some point is decided which is not necessary, which was not of first-rate importance or especially brought to the notice of the Court. The plaintiff had excluded the question by the statement of his pleader. The First Court had, therefore, expressly stated that it could not decide it. The defendant, the present appellant, has expressly urged that the Judge was wrong in not deciding this question even though his action was based on the plaintiff's adviser's statement and he asked this Court expressly to decide it. As the Court did so, it seems to us that we ought to assume not that it did something which was unnecessary, but that in so far as it decided the point raised, it must also have decided that the then defendant's objection that the point should be tried was a good one and that the issue was one which did arise in the suit.

"Then what did the learned Judges say? Maclean, C. J., after disposing of the question of reformation, sets out the three contentions of the then defendants and present appellants, the third of which was that the defendants are entitled to *jotedari* right. On this the Chief Justice held that no such rights were anywhere recorded, nor was there any evidence of such rights. It was, he said, for the then defendants and present appellants to make out such right, but that they had not succeeded in doing so. Banerji, J., states the contention that the plaintiffs cannot claim *khas* possession as the defendants had *jotedari* rights in the greater part of the lands in suit'. He says that it was part of the defence which it was necessary to consider. He then points out that the First Court did not consider the question of *jotedari* right necessary to be determined, and expressly refers to the ground of appeal that the First Court ought to have determined the question of tenancy right, and held that the possession to which the then plaintiff was entitled was subject to the tenant right of the present appellants. It is quite clear from the above that the then defendants' case was present to the mind of the Court. The learned Judge then proceeded to decide it and held that there was no *jote* right. If the learned Judges had thought the issue unnecessary, they would presumably have said so and not decided it. But they did decide it. Can it be said under these circumstances that the point was not raised, that the Court did not consider it to be a necessary issue, did not impliedly decide that it was necessary and did not decide the issue on the merits? We think the answer is clearly in the negative. Then what of the decree? It is true that it does not expressly refer to the tenancy right, but it gave a decree for possession. What, then, did it intend to give? For the appellant it is said that all that was given was possession as co-proprietor and that the question whether such possession was free of the alleged tenancy right was left untouched. But if so, what was the necessity of discussing the question in the judgment? We ought not, we think, to assume that the Judges discussed a question which was irrelevant to the case, and then granted no relief in respect of it; but rather that as they had discussed and negatived the alleged tenancy right in the judgment they intended to, and did give a decree which should give effect to these findings. If so, the learned Judges' decree in effect gave to the respondents before us a right to the lands in that suit free of the alleged tenancy right claimed. We are of opinion, therefore, that he issue as to the appellants' right is *res judicata*."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, but that the decree of the Subordinate Judge be varied by substituting for his order as to mesne profits an order that the Midnapur Company is to pay compensation to the plaintiff for the exclusive use by the Midnapur Company themselves or by their tenants of the lands in suit from the 20th June 1903 until partition has been effected and possession of the lands falling on partition to the plaintiff has been delivered to

the plaintiff. Such compensation is to be ascertained and assessed in the High Court or in the Court of the Subordinate Judge of Nadia as the High Court may direct, and the plaintiff's costs, which may be incurred in the ascertaining and assessing of such compensation, are to be paid to him by the Midnapur Company.

K. S. D. *Appeal dismissed.*

Solicitors for the Appellants—Messrs. *Burton Yeates & Hart.*

Solicitors for the Respondents—Messrs. *W. W. Box & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION NO. 331 OF 1923.

November 23, 1923.

Present :—M. Wazir Hasan, A. J. C.

SHEO DARSHAN SINGH—DEFENDANT—APPLICANT

versus

MATA DIN SINGH—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152, scope of—Amendment of judgment—Accidental mistake—Fraud—Inherent power.

An amendment of a judgment cannot be allowed under section 152 of the Civil Procedure Code merely on the ground of mistake. The error must be a natural consequence of an accidental slip or omission. Where the error is due to a deliberate wrong statement in the plaint, the section cannot be invoked for the purpose of correcting it, unless third parties have acquired rights under the erroneous judgment in the interval. [p. 834, col. 1.]

Hatton v. *Harris*, 62 L. J. P. C. 24 ; 1 R. 1 ; 67 L. T. 722 ; (1892) A. C 547 at p. 560, referred to.

Under section 151 of the Civil Procedure Code however, the Court can correct the judgment even if the mistake was due to fraud and was not accidental, as under that section it has the inherent power to act *ex debito justitiae* and to that real and substantial justice for the administration of which alone it exists. [p. 834, col. 2.]

Hukum Chand v. *Kamalanand Singh*, 23 C. 927 ; 3 C. L. J. 67, referred to.

Application for the amendment of decree of the Court of the Judicial Commissioner, dated the 10th May 1921.

Mr. *Hyder Husain*, for the Applicant.

Mr. *Bisheshar Nath Srivastava*, for the Opposite Party.

JUDGMENT.—This application purports to have been made under section 152 of the Code of Civil Procedure. The object of the application is to obtain an order for "correction of the judgment and "decree" of this Court in Second Civil Appeal No. 196 of 1903 decided on the 10th May 1904.

The facts of the case are not complicated. The applicant, Sheo Darshan, executed on the 11th May 1901 a sale-deed in favour of one Sahaj Ram in respect of one-half of 1 anna, 6 pies, 83 kirants, and 2 *jau* share in village Daraundha. Within this share lie certain plots measuring 8 *bighas* 2 *biswas* and 6 *biswansis*. These were expressly exempted from the transaction of sale. On the 25th August 1901 Matadin Singh, a co-sharer in the village brought a suit for pre-emption in respect of the sale above-mentioned. In paragraph four of the plaint of that suit it was stated that within the property sold there were certain plots of land which belonged to the plaintiff pre-emptor and consequently they should not have been made the subject-matter of the sale. At the end of the plaint the relief prayed for was a decree for proprietary possession of 9 pies 3 *kirants* 3 *jau* with the exception of the plots belonging to the plaintiff and specified in a list attached to the plaint. A decree was eventually passed in terms of the plaint and was confirmed by this Court except as to a certain variation made in the amount of the pre-emption money.

The grounds of the present application are that the plots, which were not the subject-matter of the sale and were expressly excluded from the share, which was the subject-matter of the sale, were by mistake treated throughout the trial of pre-emption as if they also were sold under the sale-deed on the basis of which the suit for pre-emption was brought. It is said that the error committed in the pleadings was repeated in the decree. It is now alleged that under the colour of that decree the pre-emptor, Matadin Singh, is making attempts to dispossess the applicant from those plots.

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The first question, which I have to decide is—does the case as stated above fall within the terms of section 152 of the Code of Civil Procedure? The perusal of the plaint in the suit for pre-emption leaves no room for doubt that the claim related to the property sold under the sale-deed of the 11th May 1901. Obviously it could not relate to any property which was not sold. The sale-deed was by its date mentioned in paragraph four of the plaint. The property sold was, however, described in the paragraph relating to the relief as 9 pies 3 *kirants* 3 *jau* with the exception of the plots belonging to the plaintiff with which we are not concerned in the present matter. This description on the premises stated is clearly a wrong one but the mere fact that the description of the property was erroneous will not in my opinion attract the application of the provisions of section 152 of the Code of Civil Procedure. The error must be a natural consequence of an accidental slip or omission. An error may be committed deliberately, and if it has been so committed it is settled law that the provisions of that section cannot be invoked for the purpose of correcting such an error. Now the mistake in the present case might have either arisen from any accidental slip or omission or the pre-emptor deliberately but erroneously included such property within his suit for pre-emption as was not the subject-matter of the sale to which the suit related. If the first alternative is correct, section 152 would apply. If the second alternative is the right one to adopt, a case of fraud would emerge against the pre-emptor. In the first event there is a long catena of decisions both in India and in England which establish the proposition that pleadings as well as the judgments and decrees of Courts may be rectified to carry out the true intention of the parties and of the Court in such a suit. In the case of *Lawrie* v. *Lees* (1), Lord Pensance said:—"I cannot doubt that under the original " powers of the Court, quite independent of any order that is made under the Judicature Act every Court has the power to vary its own orders.....to vary them in such a way as to carry out its own meaning and where language has been used which is doubtful to make it plain. I think that the power is inherent in every Court." In the case of *Hatton* v. *Harris* (2), Lord Watson made the following observation:—" When an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce." As regards the cases decided in India I would content myself with mentioning two only, that is, *Sheo Balak* v. *Sukhdei* (3) and *Pherozshah Pestonji Randeria* v. *The Sun Mills, Limited* (4). It was urged on me repeatedly that the record now sought to be corrected was perfected and closed about 20 years ago, but as observed by Lord Macnaghten in *Hatton* v. *Harris* (2), lapse of time has nothing to do with the question. In that case an error 39 years old was amended.

If, on the other hand, Matadin Singh pre-emptor deliberately suppressed the omission of the plots which were exempted from the sale in respect of which he brought his claim for pre-emption he was guilty of fraud on the Court, and when this fraud has now been brought to the notice of the Court obviously I cannot let it stand and countenance its perpetration. My action under such circumstances would clearly rest on the provisions of section 151 of the Code of Civil Procedure. Under that section the Court has the inherent power to act *ex debito justitiae* and to do that real and substantial justice for the administration of which it alone exists—see the observations in the case of *Hukum Chand* v. *Kamalanand Singh* (5). It was suggested that the applicant may be left to seek his remedy by a regular suit. To my mind such a suggestion would amount to a prayer to the Court to shut its eyes to the facts of the case. Those facts either reveal a case of error due to an accidental slip or omission or a fraud. I cannot obviously stay my hands and defer the decision of the question any longer.

There are certain limitations on the powers of the Court acting either under section 152 or under section 151 of the Code of Civil Procedure.

(1) (1882) 7 A. C. 19 at p. 34; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185.

(2) 62 L. J. P. C. 24; I. R. 1; 67 L. T 722; (1892) A. C. 547 at p 560.
(3) 23 Ind. Cas. 344; 12 A. L. J. 185.
(4) 22 B. 870; 11 Ind. Dec. (N S.) 830.
(5) 33 C. 927; 3 C. L. J. 67.

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Those limitations were stated by Lord Watson in the quotation already given from his judgment in the case of *Hatton* v. *Harris* (2). The observations of Lord Herschell in the same case were similar. The result is that even an accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. In the present case, however, no third parties are involved. The learned Advocate for the opposite party argued, however, that it would be inexpedient or inequitable to correct the error now because of certain events that have taken place since the decree was made in the suit for pre-emption.

It appears that in 1906 this applicant claimed ex-proprietary right in some of the plots which are the subject-matter of this application. His claim was not decided on the merits and the application was rejected. It further appears that two or some of these plots were in the possession of mortgagees. The opposite-party has obtained possession of them by redeeming the mortgages and is now in possession of the redeemed plots. Two of the plots, however, were left in the possession of the applicant by the order of the Court of Revenue. This happened in the year 1921. I am of opinion that these facts do not render it inexpedient or inequitable to correct the record so as to bring it into harmony with the real intention of the parties and of the Judge.

On the above grounds I allow the application and direct that the decree of this Court dated the 10th May 1904 be so amended as to declare that the decree for pre-emption in respect of the share of 9 pies 3 kirants 3 jau shall not cover the plots stated in the application before me and that those plots were not the subject-matter of the sale to which the suit for pre-emption related. The applicant will get his costs from the opposite party.

N. H. *Application allowed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

April 7, 1924.

Present :—Lord Shaw and Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

KODOTH AMBU NAIR—APPELLANT

versus

SECRETARY OF STATE FOR INDIA—RESPONDENT.

Forest lands—Ownership, presumption as to—Licensee—Long possession, whether creates title—Government order excluding trees from potta—*Suit to set aside order—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 120.

There is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government. [p. 838, col. 2.]

A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. [p. 839, col. 2.]

In 1903 the Government officials marked off the land in suit and issued to the plaintiff as the *karnavan* of his *Tarwad* a rough *potta* showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objections to the exclusion from the rough *potta* of the lands in suit. His objections were definitely rejected in 1905. In 1911 he sued to set aside that order and to obtain a declaration of the right :

Held, that the suit was governed by Art. 120 of the Limitation Act and having been brought more than 6 years from the date of the order sought to be set aside was time-barred. [p. 840, col. 2.]

Messrs. *L. De. Gruyther* and *K. Narasimham*, for the Appellant.

Messrs. *A. M. Dunne* and *K. Brown*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff in the Court of the Subordinate Judge of South Canara on the 25th November 1913, as the *karnavan*, or Manager, of a Nair *Tarwad* against the Secretary of State for India in Council for a declaration that certain lands situated in the forest

tracts in the Kasargod Taluk belong exclusively to his Tarward, and for an injunction to restrain the defendant from dealing in any manner with the said lands to the prejudice of the rights and possession of the plaintiff's *Tarwad*.

Their Lordships will have to refer more specifically in the course of their judgment to the allegations in the plaint, but it is sufficient at this stage to indicate the scope of the suit. The defendant denied the title which the plaintiff put forward ; and the Subordinate Judge found that the plaintiff had totally failed to establish the grounds on which he based his claim, and accordingly dismissed the suit. The plaintiff preferred an appeal to the District Judge who came to the same conclusion as the Court of first instance and accordingly affirmed the decree of the Subordinate Judge, dismissing the suit. There was a second appeal by the plaintiff from the decree of the District Judge to the High Court of Judicature at Madras which, apparently being of opinion that the District Judge had not sufficiently considered the evidence of possession adduced on the plaintiff's behalf, remanded the case for a fresh finding.

When the case came before the District Judge the second time he again examined the evidence thoroughly, almost meticulously, and came to the conclusion as on the previous occasion, that the plaintiff had utterly failed to establish the three propositions on which he based his claim : firstly, long possession : secondly, prescription ; and thirdly, recognition by the defendant of the Tarward's title working as an estoppel. He also found in concurrence with the Court of first instance that the suit was barred under the Statute of Limitation. If the suit is barred by limitation the question of title would not arise. But it appears to their Lordships that it will be more satisfactory to the parties that they should express their opinion on the question of title, before dealing with the question of limitation.

The case then went back to the High Court and the learned Judges accepted, on the 29th January 1920, the finding of the District Judge and dismissed the suit. The present appeal is from this decree of the High Court.

In order to explain the nature of the present litigation and the contentions advanced on the plaintiff's behalf before the Board it is necessary to describe as concisely as possible the character of the lands in respect of which the claim is made and how these lands have been dealt with until now. The district of South Canara lies to the north of Malabar and to the west of Mysore and Coorg ; in the north lies North Canara and on the west the Arabian Sea. The whole district at a short distance from the sea is covered with immemorial forests. Mr. Sturrock, who was Collector of South Canara in the eighties, describes the country thus in his Manual of the South Canara District:—

"South Canara is essentially a forest district. The slopes of the western ghats from north to south clothed with dense forests of magnificent timber and the forest growths, stimulated by the heavy rainfall, approaches within a few miles of the coast." (P. 13).

The lands in suit are situated south of the Chandragiri River, and, as already stated in the Kasargod Taluk, formerely Bekal Taluk. In the lowlands below the forest ridges there lie the farms and holdings of the ryots, which are called " *wargs*." It appears from the record that the *wargs* the ryots hold in their own right are called '*muliwargs*." These ryots and farmers, it appears, are in the habit of going upon the forest lands, clearing a part of the jungle and raising a temporary crop on it. After the crop is reaped, this patch is abandoned and some other part is taken up. For this privilege they have been paying a small fee to the Government. These patches are called " *kumries*," and the lands so desultorily cultivated are designated in the proceedings relating to the subject as " *kumri* lands." The *wargs* do not constitute a farm or an estate of a compact character, the component parts often lying apart from each other. The plaintiff's case is that he has a number of *kumri* lands in the forest, attached to the various plots or *wargs* which he holds and he claims that his *Tarwad* has acquired an absolute title to these lands, partly by long possession, partly by adverse possession against the defendant and partly by purchase and usufructuary mortgages. He also claims that the Government recognised his title and are now estopped from denying it.

The first question, then, that emerges from these allegations, is what is the nature of the forest tract and secondly, what are the

incidents of the *kumri* lands. It has been held in two cases, [*Bhaskarappa* v. *Collector of North Canara* (1) and *Secretary of State for India* v. *Manjeshwar Krishnayya* (2)] one decided by the Bombay High Court from North Canara under dissimilar conditions, the other decided by the High Court of Madras from South Canara, in both of which the identical question arising in the present appeal was involved, that the Government had an absolute title to all the forest tracts which belonged absolutely to the Crown. Their Lordships consider it would answer no useful purpose to travel, as they have been invited to do, in the regions of ancient history. Whatever may have been the custom in ancient India, or under Mohammedan rule, what they have to see is how these lands were treated since the British acquired this part of the country. Ever since 1800 when South Canara was conquered from Tippoo Sultan, the Mohammedan ruler of Mysore, the British Government—in a series of documents which have been carefully examined in the cases referred to above—asserted and exercised their right in the forests. Their Lordships desire to refer only to two of these documents. On the 23rd of May 1860, by a resolution of the Government of Madras (in the Revenue Department) it definitely pronounced in favour of checking the practice of *kumri* cultivation. Among the reports on which it rested its decision was a communication from the Conservator of Forests, dated 17th August 1859, in which he calls attention to what he describes as "the chief evils of this rude system of culture," *viz*,:—

"the destruction of valuable timber, at present urgently required for ship-building and railways, and rendering of land unfit for coffee cultivation.

This document also speaks of the method of cultivation in vogue on *kumri* lands. There were other proceedings which similarly show that the Government claimed to exercise an absolute right in respect of these immemorial forest and waste lands, and constantly asserted its title. But the matter was clinched in 1883 when the Governor in Council passed an order, dated 29th August 1883, finally stopping the right of the neighbouring farmers and ryots to go upon the forest lands for the purpose of clearing patches by destroying the trees, in order to cultivate crops on the clearings. The document is so important that it should be quoted in full.

After referring to the report with which it was concerned, it goes on as follows:—

"2. To survey and demarcate the lands in which kumri is now cut and to impose upon it an acreage rate of assessment—which under the Board's proposal is to confer complete rights of dealing with the land and with the wood growing thereon—would in the opinion of His Excellency in Council tend to compromise the right of Government to deal with the lands as may seem advisable hereafter and to create notions of proprietary right in the *Wargdars* which does not in fact exist. Forest settlement will probably not be undertaken for years in South Kanara and the forest officers cannot possibly indicate at present lands which will be wanted for reservation. Mr. Sturrock's proposed survey would doubtless cost more than he estimates and would probably be far from accurate when finished.

"3. His Excellency in Council accordingly directs that existing arrangements and restrictions (which are in fact those prescribed in G. O., 24th October 1861, No. 2032) in respect of the *Kumri* cultivation in question shall continue, with the exception of a charge of a rate of one rupee an acre on extent actually felled. In lieu of this the Collector is authorised to compound the demand at his discretion for an annual payment not exceeding seven times the *shist* and *shamil* in the case of a *Wargdar kumri*, and in the case of other permitted *Kumri*, of such amount as may seem to him just with reference to past average charges. At the same time a register should be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each *Wargdar* is allowed to cut *kumri*; and during the felling season the revenue and forest subordinates should be on the alert to prevent felling outside the authorised limits, in virgin forests and in jungle of twelve years growth.

"4. Under the above arrangement no measurement need be made in the current

(1) 8 B. 452; 2 Ind. Dec. (N.S.) 301.
(2) 28 M. 257; 15 M. L. J. 147.

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season, and no orders are required on the second of the Proceedings above read."

Pursuant to this order rules were framed for the regulation of *kumri* cultivation, which also are important and should be set out in full :—

"1. The cultivation of *kumri* is strictly prohibited in—

1. Virgin forests.
2. Cardamom and pepper forests.
3. Forests which have not been *kumried* for 12 years or upwards.
4. All forests outside the tracts recognised as *kumries* attached to *wargs*.

"2. All parties contravening Rule 1 will be criminally prosecuted.

"3. A Register will be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each *Wargdar* is allowed to cut *kumri*. In the preparation of this Register care will be taken to exclude all tracts falling under Rule 1.

"4. Every Potail in whose village there is *warg kumri* will report on the 1st April of each year whether the provisions of Rule 1 have been strictly observed in the annual fellings and all Revenue and Forest Officers will take every opportunity of checking the correctness of these reports, and otherwise assisting the prevention of felling outside the authorised limits.

"5. Assessment will be collected at a fixed annual amount, irrespective of the annual clearings which will be left to the discretion of the *Wargdar* concerned, subject to the provisions of Rule 1.

"6. Nothing in the above rules shall be held to preclude Government from taking up for reservation under the provisions of the Madras Forest Act, 1882, any land now occupied for *kumri*."

In accordance with the Rules, notices were issued by the tahsildar apparently on all the *Wargdars* who were in the habit of entering the forest and making *kumri* cultivation. About the same time a register was opened (Exhibit F) showing the details of the boundaries, etc., of the *kumri* lands with regard to which permits had been issued previous to the Government order. It shows to the *Wargdars*, who had been in the habit of promiscuously entering the forests and making clearings, the exact limits which they were permitted to enter for raising temporary crops.

It is quite clear from these records that throughout, wherever *kumri* cultivation was allowed, it was permissive. The people who cultivated these patches of land had to pay a fee for the permits which they obtained for purposes of cultivation and nothing more than these fees were entered in the registers, but they do not indicate any right in the persons who paid fees for the permits.

The right of the Government has been carefully examined and precisely set forth in the two judgments to which reference has already been made. Their Lordships, therefore, do not think it necessary to discuss further the question, beyond expressing their general concurrence with the conclusions arrived at by the learned Judges of the two High Courts, namely, that there is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government.

Bearing this principle in mind their Lordships have to examine what evidence the plaintiff has adduced in this case to establish the right he claims. The grounds on which he bases the claim of his *Tarwad* are set out in paragraphs 4, 5 and 6 of the plaint. In paragraph 4 he says as follows :—

"That the properties particularised in the annexed schedule are ancient *warg kumries* situated in the villages of Panathadi and Bedadka in Kasargod Taluk (formerly Bekal taluk) and lying to the south of the Chandragiri River."

Paragraphs 5 and 6 are in these terms :—

"That the plaint *kumries* belong to the plaintiff's *Tarwad*, some as portions of their ancient muli *wargs*, some on right of purchase from their original proprietors, some, though acquired in the first instance on mortgages from previous *wargdars*, now belong to the *Tarwad* on muli right acquired by prescription and a few on mortgage right.

"That the plaint *kumries* have been in the exclusive possession and enjoyment of the

Plaintiff and his predecessors-in-interest for more than a century on their own proprietary or *warg* right."

In other words he bases his title to the plots of land in respect of which the suit is brought on long enjoyment as parts of his *muli wargs*; secondly, on rights acquired by purchase and mortgage; and thirdly on adverse and exclusive possession for more than a century in proprietary or *warg* right. In paragraph 9 of the plaint he puts forward a claim by estoppel against the Government; his statement is to the effect that the lands in suit have been acknowledged to be *warg kumries* and included as such in the register of Government *kumries*. The onus of establishing these allegations rests on him.

The last contention requires some explanation. It appears that the Government for the purposes of clearing the undergrowth in the forests, have been in the habit of allowing the forest tribes who sparsely inhabited the forests to make clearances, and grow such cereals as they were capable of. These primitive tribes cultivated certain spots, reaped the crop and then moved off to some other patches of land. These apparently were called Government *kumries*. The Government also allowed some of the neighbouring *Wargdars* to take the leaf manures from the forest and clear the undergrowth for the desultory cultivation, called *kumri*. These apparently are designated *warg kumries*. In all these cases, dealings with forest lands appear to have been by distinct permission of the Government. Has the plaintiff been able to show either old possession of the *kumri* lands, which he says have become attached to his *wargs* by long enjoyment, or has he been able to show that he has acquired a right by adverse possession to the exclusion of the Government? Both the Subordinate Judge as well as the District Judge, whose judgments on appeal on questions of fact, properly and regularly arrived at, are conclusive, have held, upon a careful examination of the evidence, that the plaintiff has failed to establish a continuous enjoyment beyond 35 or 40 years from the date of the suit. The period of limitation against the Government is 60 years. Assuming that a licensee can convert a permissive occupation into an absolute title by long possession, the period of possession proved by the Tarwad falls short of the period of prescription. Their Lordships think that a licensee cannot claim title only from possession however long unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. The plaintiff produced no evidence to show that the Government either acquiesced in his exclusive possession or did in fact, evidence that consciously they acquiesced in the Tarwad's adverse possession.

Apart from this, the Courts in India, who were Judges of fact, have held that the boundaries which the plaintiff has set up here are unidentifiable. As regards title by tranfer they have found that in no case has the knowledge been brought home to the officers of Government that any of these lands were sold or mortgaged with their consent.

As regards a grant emanating from the Government, there is absolutely no evidence. No *potta* has been produced showing a grant by the Government. The inference is inevitable that the plaintiff possessed no such *potta*.

The order of the 23rd May 1860, No. 830, made clear the position in which the people who were licensed to enter the forests for the purpose of desultory cultivation, stood in relation to the Government. Paragraph 8 of this order runs as follows:—

"The Board give their decided opinion against the validity of any claim to proprietary rights in forest based on the entry of 'kumri sist' in the patta or the account of any estate. They regard it as simply a rent or farm of the privilege of cutting kumri in the tract in question, the continuance of which must depend on the pleasure of the Government. The facts detailed in their proceedings seem fully to bear out this view."

In the proceedings of the Board of Revenue dated 24 July 1860, the Government's rights as regards the wargdar *kumries* are placed on the same basis as the Sirkar or Government *kumries*:—

"The Board understand the Government proposal to raise the rate of assessment on kumri cultivation of the Bekal Taluk. to apply to 'Wargdar kumari' so called, as well as to Sirkar kumri as the Government do not admit that the rights of the former are in any way superior to those of the latter, or that the

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entry of that item among others in the warg originally denoted any thing more than that the wargdar was also the temporary renter of certain jungle farms or privileges, which the Sirkar was competent to modify or discontinue at will ; and it is solely as an act of grace that in the Bekal Taluk the Wargder, whose warg includes the item, is in consequence of the more systematic nature of the cultivation still to be recognised as the party with whom Government have to deal for the realization of the assessment, which elsewhere will be made directly with the kumri ryots."

On behalf of the appellant an argument was put forward before the Board which does not appear to have been advanced in any of the Courts in India. Thieir Lordships do not desire to rule out summarily on that ground the contention which has been so strongly urged before them. It is contended that the incidents attached to these *wargdar kumries* stand on the same footing as *ryotwari* holdings. The chief ground on which this analogy appears to be founded, as learned Counsel admitted, were two facts namely that the *wargdar* possessed in those *kumri* lands a heritable and transferable interest.

In order to prevent future confusion their Lordships desire to say that there is absolutely no relation or analogy between the nature of these *kumri* lands and *ryotwari* holdings. The latter belong to a totally different category of tenures. *Ryotwari* holdings relate to arable lands for fixed periods—ordinarily 30 years—and are subject to periodical surveys and assessments. No inference, therefore, can be derived from the fact that *kumri* lands, cultivated on the *kumri* system, were held by *wargdars* whose property is transferable and heritable.

Coming now to the question of limitation it appears that in 1903 the Government officials marked off the lands in suit and issued to the plaintiff as the *Karnavan* of his Tarwad, what is called a *rough* potta, showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objections to the exclusion from the rough potta of the lands in suit. His objections were definitely rejected in 1905.

The present suit to set aside that order and to obtain a declaration of his right was not brought until 1913. Article 120, of the first Schedule of the Limitation Act (IX of 1908) applies to this case. It provides that the period of limitation for a suit "for which no period of limitation is provided elsewhere in this Schedule" shall be six years. No period of limitation is specifically provided elsewhere for the assertion of a claim of this kind. Their Lordships think that the lower Courts rightly applied Article 120 to this suit.

On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs aud they will so humbly advise His Majesty.

K. S. D. *Appeal dismissed.*

Solicitor for the Appellant—Mr. *Douglas Grant.*

Solicitor for the Respondent—*Solicitor, India Office.*

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION APPLICATION NO. 107 OF 1923.

June 12, 1923.

Present :—Mr. Justice Greaves.

MEGHRAJ PUROHIT, *In re.*

Presidency Towns Insolvency Act (III of 1909) s. 41—Insolvency Rules, r. 142 A—Insolvent, failure of, to apply for discharge—Registrar in Insolvency jurisdiction to annul adjudication—Review—Forum.

Where an insolvent fails to apply for his discharge within the time fixed by r. 142 A of the Insolvency Rules of the Calcutta High Court, the Registrar in Insolvency has jurisdiction to make an order annulling the adjudication.

An order of annulment of adjudication made by the Registrar in Insolvency can only be reviewed by the Registrar, an application to the Court for review of such an order is not maintainable.

Applications for setting aside an order annulling a previous adjudication and for a fresh order of adjudication.

Mr. *S. N. Banerjee*, for the Insolvent.

Mr. *P. N. Chatterjee*, for the Creditor, Bombay Holland Trading Co.

HUKUM CHAND *v.* RAM BAHADUR SINGH

JUDGMENT.—Two petitions are before me in this matter both filed by a creditor, one Nandalal Acharya.

By the first petition, filed on the 7th May, the creditor seeks to set aside an order of the 27th April 1923 annulling a previous adjudication and by the second petition a fresh order of adjudication is sought.

The facts are as follows:—Meghraj Purohit was adjudicated an insolvent on the 29th August 1921 at the instance of a creditor. On the 27th April 1923 the Registrar in Insolvency at the instance of a creditor, the Bombay Holland Trading Company, Ltd., annulled the adjudication order under the provisions of section 41 of the Presidency Towns Insolvency Act as the insolvent had not applied for his discharge within the time fixed by r. 142A of the Insolvency Rules. The application was made upon notice to the insolvent and to the Official Assignee and it was advertised in the Calcutta Gazette as provided by r. 142B.

Now it is urged that the Registrar had no jurisdiction to make the order annulling the adjudication but I do not think that this contention is well founded. Section 6 of the Act authorises the delegation to an officer of the matters set out in subcl. (2) which includes (*c*) matters to be dealt with in chambers. Now applications for annulment do not require to be dealt with in Court (see r. 5) and can therefore be heard and determined in chambers. I think, therefore, that the Registrar had jurisdiction to make the order of annulment. Now under section 8 of the Act the Court can review its orders, but as the order was passed by the Registrar he is the person to whom the application for review must be made (see O. 47, Civil Procedure Code) and I cannot entertain an application for review.

An appeal of course lies to me from the order of the Registrar [see section 8 (2) (*a*)] but that must be made within 20 days (see section 101) which has not been done and if I have power to extend the time under section 90 (5) I see no reason for doing so in this case. The application therefore to set aside the annulment fails.

I now come to the 2nd application, namely, that for adjudication. The circumstances are suspicious and before deciding whether I should grant or refuse an order I should desire to have an opportunity of testing the truth of the allegations in the petition and I accordingly direct the Petitoner and Meghraj to attend for oral examination before me on Tuesday, June 19th.

The Official Assignee should, in the meantime, retain the sum in his possession until further order.

W. C. A. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

March 18, 1924.

Present :—Lord Shaw and Lord Blanesburgh, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.

Seth HUKUM CHAND AND OTHERS—APPELLANTS

versus

RAJA RAM BAHADUR SINGH AND ANOTHER—RESPONDENTS.

Chota Nagpur Encumbered Estates Act (*VI of* 1876), ss. 17, 18—*Owner, position of—Manager, powers of—Contract by owner, whether binding.*

Under the Chota Nagpur Encumbered Estates Act, the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the Manager is vested and alone vested with such powers. The latter is in short, in the eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office. [p. 884, col. 1.]

In the performance of such duties the Manager is neither the servant nor the agent of another, be that other either intervener a private or a public or political or departmental officer. The Manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act. [p. 844, col. 2.]

A contract for the sale of part of an estate under the Chota Nagpur Encumbered Estates Act entered into by the owner is binding neither on the Manager nor on the estate.

Appeal from a Judgment and decree of the Patna High Court, dated the 4th June 1919, affirming a Judgment and decree of the Subordinate, Judge Hazaribagh, dated the 24th June 1917.

Messrs. *W. H. Upjohn, A. M. Dunne* and *K. Brown*, for the Appellants.

HUKUM CHAND *v.* RAM BAHADUR SINGH

Messrs. *L. De-Gruyther*, *Lowndes* and *B. Dube*, for the Respondents.

JUDGMENT.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 4th June 1919, which affirmed a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated the 24th June, 1917.

The prayers contained in the suit are numerous, but the outstanding and substantial questions which were argued before the Board were two in number. The first was a declaration that an agreement dated the 30th November 1908, "is binding upon the defendant." The second is for specific performance of this agreement and that possession be made over with the demised property to the plaintiffs and the sum of Rs. 50,000 as, and by way of compensation of damages paid to the plaintiffs. Shortly stated, the suit is one for specific performance of an agreement prefaced by a declaration that that agreement is binding.

The question of who are the parties to the suit raises an important question in the case. The defendant is thus named:—

"Raja Ran Bahadur Singh, son of Raja Paresh Nath Singh, deceased, holder of the Pangunj Estate in Hazaribagh, by his representative and guardian for this suit Babu Krishna Chandra Ghosh, Manager of the said Palgunj Estate appointed under the Chota Nagpur Encumbered Estates Act (VI of 1876) and residing at Hazaribagh aforesaid."

Raja Ran Bahadur Singh was part owner of the sacred range of hills aftermentioned. But at all the material dates the management of his estate was, under the Chota Nagpur Encumbered Estates Act 1876, and an order pursuant thereto pronounced on the 13th December 1902, and duly published on the 28th January 1903, vested in the Manager, Babu Krishna Chandra Ghosh. It was thereafter, and at the time of the lodging of the defence, vested in another Manager, Babu Janki Nath Gupta, who had been appointed Manager with effect from the 25th May 1914, by order dated the 3rd and published on the 5th July 1914.

This second Manager, as such, sold the right, title and interest of Ran Bahadur Singh and the Palgunj estate, in other words sold the Paresh Nath Hill to the compeering respondent by sale deed dated the 9th March 1918. This was the result of a compromise arrived at and approved by the Court as in the interests of both the Raja Ram Bahadur Singh and another Raja, the Raja of Nowagarh, between whom another suit was thus arranged in the months of the preceding January and February.

These details are only here referred to, to explain the appearance of the second respondent. He represents the Sitambari community of Jains, and he, as representing such community, is purchaser of the hills as just mentioned. The present suit, however, the result of which if favourable to the appellants, would upset the compromise and sale just enumerated, has reference to another sale and a prior agreement alleged to have been concluded at an anterior date.

The alleged agreement, specific performance of which is asked in this suit, is said to have been made during the regime of the first Manager, Mr. Chandra Ghosh, and though not, of course, made with the Raja, was (so it is contended) such an agreement as would bind him and his encumbered estate.

The Raja Ran Babadur Singh himself, although a nominal respondent in the appeal, was not represented before the Board.

The agreement consists of a series of letters, the most important of which are dated 25th 26th and 30th November 1908; the last of these bears to be an acceptance of certain modified terms of agreement as set forth in the letter of the 26th November. It bears to be for a permanent lease of the whole hill which "will be granted to the Digambar Jains subject to the terms and conditions and reservation hereinafter contained so that the hill may be protected from everything repugnant or opposed to the feelings or religious tenets of the Jains. A premium is to be paid of Rs. 50,000, and an annual sum of Rs. 12,000 by way of rent." Various other provisions were made with reference to timber, minerals, village rights, etc. The remarkable feature of the transaction is that it is not a transaction with the person vested in the management of the property, namely the Manager, but is with the servants and officials of the Lieutenant-Governor of Bengal.

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The facts have been stated in both the judgments of the Court below with much clearness and care. The following description of these sacred hills is taken from the judgment of the High Court :—

"The range of hills known as Paresh Nath Hill lies in the Hazaribagh District and runs roughly from East to West. It has a central range about a mile and a quarter long with outlying spurs a part of which is Government property. The greater part of the hill, however, is claimed as part of the Palgunj *Zemindari*. For many years this hill has been an object of adoration by the Jains who hold an *Ekrarnama* from the father of present Raja of Palgunj agreeing to grant them such lands on the hill as they may need for the purpose of building temples. Indeed at one time they went so far as to claim the hill as their own under *Sanads* granted by Akbar and Ahmad Shah. These, however, were found by the Calcutta High Court to have been spurious documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims resort there for worship and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard rightly or wrongly as an interference with their vested rights."

There were in the hills many interests, legal, customary and religious which had to be considered. Some leaseholders had already vested interests therein : Sontal tribes claimed a right of hunting wild animals over the whole range. The *Zemindar* of Nowagarh had a claim to the property or the southern slopes of the hill as part of his *Zemindary*. Certain rights had been granted by way of lease to a Mr. Boddam, under which the lessee had made tea-gardens and erected a piggery. As the taking of life was a violation of the religious feelings and belief of the Jains this establishment tended to be provocative of confusion and disorder.

In 1907, the Governor-General of India had approved of a scheme for opening a sanatorium and residential buildings for Europeans on the western spur of the central slopes of the range. The crest of the central range is dotted over with small temples, or tonks, which the Jains are allowed to enter and there to worship the "charans"or footprints of the saints in whose honour the tonks had been erected. Much had to be done by way of demarcation of boundaries as well as an adjustment of rights.

It was in these circumstances, after the Government approval of the erection of a sanatorium, that the hill was visited by the Lieutenant-Governor of Bengal, Sir Andrew Fraser. Following upon his visit there took place the correspondence which has been referred to, the governing object of which no doubt was to have the hill taken in lease by the Jains from those in right of it by law. The principal of these was the Raja already mentioned, the *Zemindar* of Palganj. His estate, as stated, was under a Manager appointed by virtue of the Chota Nagpur Encumbered Estates Act.

It is important now to consider what are the position, legal status and the rights of such a Manager in law. Under section 2 of the act VI of 1876, called, "The Chota Nagpur Encumbered Estates Act, 1876," it is provided that when the holder of immoveable property is a minor or of unsound mind, or when his property has been attached in execution of a decree of a Civil Court ; then, upon application the Commissioner may, with the previous consent of the Lieutenant-Governor, " appoint an officer (herein-after called the Manager) and vest in him the management of the whole or any portion of the property." Section 3 declares the effect of the order and is important. It provides in particular :—

" Thirdly, so long as such management continues :—

" (*a*) the holder of the said immoveable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof or to grant valid receipts for the rents and profits arising or accruing therefrom.

* * * *

(*c*) the holder of the same property and his heir shall be incapable of entering into any contract which may involve them, or either of them in pecuniary liability."

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Elaborate provisions are made for performance of the Managers' duties including the recovery of all rents and profits, the disbursements therefrom and the settlement of duties. Under section 10 an appeal is granted to the Deputy Commissioner, within whose jurisdiction the property is situated, against refusal, admissions or determinations of claims by the Manager, failing which appeal the Manager's determination is final. Under section 12, if the debts and liabilities are paid and discharged, or an arrangement made for satisfaction accepted by the creditors and approved by the Commissioner, the holder or his heir, are to be reinvested in the property, or such part thereof, as has not been sold by the Manager under the power contained in section 18, but subject to the leases and mortgages, if any, granted and made by the Manager under the powers hereinafter contained.

Under sections 13 to 18 the wide powers of the Manager are set forth. In particular under sections 17 and 18 powers to demise the property for a term of years or in perpetuity, powers of mortgaging and selling by auction, etc., are all given to him.

Up to this point it is clear that the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the Manager is vested and alone vested with such powers. The latter is in short, in the eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

Under section 19, of which much was made by the appellants, power was given to the Lieutenant-Governor of Bengal to regulate a variety of matters by making rules which have expressly to be rules "consistent with this Act."

Under section 20 it is provided :—

"Whenever the Commissioner thinks fit, he may appoint any officer to be a Manager in the stead of any Manager appointed under this Act ; and thereupon the property then vested under this Act in the former Manager shall become vested in the new Manager. Every such new Manager shall have the same powers as if he had been originally appointed."

Section 21 may also be reckoned as relevant, namely :—

"Every Manager appointed under this Act shall be deemed a public servant within the meaning of the Indian Penal Code."

In the opinion of the Board it is necessary to give very full and careful effect to the position of a Manager vested under the Act, in the management of the property of the nature already described. It is in their Lordships' opinion clear that the owner of such property is expressly disabled from making any effective contract with regard to it and it is equally clear that no other officer, whether political or departmental, could occupy the place, or enjoy or exercise the rights, of the disposal of the estate the management of which estate is vested in the Manager and the Manager alone.

It may well be that as the Manager was in the list of public servants his conduct as such servant may have been open to comment by those in higher official rank, and it may also be that a successor to him might be appointed ; but the moment such a successor was appointed the predecessor was divested and the successor invested with all the rights and title. Under the Encumbered Estates Act, the Manager for the time being stands responsible in law for fidelity in the discharge of the entire duties of management, disposal, realisation, and restoration with regard to the estate under his case.

It is the further opinion of the Board that in the performance of such duties the manager is neither the servant nor the agent of another, be that other either intervener a private or a public or political or departmental officer The Manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act.

It may well be that political and social considerations may induce a certain course of policy with regard to portions of property under a Manager's charge and that communications may accordingly be addressed to him, in so far, for instance, as they bear upon the safety of the property, or the possible injury or advantage to the rights committed to the Manager's charge. But the Manager must, with all his local knowledge, consider these problems for himself, and with regard to the acquisition or disposal of the estate or a permanent lease thereof, it is clear that the

responsibility lies upon him as the principal in the transaction.

It must not be supposed that such considerations were absent from the mind of the Lieutenant-Governor in the course which he was anxiously pursuing for the appeasement of any trouble in the district. The contrary is the case, and in the letter of the 26th November, 1908, from the representatives of the Digambar Jains, the following express proviso was accordingly made: —

"We hereby accept the terms modified as above provided that a short agreement embodying these terms be prepared and executed by (1) the Deputy Commissioner or such other officers, representing the Court of Wards as is authorised to assign such agreement (2) the Raja of Palgunj, and (3) ourselves as representing the Digambari Jains."

On this, three points have to be noted: (1) In the negotiations reference is made to officers representing the Court of Wards. That, of course, is a mistake in terms; but it is a recognition that the property is under management other than that of the owner and that a public official is in control of it.

(2) No agreement, embodying the terms, was ever prepared. Certain communications passed with solicitors and a draft lease was attempted, but the negotiations with regard to that broke down.

(3) As to the provision that an agreement was to be prepared and executed by the three persons there named, none of them ever executed such an agreement, and in particular the Manager of the Encumbered Estate, not only never did so, but he declined to give his assent to carrying out of any transaction upon the lines indicated.

In view of what has been already said as to the position and rights of the Manager under the Encumbered Estates Act, it will be manifest that the letters founded upon as an agreement in respect of which specific performance should be asked, did not constitute any agreement with the one person who, by law, could be a contracting party with regard to the estate under his charge and, therefore, that upon that ground neither he nor any one authorised by him, or entitled to act in his name having entered into the alleged agreement, the ground of acting for specific performance fails.

But their Lordships, out of respect for the High Court who have investigated the whole complex subject with much care, do not wish to indicate any dissent from the opinions of the learned Judges on the assumption that the above proviso would have been a condition precedent. They will assume for the moment that this alleged contract was entered into with a person entitled so to do. On that assumption they are of opinion, agreeing with that of the learned Judges, that the proviso did constitute quite clearly a condition precedent. To take the consent of the Manager and the adhibition of his authority by his signature to the transaction —to take that point alone, it seems beyond question that it was most natural and proper, and indeed necessary, that that agent should be personally satisfied, and after investigation, should personally approve of the merits of the transaction under which he was to dispose of a most important part of the real estate committed to his charge. It is further clear that in such circumstances it would be a misuse of language to describe his signing the contract and becoming bound as Manager and in that capacity dominus of the estate, as a mere provision of a formal character and of a purely executory nature. The Manager's consent, authority, and signature went to the root of the alleged bargain which had been come to. In a very full and strong sense the proviso cited was a condition precedent to the transaction.

The cases upon the subject are legion and one citation very properly noted in the judgment of Mullick, J. may be here repeated, namely that made from the judgment of Lord Parker (as he afterwards was) in the case of *Von Hatzfeldt Wildenburg* v. *Alexander* (1).

"It appears to be well settled by the authorities" says that learned Judge "that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere

(1) (1912) I Ch. 284; 81 L. J. Ch. 184; 105 L T. 434.

expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the mere formal document may be ignored."

Their Lordships revert to the question only again to note, however, that the proviso is, in their opinion, much more than a condition precedent.

This is a negotiation carried on by a civil officer who is not the owner of the ground and who is not acting either as master or principal of the person who is the owner of the ground. Accordingly specific performance of any contract so entered into is an impossibility in law because the owner of the ground and the person *in titulo dominni*, namely the Manager, is no party to the contract which is asked to be specifically enforced. That is an end of the case in its legal aspect.

But their Lordships think it right to add that on a matter of fact they see no reason to differ from the judgment of the High Court where it is stated:—

"It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh: this gentleman was no party to the agreement and so far as the evidence goes there is nothing to show that he was even consulted during the negotiations and before the agreement was entered into."

Further, it is permissible to think that if the Manager had been applied to he would have made just such enquiries as were made later by the Settlement Officer, Mr. Reid, when he was asked to report upon difficulties which emerged with regard to carrying the projected policy forward. Mr. Reid narrates the conflict of opinion and otherwise between this Sitambari Society of the Jains and the Digambari Society. He refers to the litigation that has occurred, to the intrusions which have been made upon the hill, as already alluded to in this judgment, and to the conflict of title with regard to certain portions of it; and he concludes by stating in effect and quite frankly that he thinks the proposed lease is inadvisible and illegal. He then adds these observations:—

"The Digambar Society would proceed to erect new tonks some of them possibly adjacent to the already existing tonks which are managed by the Sitambars. The Sitambars would of course object and would fall back on their rights, under the agreement of 1872. To enforce their legal rights, they would no doubt re-sort to violence, and very likely the site of every proposed new tonk would be the scene of a riot of greater or lesser magnitude. I understand that it is not the local authorities but the local Government who proposed to sanction the lease of the hill to the Digambari Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease, it is evidently one which cannot be carried through."

This citation has only been made to indicate the serious responsibility that would have rested upon the Manager in becoming a party to such a transaction and the necessity for his personally acting with much circumspection. It is not for this Board to express any opinion whatsoever upon the conflicting points of policy or otherwise appearing in these discussions, but the futility of the attempt made on legal grounds in the present suit to have specific performance of the bargain not made with the Manager at all, is now obvious.

The judgments of the Courts below are accordingly affirmed.

There are two further points to which it may be necessary briefly to allude. The negotiations canvassed in this information took place during the regime of Manager No. 1, and in accordance with the opinion of the Board confirming that of the High Court no concluded agreement as the result thereof was ever arrived at. During the regime of Manager No. 2 a compromise was entered into of certain conflicting rights and this compromise was recorded and decree passed in accordance therewith on the 24th February, 1909. Accordingly, the attempted bargain in the first regime came to nothing: the compromise in the second regime re-

sulted in a transfer of the hill to the respondent No. 2 and that bargain was duly confirmed by the Court.

"It must be taken that the compromise entered into with the Manager of the Palgunj Estate in Appeal No. 551 of 1914 and the conveyances made in pursuance thereof are binding on the Raja of Palgunj and his estate to the same extent as if the latter had been himself the contracting party."

These are the words taken from the judgment of Mullick, J., and their Lordships are of opinion that it was an undoubtedly sound conclusion to be drawn as in these words :—

"There was, therefore, an implied obligation on the transferor not to derogate from the grant."

The Board is of opinion that the correct course was taken upon this point of the compromise of the suit and upon the attempt of the Raja of Palgunj to interpose on the subject.

The last question raised is as to what is to become of the Rs. 50,000 which was transmitted in the form of a cheque for Rs. 50,000 on the Bank of Bengal by Pandit Mohan Krishna Dhar dated the 3rd November 1908, per a letter from him to the Private Secretary of the Lieutentant Governor. The disposal of that remittance still stands upon the footing set out in the letter of the 6th September 1910, by Mr. Gourlay, the officiating Secretary to the Government of Bengal, to Messrs. Morgan and Co. printed on page 15 of the Record. This letter concludes in the following terms :—

"I am, therefore, to request that you will be so good as to inform your clients that the arrangement proposed in November 1908, has fallen through and that the Accountant-General, Bengal, has been asked to refund them with interest at 4 per cent. (the Bank rate of fixed deposits), the sum of Rs. 50,000 which they had paid as premium."

The right to ingather that sum still stands upon that letter and the money will no doubt be repaid upon demand by the proper authority accordingly.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

K. S. D. *ppeal dismissed.*

Solicitor for the Appellants—Mr. *Page Thomas.*

Solicitors for the Respondents—Messrs. *Ranken Ford & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 361 OF 1922.

September 13, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

GAURI MISRA—PLAINTIFF—APPELLANT
versus
MOHAN AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 11—Res judicata—Rule, whether exhaustive — Issue, decision on, whether res judicata*—Property in dispute in subsequent suit. different, effect of.*

The rule of *res judicata* as stated in section 11 of the Civil Procedure Code is not exhaustive ; the section does not supersede general principles of law on the subject of res judicata. [p. 849, col 1.]

George Henry Hook v. *Administrator-General of Bengal*, 60 Ind. Cas. 631; 48 C 499; 19 A L J. 366 ; 40 M. L. J 423; 29 M. L T. 386 ; (1921) M. W. N. 213 ; 33 C. L. J 405; 3 U. P. L. R (P. C.) 17 ; 23 Bom L. R. 648 ; 25 C. W. N. 915 ; 14 L. W. 221 ; 48 I. A. 187 (P. C.); *Ramachandra Rao* v. *Ramachandra Rao*, 67 Ind. Cas 408; 45 M. 320; 39 M. L. T. 154 ; 26 C. W. N. 713 ; 35 Ch. J. 515 ; 16 L. W 1 ; (1922) A. I. R. (P C.) 80 ; 20 A L. J. 684 ; 43 M. L. J. 78 ; 24 Bom. L. R. 693 ; 49 I A. 129 (P. C.), followed.

The general principle underlying the rule of *res judicata* is that persons should not be harassed by continuous litigation about the same subject-matter. [p. 849, col 1.]

Kameswar Pershad v. *Rajkumari Ruttan Koer*, 20 C. 79 (P. C.); 19 I. A 234; 6 Sar. P. C. J. 241; 10 Ind. Dec (N. S.) 53 (P. C.), followed.

Under the rule as laid down in section 11 of the Civil Procedure Code, it is not only the decision of a suit which may constitute *res judicata* but the decision of an issue alone may operate as such, and it is immaterial that in the subsequent suit the property which is the subject-matter of the dispute is not identical with the property which was in dispute in the previous suit. [p. 849, col. 2.]

Appeal against the decree of the District Judge, Fyzabad, dated the 26th July 1922,

GAURI MISRA *v.* MOHAN

confirming the decree of the Munsif, Fyzabad, dated the 6th March 1922.

Mr. *A. Zaheer*, for the Appellant.
Mr. *E. R. Qidwai*, for the Respondents.

JUDGMENT.—A short pedigree may be given at the outset :—

JAI RAM MISRA.

Kalka.	Rasyawan.	A.	B.	C.

Rasyawan

Ram Nath deceased.	Gauri Misra Plaintiff-appellant.

Hanoman.	Guptar= widow defendant No 2.	Mahabir died childless.

Hanoman

Jagdeo.

Mohan defendant No. 1.

Gauri Misra, plaintiff, is the appellant. He has lost his suit in both the Courts below. His claim was for the recovery of a half share in 20 *bighas* 12 *biswas* and 10 *biswansis birt* land specified in list C attached to the plaint by partition on the ground that it belongs to the joint family of which he and the defendants are members. It is common ground that the property in suit was acquired in the name of Harbans some time prior to the year 1869. For the purpose of the decision of this appeal it may be stated that the substance of the plaintiff's case is that on the date of the acquisition of the property in suit Harbans and his brother, Rasyawan, formed a joint Hindu family and equally the substance of the defence is that they did not. It should be mentioned that no plea of limitation was raised. The finding of the Courts below that there has been a disruption of the joint family since does not affect the merits of the case because it is common ground that there has been no actual partition of the property in suit. The only result of the finding is that what was joint tenancy according to the case of the plaintiff was converted into a tenancy-in-common since the breaking of the joint family and there being no question of limitation as stated above the merits of the case are not in the least affected. The main question, therefore, is, Did Harbans and Rasyawan constitute a joint Hindu family on the date of the acquisition of the property in suit ? On the face of it this question is one of fact but the argument in appeal is that it is concluded by a decision of a competent Court between the parties, dated 5th April 1889 in favour of the plaintiff. That decision is evidenced by Exhibits 5 and 6 produced by the plaintiff. Exhibit 5 is a certified copy of the judgment and Exhibit 6 is a decree following that judgment. These exhibits were denied by the defendants and the endorsement thereon made by the Court of first instance was "to be proved." This is startling. They are both certified copies of public record and should have been presumed to be genuine. Their genuineness was, however, not disputed before me. I have to decide whether these exhibits establish the plea of *res judicata* on the question already stated.

A perusal of the pedigree will reveal that the defendant No. 1, who is the chief defendant in the case, is the grandson of Hanoman, defendant No. 2 being the widow of a deceased brother of Hanoman. Exhibit 5 proves that Hanoman brought a suit against the plaintiff for the recovery of possession of 5 *bighas* 1 *biswa* and 12½ *biswansis* of land in the Court of the Subordinate Judge of Fyzabad. On a comparison of the numbers of the plots then in suit and specified in the judgment under consideration with the numbers given in the plaint of the present suit, it will be found that the plots measuring 5 *bighas* 1 *biswa* 12½ *biswansis* then in suit formed part and parcel of *birt* lands measuring 20 *bighas* 12 *biswas* and 10 *biswansis* now in suit. Hanoman's suit was dismissed. The ground of the claim was that Gauri's father, Rasyawan, had no share in the *birt* lands and that consequently the defendant was in unlawful possession of the plots then in suit. Gauri's defence was that Harbans and Rasyawan were in union and that while they were in union the *birt* lands were acquired. One of the issues framed in that case was "Did Harbans and Rasyawan live in union or separation at the time of the purchase? This was issue No. 2. On this issue the decision of the Court was as follows :—"I, therefore, find the second issue in his favour *i.e.* Harbans and Rasyawan lived in union at the time the *birt* was purchased." In the end Hanoman's claim was dismissed. As I have said before, exhibit 6 is the decree following the judgment

of the 5th April 1889. I am of opinion that this judgment establishes the plea of *res judicata* on the question stated above in favour of the plaintiff.

It was argued at the hearing of this appeal that there is no presumption that a joint family is possessed of joint family property. The argument may be correct but it has no bearing on the question under consideration. Rightly or wrongly the Court in effect decided in the previous litigation between the present plaintiff and the predecessor-in-interest of the defendant No. 1 that Harbans and Rasyawan were joint at the date of the acquisition of the property then in suit and that fact gave title to the defendant of that suit, that is, Gouri, in the *birt* lands. The five plots then in suit are included in the present suit as well. It is agreed that the title of the plaintiff, if any, to those five plots is the same as his title to the other plots comprised in the *birt* tenure as a whole: that title being that on the date of the acquisition of the *birt* lands Harbans and Rasyawan formed a joint Hindu family. I have no doubt that this title was in issue then and decided in favour of the plaintiff, Gouri.

On the plea of *res judicata* as a question of law two observations fall to be made. In the first place, the rule as stated in section 11 of the Code of Civil Procedure is not exhaustive. The section does not supersede general principles of law on the subject of *res judicata*. This was made clear by their Lordships of the Privy Council in the case of *George Henry Hook* v. *Administrator General of Bengal* (1). In a still later decision in the case of *Ram Chandra Rao* v. *Ram Chandra Rao* (2), Lord Buckmaster reaffirmed the proposition. The general principle, as stated by Lord Morris in the case of *Kameshwar Prasad* v. *Rajkumari Rattan Koer* (3) is that persons should not be harassed by continuous litigation about the same subject-matter. *Nemo debet bis vexari pro una et eadem causa*. Secondly under the rule as laid down in section 11 of the Code of Civil Procedure it is not only the decision of the suit which may constitute *res judicata* but the decision of an issue alone may operate as such. The issue which that Court decided in favour of the present plaintiff certainly raised the matter of the then defendants' title in respect of a portion of the lands now in suit and that issue, as I have said repeatedly, was decided in favour of the present plaintiff. The matter, that is, the plaintiff's title to the *birt* lands, was clearly in issue then and decided as mentioned above. The matter, therefore, being the same, makes no difference that the property in suit now is not only the property then in suit but more than that.

It is not disputed that if the question of the title is decided in favour of the plaintiff his share in the lands in suit is half for the possession of which by partition he prays. There was no other issue in the case.

I allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's suit with costs throughout.

Z. K. *Appeal allowed.*

(1) 60 Ind. Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 8 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 I. A. 187 (P. C.).

(2) 67 Ind. Cas. 408; 45 M. 320; 30 M. L. T. 154; 26 C. W. N. 713; 35 C. L. J. 515; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R.; (P. C.) 80; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 693; 49 I. A. 129 (P. C.).

(3) 20 C. 79 (P. C.); 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec (N. S.) 53 (P. C.).

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NO. 151 OF 1922 AND NOS. 25 AND 26 OF 1923.

March 15, 1923.

Present:—Sir Lancelot Sanderson, Chief Justice, and Mr. Justice Richardson.

GOVIND DAS PITY—APPELLANT
versus
JARDINE SKINNER & CO.—RESPONDENTS.

Insolvency—Composition between insolvent and creditor—Guarantor for payment—Default in payment—Adjudication annulled—Guarantor, liability of—Jurisdiction of Insolvency Court—Presidency Towns Insolvency Act (III of 1909), s. 30 (2).

A person who makes himself liable as a guarantor the payment of a composition in insolvency, does

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not by so doing render himself subject to the jurisdiction of the Insolvency Court so as to be liable to be dealt with for contempt of Court, if he does not carry out any order made under such jurisdiction. [p. 854, col. 1.]

Upon the execution of a deed of composition between an insolvent and his creditors a person became guarantor for payment of the amounts which the insolvent was to pay and the adjudication was annulled. No payment, however, was made, and, on an application under section 30 (2) of the Presidency Towns Insolvency Act, by one of the creditors, the guarantor was directed to pay, and, on his failure to do so, the Court readjudged the debtor insolvent, and allowed time to the guarantor and insolvent to pay. No payment having been made, the order readjudging the debtor insolvent was, on the application of a creditor vacated, and the writ of attachment was issued against the guarantor for failure to comply with the order of payment. On appeal by the guarantor:

Held that the order re-adjudging the debtor insolvent had the effect of putting the composition deed to an end, and of discharging the guarantor from liability thereunder. [p. 854, col. 2.]

Appeals against the orders of Mr. Justice Greaves, in Insolvency Proceedings, dated respectively the 31st August 1922, 6th and 7th February 1923.

Mr. *A. N. Chaudhuri* (with Mr. *B. Basu*), for the Appellant.

Mr. *John Langford James* (with Mr. *K. P. Khaitan*), for the Respondents.

JUDGMENT.

Sanderson, C. J.—In this matter there are three appeals, Nos. 151 of 1922, 25 of 1923 and 26 of 1923. Appeal No. 151 of 1922 is against an order made by my learned brother Mr. Justice Greaves on the 31st of August 1922, whereby he directed the appellant Govind Das Pity to pay the sum of Rs. 3,750 to Messrs. Jardine Skinner & Co., on or before the 13th of November 1922.

The next appeal, No. 25 of 1923, is against an order made by the learned Judge, on the 6th of February 1923, whereby the learned Judge directed that a previous order, which he had made on the 21st of November 1922, should be vacated, and the third appeal, No. 26 of 1923, is against an order which the learned Judge made on the 7th of February 1923, directing that a writ of attachment should issue against the person of the Appellant to the Sheriff of Calcutta authorizing him to attach the person of the Appellant and bring him up before the Court to be dealt with according to law for having failed to comply with the order dated the 31st August 1922.

The facts of this case are, to say the least unusual: It appears that certain persons, Bhimraj Ramprotap and Bangsidhar, carrying on business in co-partnership in piece goods in Calcutta, were adjudicated insolvents on the 31st of October 1910. On the 10th December 1910, a deed of composition was entered into by the insolvents of the first part, the Appellant Seth Govind Das Pity, referred to therein as "Guarantor" of the second part, and the several creditors whose names were entered in the second column of the schedule to the deed, who had executed that deed, of the third part. It recited the insolvency, that the estate of the insolvents had vested in the Official Assignee, that the debtors had proposed to pay a composition to their creditors on their debts set forth in the schedule of six annas in the rupee payable at the time and in the manner mentioned in the deed: and, then there was this recited: "Whereas the said guarantor has agreed to join in these presents for the purpose of guaranteeing to the creditors the due payment of the said composition, this indenture witnesseth as follows: 1st. That the debtors and the guarantor jointly and severally covenant with the creditors, and each of them to pay to the said creditors, and each of them a composition of six annas in the rupee upon the amounts of their respective debts fixed and settled at sums mentioned in the said schedule, such payment to be made within a month from the date of the order revoking, annulling or setting aside the aforesaid adjudication order or determining, dismissing or putting an end to the aforesaid insolvency proceedings now pending in the said High Court of Judicature at Fort William in Bengal in its Insolvency Jurisdiction." Then there was the ordinary covenant by the creditors that they should abstain from bringing actions in the events provided for. Cl. 3 provided: "If and when the said composition shall have been duly paid to the creditors respectively then the debtors and their heirs, executors, administrators, representatives and their estate and effects shall be released and discharged from the several debts and liabilities now owing from or incurred by the debtors to

the creditors respectively and from all actions, claims or demands in respect or on account thereof." Cl. 5 provided: "The guarantor will be considered as the trustee of the settlement and is hereby empowered and authorised by the debtors to take over the estate of the said insolvents from the Official Assignee of Calcutta or from any other person or persons who has or have or may hereafter have any of the properties, estate or effects of the debtors or any of them and also to demand, realise, recover, sue for and have all debts and outstandings which the debtors or any of them or which the said Official Assignee by virtue of the aforesaid vesting order is now entitled to and also to give all effectual receipts and discharges . . ." Cl. 7 provided: "The debtors and each of them will see and take steps to have all their properties and estate and effects now vested in the Official Assignee vested in the guarantor and will execute all deeds and documents that may from time to time be required by the guarantor in that behalf." The last clause, Cl. 9, provided: "If the debtors and the guarantor make default in payment of the composition or the costs in accordance with their covenants in that behalf hereinbefore respectively contained or if the adjudication or insolvency proceedings aforesaid be not set aside, annulled, quashed, dismissed or determined by the end of February one thousand nine hundered and eleven, the foregoing release shall be void and and of no effect and the creditors and each of them respectively shall be remitted to and be entitled to exercise as regards their respective debts all such rights, and remedies as they and such of them would have been entitled to exercise if these presents had never been executed but without prejudice in any way to the rights of the creditors against the guarantor or to his liability under the covenant by him hereinbefore contained.

By an order of the 14th September 1911 the composition was approved by the Court, and a copy of the deed was attached to the order, and marked "A."

It is to be noted that the deed of composition provided not only that the Appellant should be the guarantor of the payment, which the debtors had undertaken to make in pursuance of the composition, but also that the guarantor was to be the trustee of the settlement, and therefore he assumed a dual capacity.

In the first place, the appellant was a guarantor or surety for the amounts, which the insolvents were to pay: and in the second place, he assumed the position of a trustee for the purpose of collecting the assets and the effect of the insolvents from the Official Assignee, or from any other person or persons who might have any effects of the insolvent in his or their possession: and, in my opinion, the form, in which this deed of composition was made, has given rise to a considerable amount of difficulty in this case.

The facts which are necessary for me to state are as follows:—The adjudication according to the terms of the deed ought to have been set aside by the end of February 1911, but it was not in fact annulled until the 14th of September 1911, when the Court by an order of that date annulled the adjudication made on the 31st of October 1910, directed the Official Assignee to make over the assets belonging to the estate of the debtors to the trustee named in the deed, upon the trustee furnishing security to the extent of the amount of the assets to be made over to him, to the satisfaction of the Registrar of this Court: so that on the 14th of September 1911 the adjudication in insolvency was annulled. The appellant gave security to the satisfaction of the Registrar in September 1911. As far as the respondents are concerned, no steps were taken by them to enforce the provisions of the composition deed until the 29th of July 1922. Then an application was made to my learned brother Mr. Justice Greaves under section 30 (2) of the Presidency Towns Insolvency Act: and, the application was for an order that "the debtors and the trustee aforesaid (*i. e.*, the appellant) should pay to Messrs. Jardine Skinner & Co., the sum of Rs. 3, 750 with interest within three days from the date of the order to be made on the application, and in default thereof the said debtors and trustee should be committed for contempt." The second part of the application was for an order that "the debtors should be re-adjudged insolvents and the annulment of the adjudication order should be set aside and the order for composition should be set aside and that such further or other orders might be made as to the Court might appear proper."

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The learned Judge dealt with the first part of that application on the 31st of August 1922, and he made an order, as I have already said, that the appellant should pay the sum of Rs. 3,750 to Messrs. Jardine Skinner & Co. As far as the debtors were concerned, the learned Judge allowed the application to stand over to see what the effect of the order, as far as the guarantor was concerned, would be. The sum was not paid ; and, the matter was brought before the learned Judge on the 21st of November 1922. Thereupon, the learned Judge dealt with the second part of the application which I have already read, and he made an order as follows: "It is ordered that the order made herein and dated the 14th September 1911, approving the composition therein mentioned be and the same is hereby vacated and it is hereby further ordered that an adjudication order be made against the said Bhimraj Ramprotap and Bangsidhar : and it is further ordered that this order be not drawn up or completed for a period of a fortnight from the date hereof in order to enable the said Govind Das Pity or the said insolvents in the meantime to pay to the said creditors Jardine Skinner & Co., the sum of Rs. 3,750 pursuant to the said Order dated the 31st day of August last and in the event of the said sum of Rs. 3,750 being paid within the time aforesaid the order of adjudication of the said insolvents hereby made do stand vacated." The result of that was that the order was not to be drawn up for a fortnight : if the sum of Rs. 3,750 was paid within the fortnight the order of the 21st of November was to be vacated. If that sum was not paid, then the effect of the learned Judge's order was that the composition, which had been approved, should be set aside and the debtors would be adjudicated insolvents. The money was not paid within the fortnight. The result was, in my judgment, that but for what happened afterwards, there was an end of the composition deed and the debtors were adjudged insolvents.

The fortnight's time, which was prescribed by the learned Judge, expired on or about the 6th of December 1922. On the 19th of January 1923, Messrs. Jardine Skinner & Co. gave notice that they would apply for an order that "the time given for payment by the order of the 21st of November 1922 should be extended and that the order might not be drawn up or come into effect *sine die* till the proceedings against the trustee Govind Das Pity taken by the applicant be completed and thereafter till further orders : and that in the alternative the said order be vacated, and for such further and other orders or directions as to the Court might seem fit, and that the debtors and the trustee should pay to the applicant the costs of and incidental to the application." That came before the learned judge on the 6th February 1923, and the learned Judge came to the conclusion that inasmuch as his order of the 21st November 1922, had not been drawn up, although in fact it had been settled, he had jurisdiction to alter the order which he had made on the 21st of November, with the result that he directed that the order of the 21st of November 1922 should be vacated. The ground of his decision was that, as the appellant had made himself personally liable under the deed of composition, the learned Judge thought that he ought not to allow him to escape from that liability inasmuch as there was no doubt that the order of the 21st November 1922 was made so far as the applicants (*i.e.*, to say, Messrs. Jardine Skinner & Co) were concerned under a misapprehension of what the effect of that order would be with regard to the appellant: in other words, Messrs. Jardine Skinner & Co. had discovered that the result of their application to the learned Judge on the 21st of November 1922 and of the order which the learned Judge made upon it was that the composition deed was at an end, and that the liability of the appellant was at an end: and, having discovered that, they applied to the learned Judge to vacate the order, which he had previously made, at the instance of Messrs. Jardine Skinner & Co. There is one other fact which I have to mention before I deal with the merits of these appeals. Having set aside the order of the 21st of November 1922, the learned Judge, on the 7th February 1923, directed that a writ of attachment should issue against the appellant inasmuch as he had failed to comply with the order of payment made on the 31st of August 1922.

The first point that was taken in this case was that the learned judge had no jurisdiction

to make an order for payment against the appellant on the 31st of August 1922.

The learned Judge came to the conclusion that he had jurisdiction. He said: "In my opinion he is a trustee for the reasons indicated above and he is a trustee for all the creditors who signed the deed. Then so far as the question of suit is concerned it seems to me that having regard to the provisions of r. 124 of the rules under the Presidency Towns Insolvency Act, the creditors are expressly precluded from proceeding by suit and it seems to me that the words of that rule are quite clear and can bear no other interpretation. I think, therefore, that so far as the trustee is concerned the only remedy of the creditor is by proceedings under section 30." Then he proceeded to discuss whether the trustee had received any assets of the estate: and then he said: "To my mind that is not material if you have regard to the express terms of the covenant under clause 1 of the composition."

I agree with the learned Judge that if this application is to be regarded as an application by a creditor against the trustee under the composition deed as such trustee, then the procedure, which was adopted, namely, of applying to the learned Judge under section 30 (2) of the Presidency Towns Insolvency Act was correct, and the learned Judge had jurisdiction to deal with the application. But I have already mentioned that in this particular case the appellant was in the first place a guarantor in the real sense of the word, having entered into a personal liability to pay the amount specified in the composition deed: and, in the next place, he was constituted a trustee to collect the assets. Now, there is no finding by the learned Judge that the appellant had received any assets of the estate and had not distributed them according to the deed of composition. There was an allegation on the one hand that he had received such assets: and there was a denial on the other hand that he had received any assets, but there is no finding by the learned Judge either one way or the other. The learned Judge held that the appellant was liable by reason of his personal covenant under clause 1 of the deed of composition. I need not read that clause again. Clause 1 of the deed is the clause which constitutes the Appellant's personal liability as a guarantor. By that clause he made himself personally liable to the creditors and to each of them, "to pay to the said creditors and each of them a composition of six annas in the rupee, ... such payment to be made within a month from the date of the order . . . . . annulling the adjudication." The learned Judge, therefore, in my judgment, held the appellant to be liable in his capacity as guarantor and by virtue of the personal covenant into which he had entered as such guarantor: and the appellant was not held liable in his capacity of trustee, inasmuch as the learned Judge considered it immaterial to decide whether he had received any assets of the debtor's estate. Now, under those circumstances, in my judgment, it is, to say the least, doubtful whether the learned Judge had jurisdiction under section 30 (2) of the Presidency Towns Insolvency Act to deal with the alleged personal liability of the appellant as a mere guarantor of the amounts, which the debtors had covenanted to pay in the composition deed.

There is a case in English Courts, *Ex parte Mirabita: In re Dale* (1). It is a judgment by the Chief Judge of the Court of Bankruptcy, Sir James Bacon, with reference to section 126 of the Bankruptcy Act of 1869, which is, in material respects, similar to section 30 (2) of the Presidency Towns Insolvency Act. That section runs as follows:—"The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court." In that case the learned Judge was considering an application which was made by a creditor against a person called Fenwick, who had joined in the deed of composition as a surety: and, the learned Judge said this: "The Court has power to enforce the payment of the composition by the debtor, and by the trustee if he has in his hand the money with which to pay it, though of course he cannot be compelled to pay it out of his own pocket. If the composition is not paid when it becomes due, it is his duty to sue the surety at law upon his covenant. Application should be made to the trustee to do

(1) (1875) 20 Eq. 772; 44 L. J. P. K. 119; 33 L. T. 60; 23 W R. 864.

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this, and if he refuses, the Court can compel him to discharge his duty." The *ratio decidendi* was stated as follows :—" I think that the application against the surety is wholly without authority and entirely contrary to principle. A man who becomes surety for his friend for the payment of a composition does not by so doing make himself subject to the jurisdiction of the Court of Bankruptcy. There is no necessity for resorting to this extraordinary proceeding." That reasoning, in my judgment, is applicable to the construction of section 30, sub-section (2) of the Presidency Towns Insolvency Act. It is to be noticed that the sanction provided by the section is a drastic one; because if an order is made under section 30 (2), and any disobedience of that order occurs, that disobedience may be dealt with as a contempt of Court.

It is a novel proposition, in my experience, that a person who has made himself liable as a guarantor for the payment of a composition in insolvency, should be subject to the insolvency jurisdiction so as to be liable to be dealt with for contempt of Court, if he does not carry out any order made under such jurisdiction. I have already stated that it appears to me that the learned Judge did not hold the appellant liable as a trustee by reason of his having assets of the estate in his hands, but on the ground that he had entered into a personal covenant as guarantor. I have serious doubt whether the learned Judge had any jurisdiction in a proceeding under section 30 (2) of the Presidency Towns Insolvency Act to make the order of the 31st August 1922, on that ground.

In any event, having regard to the facts of this case, assuming for the sake of my judgment that the learned Judge had jurisdiction, in my opinion the order ought not to have been made. I need not re-capitulate all the facts which lead me to this conclusion, I have stated them at the beginning of my judgment: the scheme of composition was made so long ago as the 10th of December 1910. By its terms the composition was to be paid within a month from the date of the order annulling the adjudication order. The adjudication was annulled on the 14th September 1911 ; and it was not until the 29th July 1922 that the respondents applied for the covenant to be enforced against the appellant. The learned Judge held that this long delay was not explained. Under these circumstances, in my judgment, the peculiar jurisdiction under section 30 (2) of the Presidency Towns Insolvency Act should not be exercised against the appellant, in his capacity as guarantor, even assuming that the Court has jurisdiction to deal with such a matter under that section.

The matter, however, does not rest there. The respondents, Messrs. Jardine Skinner & Co , applied to the learned Judge to set aside the deed of composition and to re-adjudge the debtors insolvents, and the learned Judge proceeded to do so on the 21st November 1922. Consequently the appellant's liability under the covenant came to an end. Then without any further facts but merely because it was alleged that the respondents had misconceived the effects of the order, for which they had applied, the learned Judge vacated the order of the 21st of November 1922. and revived the liability of the appellant Mr. Pity, and on the next day he issued a writ of attachment on the ground that he had failed to comply with the order of the 31st of August.

It was argued that the learned Judge had no jurisdiction to vacate or alter the order, which he had made on the 21st November 1922. It is not necessary for me in this appeal to decide that question and I assume for the purpose of my judgment that he had jurisdiction to vacate the previous order inasmuch as the order had not been completed or perfected, but with much respect to the learned Judge, I cannot think that the order of the 21st November 1922, ought to have been vacated, having regard to the circumstances of this case. The order of the 21st of November 1922 had been made upon the application of the respondents themselves, and having regard to the fact that such a long period had elapsed since the deed of composition was entered into and approved by the Court, during which no steps had been taken to enforce the covenant against the appellant, I see no sufficient ground for setting aside the order which the respondents themselves had applied for.

For these reasons in my judgment these appeals ought to be allowed, and the orders of my learned brother, dated the 31st of August 1922, the 6th of February 1923 and the 7th of February 1923, should be set aside.

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As regards costs, it seems to me that if the appellant had complied with the learned Judge's order of the 31st of August 1922, subject to his right of appeal to this Court, a large part of these proceedings would have been unnecessary. Having regard to the circumstances of this case we are of opinion that the proper order to make in this matter is that the parties must bear his and their own costs both of the proceedings in this Court and in the Court of first instance.

Richardson, J.—I agree that the appeals should succeed.

W. C. A. *Appeals allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 284 OF 1922.

September 13, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

RAM NATH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DAMODAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872) s. 65—Agreement discovered to be void—Restoration of benefit—Discovery, date of—Limitation, commencement of—Hindu Law—Joint family—Mortgage by adult members, acted upon for several years, declared void, effect of.

If an agreement is void *ab initio* the discovery that it is so, within the meaning of section 65 of the Contract Act, must be held to have been made at the date of the agreement, because the parties must be presumed to have known the law. But the special circumstances of a case may enable the Court to say that the discovery was later than the date of the agreement itself. [p. 857, col. 2.]

Harnath Kuar v. *Indar Bahadur Singh*, 71 Ind. Cas. 629; L. R. 50 I. A. 69; (1922) A. I. R. (P.C.) 403; 9 O & A. L. R. (P C.) 270; 9 O. L J. 652 ; 44 M L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C W. N. 949; 18 L. W. 383; 26 O. C. 223; 33 M. L T. 216 (P.C.); *Annanda Mohan Roy* v. *Gour Mohan Mullick*, 74 Ind. Cas. 499 L. R. 50 I. A. 239; 21 A. L. J. 718; 4 P. L T. 609; (1923) A. I. R. (P.C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M L. T. 365; 50 C. 929 (P.C.), referred to.

A mortgage executed by the adult members of a joint Hindu family was acted upon for several years, the mortgagee being put in possession of the mortgaged property. It was then held to be void for want of legal necessity:

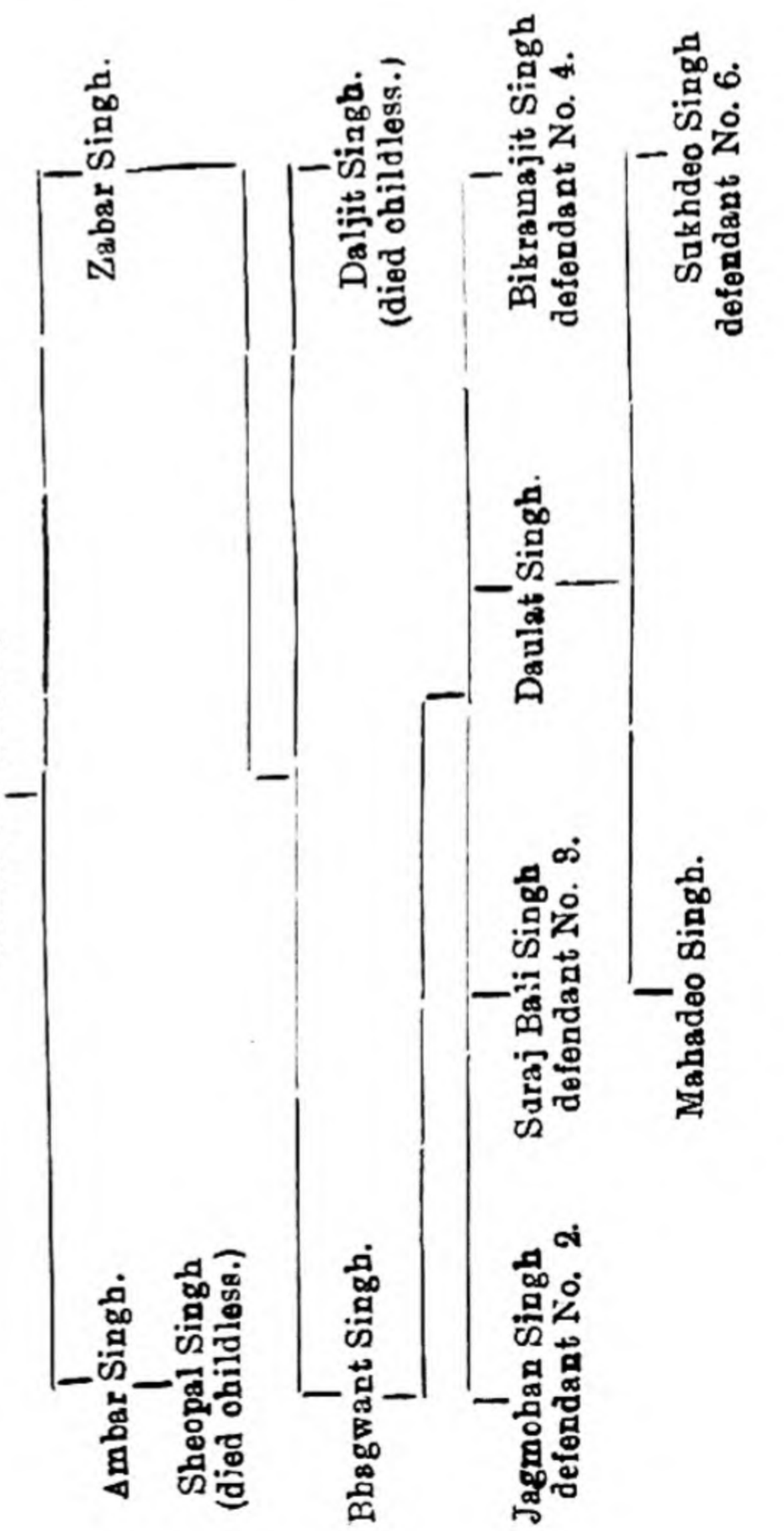
Held, that for the purposes of section 65 of the Contract Act the mortgage was discovered to be void only when the decision of the Court was pronounced. [p. 858, col. 1.]

Appeal against the judgment of the Subordinate Judge, Sultanpur, dated the 6th May 1922.

Dr. *J. N. Misra*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava* and Mr. *Hyder Husain*, for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiffs. A short pedigree may be given at the outset of this judgment.



RAM NATH *v.* DAMODAR PRASAD

By a deed of the 17th August 1908 Daljit Singh, Sheopal Singh, Jagmohan Singh and Suraj Bali Singh made a usufructuary mortgage of certain specified plots of land measuring 9 *bighas* situate in *Mauza* Gulaitha, *Pargana* Chaida, District Sultanpur, for a sum of Rs. 950 in favour of Damodar Pershad defendant No. 1. The mortgagors formed a joint Hindu family and the property mortgaged belonged to that family. The mortgagors were the only adult male members of the family at the time. In pursuance of the mortgage, Damodar Pershad entered into the possession of the property. On the 5th July 1920 he assigned his mortgagee rights to the plaintiffs by a deed of sale of the date. On Damodar Prasad's vacating possession after the sale mentioned above, Jagmohan Singh and Suraj Bali Singh, defendants Nos. 2 and 3 respectively, and other members of the family, that is, defendants Nos. 4, 5 and 6 entered into possession of the property in question; in other words the plaintiffs could not get possession of the property. They consequently brought the suit, out of which this appeal arises, for the recovery of the sum of Rs. 950 together with some interest against the defendants. In the alternative they asked for a decree for possession of the mortgaged property. Two of the original mortgagors, Daljit Singh and Sheopal Singh, died childless some time ago. There were several defences to the suit, all of which need not be considered now.

The Court of first instance found that the property mortgaged was ancestral joint family property, that there was no legal necessity for making the mortgage of the 17th August 1908 and consequently no decree for possession could be passed, the mortgage being void altogether. That Court, however, granted a simple money-decree for Rs. 1,007 in favour of the plaintiffs against defendants, Jagmohan Singh and Suraj Bali Singh and discharged the other defendants. Jagmohan Singh and Suraj Bali Singh preferred an appeal against that decree. All persons, who were party to the suit in the Court of first instance, were made party to that appeal. One of the plaintiffs, Salik Ram, had died. His son, Sri Bhagwan, was made respondent No. 2 in the appeal. He preferred an objection against the decree of the Court of first instance in so far as it discharged Damodar Pershad defendant No. 1. The lower Appellate Court allowed the appeal and dismissed the plaintiff's suit altogether by its decree dated the 6th May 1922. This is an appeal against the last mentioned decree. The sole ground on which the decision of the Court below is based is that the plaintiffs' claim for a money-decree is barred by limitation under Article 116, Schedule I of the Indian Limitation Act. Following the decision of a Bench of this Court in the case of *Gajodhar Baksh* v. *Gauri Shankar* (1) the Court below has held that the mortgage of the 17th August 1908 was void *ab initio* and consequently limitation under Article 116 began to run from the date of the mortgage and the suit brought more than six years after that date is barred by time. There is no doubt that the decision referred to above clearly supports the view taken by the learned Subordinate Judge and I venture to think that that decision is correct so far as it goes. In this Court the claim for a money-decree has been based not on any breach of contract which might attract the application of Article 116 to it but upon the provisions of section 65 of the Indian Contract Act (IX of 1872) and the recent decision of their Lordships of the Privy Council in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (2) on appeal from a decision of this Court is relied upon. According to that decision section 65 deals with (*a*) agreements and (*b*) contracts. By clause (*h*) of section 2 of the same Act an agreement enforceable by law is a contract and by clause (*g*) an agreement not enforceable by law is void. It follows in the present case that the mortgage of the 17th August 1908 is void for the reason that it is an agreement not enforceable by law. Sir Lawrence Jenkins, in delivering the judgment of the Privy Council in the case mentioned above observed that it was "an agreement that was void in that sense from its inception." Under section 65, therefore, the right to the recovery of the money advanced as consideration of the agreement of the 17th

(1) 61 Ind. Cas. 205 ; 8. O. L. J. 81 .
(2) 71 Ind. Cas. 629 ; L. R. 50 I. A. 69 ; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. (P. C.) 270; 9 O. L. J. 652 ; 44 M. L. J. 489 ; 87 C. L. J. 346 ; 45 A. 179 ; 27 C. W. N. 949 ; 18 L. W. 383 ; 26 C. C. 293 ; 33 M. L. T. 216 (P. C.).

August 1908 arose when that agreement was discovered to be void or unenforceable by law and the liability of the person, who received it to restore it, arose simultaneously. This does not appear to have happened at any moment earlier than the proceedings in the present case. As observed already, the mortgage in question was made by all the adult members of the family. It was followed by mutation of names in the revenue records in favour of the mortgagees who admittedly entered into possession and continued in it for a period of about 12 years without any protest as to the invalidity of the mortgage on the part of the mortgagors. I must hold therefore that the parties to the agreement of the 17th August 1908 accepted it as a valid contract and it was only by the decision of the plea of its invalidity raised by the defendants, Jagmohan Singh and Suraj Bali Singh, by the Court of first instance that the mortgage of the 17th August 1908 was discovered to be void. The limitation, therefore, began to run from the date of that decision and whichever article may be applied to it the claim for a money decree against Jagmodan Singh and Suraj Bali Singh is well within time.

In this connection another but a later decision of the same tribunal in the case of *Annanda Mohan Roy* v. *Gour Mohan Mullick* (3) should not be lost sight of. It was held in that case that a contract by a Hindu to sell immoveable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him is void. So far this decision is in consonance with the case of *Harnath Kuar* v. *Indar Bahadur Singh* (2) already referred to. The issues as to whether the plaintiff was entitled to a refund of the amounts which he had in fact paid or any of them and whether his rights were barred by limitation were abandoned by him in the Court of first instance and this abandonment was adhered to in appeal by him to the High Court from the decree of the Court of first instance. When the matter went in appeal to the Privy Council the plaintiff-appellant asked for permission to recall the abandonment of the issues and "so to allow in some shape or form discussion, if not proof, of the remaining issues in the case, the object being to show that there were, or might be circumstances in which it possibly could be held that the time of the discovery of the illegality of the contracts was not the time when the contracts were made and the parties knew the law or must be presumed to have known it, but at a later date (what date, their Lordships are not exactly told)." Their Lordships of the Privy Council refused to grant the permission asked for. With regard to the case of *Harnath Kuar* v. *Indar Bahadur Singh*,(2) Lord Sumner said:— "In that case, however, there were special circumstances wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself. There has been no suggestion anywhere in the course of the present proceedings that any such facts occurred as could alter the view which must normally be taken of the meaning of the word 'discovery' and of the time at which that discovery must be held to have occurred." Normally therefore if an agreement is void *ab initio* the discovery that it is so must be held to have occurred at the date of the agreement because the parties must be presumed to have known the law. But the special circumstances of a case may enable the Court to say that the discovery was later than the date of the agreement itself. What are the facts of the case before me? As I have said before, the mortgage was made by all the adult members of a joint Hindu family It was acted upon by the mortgagee's entering into possession, obtaining mutation of names on that basis and continuing in possession for about a period of 12 years. The agreement has been held by the Court of first instance to be void on the ground that the mortgagee failed to establish legal necessity for the transaction. But whether legal necessity existed or not is a matter of proof which would ordinarily be adduced at the time when the validity of the mortgage is assailed and the finding of the Court as to its validity or invalidity

(3) 74 Ind. Cas. 499; L. R. 50 I. A. 239; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A I. R. (P.C.) 169; (1923) M. W. N. 808; 45 M. L. J. 617; 25 Bom. L. R. 1269; 38 M. L. T. 365; 50 C. 929 (P.C.).

would rest on the evidence so adduced. The mortgagee in the present case attempted to show that there was legal necessity for the mortgage but the decision of the Court of first instance was given against him on that issue. It was only then that the mortgage in question was in fact discovered to be void in law, though when so discovered it must be taken to have been void from its inception. The discovery therefore in a case like the present occurred later than the date of the agreement and as to when it occured I have already said.

It was urged that the decree should be directed against Damodar Prasad also. It might have been so done under O. XLI, r. 33 of the Code of Civil Procedure but in the circumstances of this case I am not prepared to make use of the provisions of that rule. The decree of the Court of first instance had clearly exonerated Damodar Prasad from all liability. One of the plaintiffs formally objected to such an exoneration by taking cross-objection to the decree of the Court of first instance under O. XLI, r. 22, of the Code of Civil Procedure but on being asked to pay the proper amount of Court-fee in respect of that cross-objection he preferred to withdraw it. In the circumstances the learned Subordinate Judge refused to act under O. XLI, r. 33, of the Code. I think he was right.

For the reasons stated above, I allow the appeal, set aside the decree of the lower Appellate Court, dated the 6th May 1922 and restore that of the Court of first instance, dated the 6th August 1921. The plaintiffs-appellants will get their costs in all Courts from the defendants Nos. 2 and 3 and Damodar Prasad defendant No. 1 will get his costs of this Court from the appellants and will bear his own costs in the Courts below.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER No. 356 OF 1921.

April 1, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Graham.

CHATTURBHUJ MAHESRI—APPELLANT

versus

HARLALL AGARWALLA AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 75 (2)—Deputy Commissioner invested with powers of Subordinate Judge—Order in insolvency matter—Appeal, to whom lies—General Clauses Act (X of 1897), s 24—Notification under repealed Act, when remains in force—No excuse for not preferring appeal to proper Court—Appeal to be dismissed.

The Court of a Deputy Commissioner, who has been invested with powers of a Subordinate Judge, is subordinate to the Court of the District Judge within the meaning of section 75 (2) of the Provincial Insolvency Act, 1920, and an appeal against his order in the exercise of insolvency jurisdiction lies to the District Judge and not to the High Court. [p. 859, col 2.]

Chhugmul v. *Jai Narain*, 13 Ind. Cas. 605; 15 C. L. J. 239, followed.

By virtue of section 24 of the General Clauses Act, a notification issued under section 3 of the Provincial Insolvency Act would remain in force under the repealing Act (V of 1920), as section 3 of the repealed Act has been re-enacted in the repealing Act [p. 859, col. 2.]

Chhugmul v. *Jai Narain*, 13 Ind. Cas. 605; 15 C. L. J. 239, referred to.

Where, the law being clear, there was no excuse for preferring to the High Court an appeal which lay to the District Judge, the High Court refused to return the memorandum of appeal and dismissed the appeal. [p. 859, col. 2.]

Debi Prasad v. *Jamna Das*, 23 A 56 ; A. W. N. (1900) 194; *Manekh* v. *Dadabhai*, 27 B. 601; 5 Bom. L. R. 591, referred to.

Appeal against the order of the Deputy Commissioner, Darjeeling, dated the 15th August 1921.

Mr. *L. B. Sen* and Babu *Harendra Kumar Sarbadhikari*, for the Appellant.

Babu *Jatindra Nath Sen*, for the Respondents.

CHATTURBHUJ MAHESRI *v* HARLALL AGARWALLA

JUDGMENT.

Suhrawardy, J.—This is an appeal in an insolvency matter, the appellant being one of the creditors of the insolvent. The appeal is against the judgment of the Deputy Commissioner of Darjeeling who had powers under the Provincial Insolvency Act, 1920 by virtue of the notification of the Local Government investing him with such powers.

A preliminary objection has been taken to the competency of the appeal on the ground that the appeal under the law lay not to this Court but to the District Judge of Dinajpur and Jalpaiguri inasmuch as the Deputy Commissioner of Darjeeling has been invested with the powers of a Subordinate Judge and also the special jurisdiction conferred upon him under section 3 of the Provincial Insolvency Act, 1920 and is thus a Court subordinate to that of the District Judge. The memorandum of appeal in this case purports to have been filed under section 75 sub-section(2) of the Provincial Insolvency Act. That section provides that an appeal from an order made in the exercise of insolvency jurisdiction by a Court subordinate to the District Court shall lie to that Court. The District Court has been defined as the principal Civil Court of original jurisdiction in the district. Apparently the Deputy Commissioner's Court is subordinate to the District Court and an appeal from a decision of the former Court would, therefore, lie to the latter Court. Clause (2) of section 75, therefore, does not empower the appellant to appeal to this Court from the order of the Deputy Commissioner inasmuch as that section merely provides for an appeal from the District Court to the High Court. It is not contended before us that the Deputy Commissioner's Court is the District Court within the meaning of the Provincial Insolvency Act, but it is argued that there is no notification under section 3 of the Provincial Insolvency Act, 1920 investing the Deputy Commissioner of Darjeeling with jurisdiction under the Act and, therefore, an appeal lies to this Court from the order passed by the Deputy Commissioner. It is difficult to see how this argument supports the appellant's case. Be that as it may, the contention has no substance. The notification issued by the Local Government investing the Deputy Commissioner of Darjeeling with powers under the Provincial Insolvency Act was issued under section 3 of the repealed Act III of 1907. Section 3 of Act III of 1907 has been re-enacted word for word in the new Act V of 1920 and, therefore, under section 24 of the General Clauses Act, 1897 the notification made under the repealed Act would remain in force. It is clear that an appeal in this case lay to the District Judge of Dinajpur and Jalpaiguri. Reference may be made in this connection to the case of *Chhugmul* v. *Jai Narain*(1) where a point very similar to the present was raised and it was decided that though a portion of the case was transferred to the Deputy Commissioner of Darjeeling by the District Court namely, the District Judge, an appeal from the order passed by the Deputy Commissioner lay to the District Court and not to the High Court.

The learned Counsel for the appellant next prays that the memorandum of appeal may be returned to him for presentation to the proper Court, and he has relied upon the decision in the cases of *Debi Prasad* v. *Jamna Das* (2) and *Manekah* v. *Dadabhai* (3). We do not think that we should accede to this request. There is no excuse for the appeal having been preferred to this Court. It can hardly be said that the mistake was a *bona fide* one and that the appellant was misled by an ambiguity in the law which is quite clear on the point. It is not necessary to consider the question whether this Court has power under the Provincial Insolvency Act 1920 to return the memorandum of appeal for presentation to the proper Court. In the case of *Chhugmul* v. *Jai Narain* (1), the appeal was dismissed. I think that we should follow the same course and dismiss the appeal leaving it open to the appellant to take such steps as he may be advised in the Court below.

The result is that this appeal is dismissed with costs. We assess the hearing fee at two gold mohurs. The costs should be paid by the appellant to the respondent No. 1.

Graham, J.—I agree. It is clear that the appeal in this case lay to the District Judge of Dinajpur and Jalpaiguri and not to this Court and that it should be dismissed on that ground, *Chhugmul* v. *Jai Narain* (1). It has been

(1) 13 Ind. Cas. 605 ; 15 C. L. J. 239.
(2) 23 A. 56 ; A. W. N. (1900) 194.
(3) 27 B. 604 ; 5 Bom. L. R. 591.

urged by the learned Counsel for the appellant that the Deputy Commissioner had no jurisdiction to deal with the case on the ground that no notification has been published investing him with powers under the present Insolvency Act and it has been suggested that we should deal with the matter in the exercise of our extraordinary powers under section 115 C. P. C. I do not think that there is any substance in this contention in view of the provisions of section 24 of the General Clauses Act. (1897) I agree that the appeal should be dismissed with costs.

S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISIONS NOS. 110 AND 111 OF 1923.

October 30, 1923.

Present:—Mr. Dalal, J. C.

DAYAL AND ANOTHER—DEFENDANTS—APPLICANT

versus

BHIMMA—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Decree based on no evidence, whether in accordance with law—Stamp Act (II of 1899), s. 2, (5) (b)—Bond—Attestation, whether necssary.

In a suit to recover money on the basis of a document alleged to be a bond the plaintiff's statement was contradicted by all of his witnesses. The suit was nevertheless decreed ;

Held, that the decree was not based upon evidence and could not be said to be in accordance with law within the meaning of section 25 of the Provincial Small Cause Courts Act.

Under section 2 (5) (*b*) of the Stamp Act a bond requires attestation by a witness.

Revisions against the decree of the Munsif, Hardoi, dated the 5th April, 1923.

Mr. *Mohammad Ayub*, for the Applicants.

Mr. *H. K. Ghosh*, for the Opposite Party.

JUDGMENT.—These two applications cover the same ground. A Court of Small Causes decreed two suits brought on foot of two documents which were termed pro-notes. The Court held them to be bonds and recovered penalty. If the Court had gone wrong only on the subject of the nature of the document I would not have had anything to say in the matter. Under section 2 (5) (*b*) of the Stamp Act a bond required attestation of a witness. Putting the documents aside the lower Court had jurisdiction to hold on oral evidence that money had been advanced as alleged by the plaintiff. In these two cases however there is not an atom of evidence to support the plaintiff's statement. If the plaintiff's statement had stood alone it might have been said that this Court could not interfere with a decision of the Court of Small Causes based on the solitary testimony of the plaintiff. The plaintiff however went further and produced witnesses, one of them the scribe, who all contradicated him. The Judge of the lower Court held that the scribe was a liar and the other two witnesses got up for the occasion. When the plaintiff's witnesses consist of liars and perjured witnesses it cannot be said that the Court of Small Causes acted on the basis of any evidence whatsoever when it has relied on the statement of the plaintiff which was contradicted by his own witnesses. The defendant did not examine himself as a witness but he did all he could in answer to what he considered to be a false claim that he had not executed the document nor received any money. In my opinion the finding of the lower Court is based on no evidence whatsoever and is therefore defective ; this Court ought therefore to interfere. In both cases I set aside the decrees of the lower Court and dismiss the plaintiff's suits with costs of all the Courts.

Z. K. *Decrees set aside.*

DEVENDRANATH BASU *v.* KAILASH CHANDRA KALU

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER No. 28 OF 1923.

May 16, 1924.

Present :—Mr. Justice Pearson
and Mr. Justice Graham.

DEVENDRA NATH BASU AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus
KAILASH CHANDRA KALU AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s (2), 47, O. XXI, r. 66—Sale proclamation—Objection as to misdescription of boundaries—Order, whether final—Test—Appeal, whether competent.

If an order falls within section 47 of the Civil Procedure Code and is a final order, it is a decree within the meaning of the Code and can be challenged by way of appeal. [p. 862, col. 1.]

In order to determine whether an order falls within the terms of section 47 of the Code it is necessary to see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. [p. 862, col. 2.]

Deoki Nandan Singh v. *Bansi Singh*, 10 Ind. Cas. 871 ; 16 C. W. N. 124 ; 14 C. L. J. 35 ; *Baishnabcharan Shaha* v. *The Bank of Bengal*, 26 Ind. Cas. 866 ; 19 C. L J. 581 ; 19 C. W. N. 1008, referred to.

Per Pearson, J.—The determination of a question arising upon an application under O r. XXI 66, may also be an order passed under section 47, Civil Procedure Code. The test in each case would be whether there had been a judicial adjudication binding on the parties in a subsequent proceeding, finally determining the rights of the parties. [p. 861, col. 2.]

Appeal against the order of the District Judge, Nadia, dated the 4th September 1922, affirming the order of the Munsiff, Ranaghat, dated the 22nd May 1922.

Dr. *Dwarkanath Mitter* (with him Babu *Birewar Bagchi*), for the Appellants.

Babu *Santosh Kumar Bose*, for the Respondents.

JUDGMENT.

Pearson, J.—This is an appeal from an order of the District Judge of Nadia, confirming an order the Munsiff of Ranaghat.

The appellants obtained a decree for rent and applied in execution for sale of the lands. A notice was served on the judgment debtors under O. XXI, r. 66 upon which the latter appeared and objected that the lands were not properly described in the sale proclamation. The objection related to the western boundary which was stated to be certain accreted lands whereas the judgment-debtors contended that the accretions should be included in the sale, the boundary on that side being in that case the river. Upon a hearing of the application the Munsiff decided in favour of the judgment-debtors and ordered the decree-holders to furnish a true description of the rent lands within a week, failing which the execution case would be dismissed. From that order an appeal was preferred, and the learned Judge upheld the order of the Munsiff, holding upon a preliminary objection that no appeal lay, in as much as the order was one under O. XXI, r. 66 which did not judicially determine any matters between the parties. I am not prepared to say that the determination of a question arising upon an application under O. XXI r. 66 may not also be an order passed under section 47, Civil Procedure Code. The test in each case would be whether there had been a judicial adjudication binding on the parties in a subsequent proceeding, finally determining the rights of the parties : *Deoki Nandan Singh* v. *Bansi Singh* (1), *Baishnab Charan Shaha* v. *Bank of Bengal* (2). An estimate of value is on a different footing from a fixing of definitive boundaries. These were arrived at by the Munsiff after full consideration of the evidence adduced and it is difficult to see how the question so determined could be reopened and reagitated upon that particular ground in subsequent proceedings under O. XXI, r. 90. In my opinion the Munsiff's order amounted to a judicial determination of the rights of the parties and was a final order under section 47 and so appealable. Some support also is lent to this conclusion by the case of *Rambhadra Naidu* v. *Kadiriyasami Naicker* (3). The appeal is, therefore, allowed,

(1) 10 Ind. Cas. 871 ; 16 C. W. N. 124 ; 14 C. L. J. 35.
(2) 26 Ind. Cas. 866 ; 19 C. L. J. 581 ; 19 C. W. N. 1008.
(3) 63 Ind. Cas. 708 ; 48 I. A. 155 ; 44 M. 488 ; (1921) M. W. N. 374 ; 14 L. W. 125 ; 3 U. P. L. R. (P. C.) 63 ; 30 M. L. T. 34 ; 24 Bom. L. R. 692 ; (1922) A. I. R. (P. C.) 252 (P. C.).

NAGINDAS MOTILAL *v.* NILAJI MORABA NAIK

the order of the District Judge set aside and the case must go back to be disposed of on the merits. The appellants will get their costs in this Court. Hearing fee two gold mohurs.

Graham, J.—This appeal is directed against the judgment and decree of the District Judge of Nadia confirming the decision of the Munsiff of Ranaghat and arises out of an execution of a rent decree. The decree-holders, now appellants, wanted to put the holding in question up for sale in accordance with the boundaries given in the plaint wherein one of the boundaries is described as an accretion and not as the river itself. Notice was served on the judgment-debtors under O. XXI, r. 66 and they then objected that the boundaries had not been properly described, their contention briefly being that the river was the boundary and not the accretion.

Two points arose before the Court of first instance-firstly whether the application was maintainable under section 47 of the Code of Civil Procedure and whether the matter could be gone into in the execution stage, and secondly, on the merits, whether, if it could be gone into, the disputed portion was an accretion.

The Munsiff decided both points in favour of the tenants and the decree-holders were directed to give correct boundaries within a week failing which the execution case would be dismissed.

The decree-holders then appealed to the District Judge who dismissed the appeal on a preliminary objection holding that the order of the Munsiff had been made under O. XXI, r. 66 and that, therefore, no appeal lay.

Against that order the decree-holders have now preferred this second appeal and the substantial contention urged on their behalf is that the learned District Judge erred in law in holding that no appeal lay, and that in as much as the order of the Munsiff conclusively determined the rights of the parties in regard to the accreted portion it was a decree within the meaning of section 2 (2), Civil Procedure Code, and, therefore, an appeal was competent.

In my opinion this contention is well founded and must prevail. There can be no question that if the order falls within ssotion 47, Civil Procedure Code, and is a final order it is a decree within the meaning of the Code, and can be challenged by way of appeal. In order to determine whether the order falls within the terms of section 47, sub-section (1) it is necessary to see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. There is no room for controversy that the order relates to the execution of the decree, and that the question does arise between the parties to the suit. The only essential which remains, therefore, to be fulfilled is that the order decided something. As to that it seems to me to be plain that the order finally determined the liability of the judgment-debtors to have execution issued against them on the basis of the decree. Such an order seems to me to be plainly a final order made under section 47, Civil Procedure Code.

In my judgment the learned District Judge erred in giving effect to the preliminary objection and the case must go back to the Court below for an investigation on the merits.

I agree that the appeal must be allowed with costs.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 7 OF 1922.

March 7, 1924.

Present:—Mr. Justice Marten, Mr. Justice Pratt and Mr. Justice Fawcett.

NAGINDAS MOTILAL—DEFENDANT—APPELLANT

versus

NILAJI MORABA NAIK—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908) s. 5, Sch I, Art. 179—Letters Patent (Bombay) cl. 15—'Judgment', meaning of—Appeal, delay in filing—Order refusing to extend time, whether 'judgment'—Appeal, whether lies—'Practice of High Court', meaning of- Limitation—Leave to appeal to His Majesty-in-Council, application for—Delay, owing to mistaken advice of counsel—Sufficient cause—Description of Court—Appellate Court, interference by.

NAGINDAS MOTILAL *v.* NILAJI MORABA NAIK

The word 'judgment' in clause 15 of the Letters Patent of the Bombay High Court means a decision which affects the merits of the question between the parties by determining some right or liability. An order refusing to extend time under section 5 of the Limitation Act for the filing of an appeal is a 'judgment' within the meaning of clause 15 of the Letters Patent of the Bombay High Court and is appealable under that clause. [p. 867, col. 2.]

Case-law discussed.

The words "practice of the High Court" in the explanation to section 5 of the Limitation Act, extend to all the habits and customs of the Court in dealing with the litigation before it. The limit of time for an appeal in the High Court is part of the practice of the Court, even though that practice may be regulated by a Statute *viz*, the Limitation Act. [p. 868, col 2.]

An application for leave to appeal to His Majesty-in-Council was filed a few days beyond limitation owing to the wrong advice of Mofussil lawyers whom the appellant consulted and who, in ignorance of the passing of Act XXVI of 1920, told him that the limitation for making the application was six months instead of ninety days ;

***Held*, that there was sufficient cause for extending the period of limitation under section 5 of the Limitation Act.**

Case-law discussed.

Per Marten, J.—**The mere fact that it is counsel who makes a mistake does not necessarily protect his client against the consequences of his blunder, but on the other hand the fact that the mistake is one made by counsel is not necessarily fatal to his client. [p. 869, col. 2.]**

In India litigants are treated with more indulgence in the matter of time than in England. [p. 870, col. 2.]

Per Pratt, J. :—**A Court of appeal should always be slow to reverse the decision of a lower Court made in the deliberate exercise of a discretion entrusted to it by law. But the rule is not absolute and the fact that there was a difference of opinion between the Judges of the lower Appellate Court is a circumstance which entitles the Appellate Court to substitute its own discretion for that of the lower Appellate Court, if it thinks it was wrongly exercised. [p. 872, col. 1.]**

Letters Patent Appeal against an order passed by Sir Norman Macleod, Chief Justice, in Civil Application No. 615 of 1921.

Following is the judgment appealed against as well as the dissenting judgment of Mr. Justice Shah :—

MACLEOD, C. J.—This is an application for excuse of delay in filing the petition for a certificate for leave to appeal to the Privy Council. This Court delivered judgment in Second Appeal No. 647 of 1919 on February 11, 1921. The period prescribed for leave to appeal to the Privy Council was three months under Act XXIV of 1920 which came into force on January 1, 1921. Allowing for the time required for obtaining the copy of the judgment, the three months expired on July 3, 1921. By that time the successful party obtained a valuable right, namely, the finality of the decision of this Court in his favour. The petition was actually filed on July 16, 1921. The excuse which one of the applicants sets forth for proving that there was sufficient cause for delay is the wrong advice given to him by his pleaders, whom he consulted with regard to the question of limitation for an application for leave to appeal to the Privy Council and who told him that the period was six months.

The petitioners attach considerable importance to this suit. In the Trial Court before the Second Class Subordinate Judge of Bhiwandi, they instructed Mr. Shingne, a pleader practising in the High Court. In the District Court in first appeal they engaged the services of Mr. Coyajee, advocate, in addition to those of Mr. Shingne. In this Court Mr. Coyajee argued the second appeal. I think, therefore, under these circumstances, the petitioners should have consulted Mr. Shingne as to what was the period of limitation for filing a petition for leave to appeal to the Privy Council. Instead of doing so, they asked the opinion of their local pleaders whom they could not trust to conduct the case in the lower Courts. These two pleaders have made their affidavits admitting that they had advised the petitioners that the period of limitation was six months. It was only when Mr. Thaker was consulted in July 1921 that the petitioners were told that the proper period was three months and those three months had already expired. Sir Lawrence Jenkins in *Krishnasawmi Pandikondar* v. *Ramasami Chettiar* (1) said at p. 28 :—

"It is the duty of a litigant to know the last day on which he can present his appeal,

(1) 43 Ind Cas. 493; 45 I A. 25; 20 Bom. L. R. 541; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481; 41 M. 412; 11 Bur. L. T. 121; (1918) M. W. N. 906 (P.C).

and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies."

It seems to me that, in this particular case the petitioners have not proved sufficient cause for delay so as to deprive the opponents of the rights that they had acquired by the expiration of the period of limitation prescribed by the law. Ordinarily, if a litigant asks the advice of a person learned in law and gets wrong advice, the Court is not anxious that he should have to suffer owing to the fault of his legal adviser. But in every application of this nature there are two parties to be considered. The opponent has as much right to have the hardships of the case considered in his favour as the applicant. I do not think that the applicants did everything that was incumbent on them to do in order to ascertain what was the last day on which they could present their petition.

Thana, where the petitioners reside, is only twenty miles from Bombay and for that reason they were able to employ a Bombay pleader throughout but apart from that, although the local pleaders should know the law, the Bombay pleaders were the proper persons to consult if an appeal to the Privy Council was contemplated. The petitioners were perfectly well aware that they had lost their case on the plea of *res judicata* which had been argued in three Courts. There was no reason, therefore, if they were dissatisfied with the decision of the High Court, why they should not have presented their petition well within the three months prescribed. For these reasons I do not think that this is a case in which the Court should exercise the power contained in section 5 of the Indian Limitation Act. In my opinion the delay should not be excused.

Opponents to get costs in both the applications.

SHAH, J.—I regret that on a point of this character I find myself unable to agree with the Chief Justice. In this case the application was filed on July 16, 1921, the judgment of this Court having been delivered on February 11, 1921. The copy of the judgment was applied for on March 16, 1921. It was ready for delivery on May 6 though in fact it was delivered later. Deducting the time requisite for obtaining the copy of the judgment, it would appear that according to the period of limitation prescribed by Act XXVI of 1920 for such an application, the application should have been filed by July 2, 1921. Thus there has been a delay of fourteen days.

The case for the applicants is that they were honestly under the impression that the time allowed for such an application was six months, that they consulted their local pleaders on this point, the petitioners being residents of Thana, and that they were told by them that the period was six months. In connection with this point it must be remembered that until the amending Act of 1920 the period prescribed was six months and though no doubt the amending Act came into force on January 1, 1921, it is a matter of common knowledge that it took some time before the curtailed period of limitation came to be generally known. I also think it is necessary to bear in mind that ordinarily the new Act would not be available in any of the books on the Indian Limitation Act that may be referred to for the purpose. Under the circumstances, the local pleaders might honestly, though mistakenly, be under the belief that the period was six months. At any rate the point to be considered to my mind is whether in spite of reasonable diligence, the applicants were under the honest impression that the period was six months, when they consulted Mr. Thakor, their pleader for the purpose of this application in July, or whether they had been guilty of any negligence in getting the necessary information. I cannot say that any omission to consult the Bombay lawyers whom they had originally engaged up to the second appeal would amount to negligence on their part in making the necessary inquiry on a point of this character. It seems to me that if a litigant in the mofussil consults his local pleaders on a point of this character and if he is advised in a particular way though mistakenly, I think he would be honestly under the impression that the time was six months. It is not suggested in this case that if they were under that impression they were dilatory in consulting Mr. Thakor, whom they ultimately engaged for

this petition, early in July, or that after they got the correct information from Mr. Thakor who ultimately presented this application on their behalf, there was any unreasonable delay in filing the application. It seems to me that under section 5 of the Indian Limitation Act, we have to see whether sufficient cause is shown within the meaning of that section for the purpose of condoning the delay of fourteen days. In considering this I fully recognise that the litigants who fail to present their appeal or application for leave to appeal within time, allow a valuable right to accrue to the respondents by their omission. But it seems to me that in the present case the petitioners have not been guilty of negligence and so far as the affidavits show they cannot be said to be lacking in due diligence. I think it would not be consistent with justice to hold that the petitioners have not shown sufficient cause. Having regard to the facts established in this case it would be fair to hold that sufficient cause is shown within the meaning of section 5 of the Indian Limitation Act. I would excuse the delay. But as in the end the opinion of my Lord the Chief Justice prevails according to law, it is not necessary to decide as to whether the certificate applied for should be granted.

Under cl. 36 of the Letters Patent, the opinion of the Chief Justice prevailed and the application was dismissed. The Letters Patent Appeal was thereupon filed.

Mr. *G. N. Thakor*, with Mr. *R. J. Thakor*, for the Appellant.

Mr. *N. M. Patvardhan*, with Mr. *D. G Dalvi*, for the Respondent.

JUDGMENT.

Marten, J.—This is an appeal under clause 15 of the Letters Patent from the decision of the Division Court on November 23, 1921, refusing to excuse the delay of the applicants in the presentation of their petition for a certificate of appeal to the Privy Council. The learned Judges who constituted the Court disagreed as to whether the delay should be excused. Accordingly under clause 36 of the Letters Patent the opinion of the senior Judge prevailed, which was to the effect that the delay should not be excused. Consequently it became unnecessary to decide whether the certificate should be granted. I should state that one consolidated rule had been granted both in the above application to excuse delay and in the above petition for a certificate. They were respectively Civil Applications No. 615 of 1921 and No. 631 of 1921, and both of them were before the Division Court. Similarly the present appeal before us is headed in both the above applications, although that does not appear from page *a* of the Appeal Paper Book before us; and it would seem from the notice of appeal sent to the present respondents by the office that only Civil Application No. 615 of 1921 is specially mentioned, *viz*, the application to excuse delay.

Now this Letters Patent appeal was filed on January 23, 1922, and the delay of over two years which has ensued in bringing the appeal to a hearing is serious and, so far as I am aware, most unusual. We have called for a report on this matter, which can be marked for identification as Exhibit Z. But it is admitted that the appeal was originally brought within time, and no contention has been raised before us that there has been any subsequent laches on the part of the applicants which would disentitle them from obtaining the relief which they claim.

The only preliminary objection taken by the respondents is that no appeal lies from the decision of the Division Court on November 23, 1921. This depends on whether the above decision was a "judgment" within the meaning of clause 15 of the Letters Patent. It should be borne in mind that by the High Court's judgment of February 11, 1921, the decision of the trial Judge had been restored, and that of the first Appellate Court reversed, with the result that the plaintiff and others succeeded in the claim for rent which they had advanced in respect of the suit lands. The effect, therefore, of the decision of November 23, 1921, refusing to excuse the delay and consequently refusing to entertain the petition for the necessary certificate of appeal to the Privy Council amounted to a final decision so far as this High Court was concerned, and put an end to the litigation between the parties. The only remedy then open to the appellants was to apply direct to the Privy Council for special leave to appeal. But as such special leave

will not as a rule be granted unless there is some substantial question of law or general interest involved, presumably the applicants would not be in so strong a position as if they would rely before us on section 110 of the Civil Procedure Code. The question, therefore, whether the applicants can still rely before us on section 110 is or may be one of practical importance.

Now there are a considerable number of decisions in the various High Courts in India as to what constitutes a judgment. The decisions of those Courts are not uniform, and with respect I do not propose to discuss them all, nor to attempt to reconcile them. So far as this Court is concerned, the meaning attributed to the expression "judgment" by Couch, C. J. in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2) has been approved and followed. (See *Charandas* v. *Chhaganlal* (3). So also in this Court we have a case closely in point in *Ramchandra* v. *Mahadev* (4). This was decided by Mr. Justice Heaton and Mr. Justice Shah in 1917, and the headnote runs as follows :—

"An order passed by a single Judge refusing to excuse the delay for an appeal presented beyond the time allowed by law is a judgment within the meaning of clause 15 of the Amended Letters Patent; and an appeal lies from the order under the clause."

No doubt it does not appear from the report that any authorities were cited to the Court. But the judgment of Mr. Justice Heaton shows clearly the grounds on which the order was made, and I will read it :—

"It happened that this appeal was presented beyond the time allowed by law and that an application was made by the appellant to a single Judge of this Court to excuse the delay. That Judge refused to excuse the delay. And here I pause to remark that this order had the effect of dismissing or rejecting the appeal and that it was an order of a final character, not of an interlocutory character. The appellant appealed to a Bench of this Court against that order and the Bench excused the delay, the result of which was that the appeal was admitted and has now come on for hearing. It is argued that the order of a single Judge refusing to excuse the delay is not a judgment within the meaning of clause 15 of the Charter of this High Court and that therefore no further appeal lay. But seeing, as I have said, that the order had the very drastic effect of dismissing or rejecting the appeal, it seems to me it must be taken to fall within the meaning of the word judgment as used in clause 15, and I think therefore that there is no objection to our disposing of this appeal on its merits."

I will only add by way of explanation that under the Court's practice at that time, applications to excuse delay were heard *ex parte*, and that is how the question of jurisdiction was not raised until the hearing of the appeal itself. That practice has now been altered, having regard to *Krishnasami Pandikondar* v. *Ramasami Chettiar* (1) and that is why in the present case both applications were heard together.

No doubt there are other decisions in our High Court showing that merely interlocutory orders on matters of procedure and otherwise are not judgments within the meaning of clause 15. For instance, in *Miya Mahomad* v. *Zorabi* (5) an order directing the issue of a commission for the examination of witnesses was held not to be a judgment. Similarly in *Charandas* v. *Chhaganlal* (3) an order refusing directions in a Chamber Summons taken out in third party proceedings was held not to be a judgment. But decisions of that description seem to me essentially different from the one we have here, for they can in no way be said finally to end or determine the litigation. In *Tuljaram Row* v. *Alagappa Chettiar* (6) a Full Bench of the Madras High Court interpreted clause 15 in a wide sense, and authorities have recently been reconsidered in that Court in *Sonachalam Pillai* v. *Kumaravelu Chettiar* (7) For the present purposes it is sufficient to say that the present application to us falls well within the tests adopted by the Madras High Court.

On the other hand the Calcutta High Court has taken a more restricted view. If, however

(2) 8 B. L. R. 433 at p. 452 ; 17 W. R. 364.
(3) 59 Ind. Cas. 533; 22 Bom. L. R. 1169 at p. 1172; 45 B. 428.
(4) 44 Ind. Cas. 913; 20 Bom. L. R. 172; 42 B. 260.
(5) 2 Ind. Cas. 157; 11 Bom. L. R. 241.
(6) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453 ; 21 M. L J. 1 (F. B.).
(7) 79 Ind. Cas. 109; (1924) M. W. N. 167; 46 M L. J. 133; 19 L. W. 427; 47 M. 316.

Mowla Buksh v. *Kishen Pertab Sahi* (8), and *Manly* v. *Patterson* (9) are considered, it will be found that importance is attached to the fact that in that Court there is what is called a Privy Council Department, and it would seem that the presiding Judge of that Department was regarded more as an officer of the Privy Council than as a Judge of the High Court when hearing any applications with reference to Privy Council appeals. In our High Court we have no such Department, and it is quite clear that in dealing with any such applications we sit as Judges of the High Court and in no other capacity.

But in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (10), there was an appeal to the Privy Council, and it was there held that a decision by the Judge appointed to dispose of matters relating to appeals to Her late Majesty in Council, refusing to transmit for execution. Her order restoring a decree, was a judgment within the meaning of clause 15 of the Letters Patent, and was appealable to the High Court. There at page 493 it was said :—

"These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under section 610 would or would not be a merely ministerial proceeding, Mr. Justice Pontifex had in fact exercised a judicial discretion, and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kalisunderi to an execution in this suit. They held, therefore, that it was a judgment within the meaning of section 15."

No doubt that was a case of an execution of the decree of the Privy Council, and not one of an application for leave to appeal, but the decision is none the less useful.

The respondents relied on *Lutf Ali Khan* v. *Asgur Reza* (11) where it was held that no appeal lay from an order granting a certificate of appeal to the Privy Council. But the present appeal is not one from the grant of a certificate, but from the refusal of it, and the practical distinction between the two is sufficient to distinguish that case.

In *Kishen Pershad Panday* v. *Tiluckdhari Lall* (12) it was held that no appeal lay from a refusal to extend the time for finding security for costs in a Privy Council appeal ; and in *Gobinda Lal Das* v. *Shiba Das Chatterjee* (13) a similar decision was arrived at, where the Court had refused to enlarge the time for preferring an appeal. I have considered these and certain other authorities which were cited to us to the best of my ability. In the result I am of opinion that the decision of this Court in *Ramchandra* v. *Mahadev* (4), was correct and ought to be followed, and that consequently an appeal lies in the present case from the order of the Division Court. In the result, therefore, I would overrule the preliminary objection.

I will now proceed to deal on its merits with the application to excuse the delay. I have already stated that the judgment of the High Court restoring the decision of the Trial Judge is dated February 11, 1921. The petition for a certificate of appeal to the Privy Council from this judgment was presented on July 16, 1921. Under the practice existing up to January 1, 1921 this petition would have been well within the time of six months then allowed. But that period of six months was cut down to ninety days by Act XXVI of 1920, which was passed in September 1920 and came into operation on January 1, 1921. After making, therefore, allowances for certain periods which the applicants were entitled to deduct for getting copies of the judgment and decree, they were thirteen or fourteen days out of time under this new practice.

The question before us is whether this delay should be excused. The applicant Pranjivandas relies strongly on the fact that he consulted his local pleaders and was told by them that he had six months in which to appeal, and it was not until July 1921 when he consulted his High Court pleader Mr. Thakor, that he was told that the local pleaders' advice was erroneous. Now I think it clear that the question whether this delay can be excused is a matter of judicial discretion. Under section 5 of the Indian Limitation Act,

(8) 1 C. 102; 1 Ind. Dec. (N.S.) 68.
(9) 7 C. 339; 9 C. L. R. 166; 3 Ind. Dec. (N. S.) 767.
(10) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511 ; 7 Ind. Jur 161; 4 Sar. P. C. J. 406 ; 4 Ind. Dec. (N. S) 970 (P.C.).
(11) 17 C. 455; 8 Ind. Dec. (N.S.) 842.
(12) 18 C. 182; 9 Ind. Dec. (N.S) 122.
(13) 33 C. 1323; 10 C. W. N. 986; 3 C. L. J. 545.

an application for leave to appeal may be admitted after the prescribed period of limitation, when the applicant satisfies the Court that he had sufficient cause for not making the application within such period. Then there is the following explanation : –

" The fact, that the appellant or 'applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation, may be sufficient cause within the meaning of this section."

In the present case, the application in question came before a Bench of two Judges for the exercise of their joint discretion They differed. The senior Judge thought that the discretion of the Court ought to be exercised by refusing to excuse the delay. The junior Judge took the contrary view. Consequently under clause 36 of the Letters Patent the opinion of the senior Judge prevailed, and the application failed.

It is now argued before us that in effect the present appeal is an appeal from the discretion of a single Judge, *viz.*, senior Judge, and that as a matter of law the fact that the junior Judge dissented should not be taken into consideration. Consequently it was urged that we cannot interfere with the exercise of the discretion of the senior Judge unless it is shown by the applicants that there was some material error of law or of fact or some want of the exercise of his discretion. Neither party cited to us any authority bearing directly on this point. For the purpose of this case, therefore, I must regard the matter as one of first impression. The opinion which I have formed is that we ought not to accede to the arguments presented to us by the respondent on this point, and that we ought not to treat this appeal as if it was one merely from the decision of a single Judge. The Court here was composed of two Judges and not one. Having regard to their difference of opinion it was necessary that the application should formally be disposed of in one way or another. In Letters Patent appeals we find the mode adopted is that the opinion of the senior Judge is to prevail. In other appeals the method adopted is to confirm the decision appealed from, though the Bench has power to refer a point of law to a third Judge (see for instance section 98, Civil Procedure Code). On the other hand, clause 15 of the Letters Patent expressly provides for a further appeal where the Judges of a Division Court are divided in opinion.

If, then, the argument presented to us was to succeed, it would mean that, in matters involving a discretion, the ultimate decision would not rest with the last Appellate Court, but would depend upon the accident which of the two Judges in the Division Court was the senior. Consequently in the present case the ownership of the 112 acres in dispute would ultimately depend not so much on the exercise of the discretion of the Court as a whole, but on the question whether Judge A or Judge B was the senior of the two.

In my opinion, therefore, it is open to us to consider the judgment of the junior Judge as well as of the senior Judge in deciding what is the proper order to make on this application. I have read both judgments carefully. The decision of the senior Judge is based mainly on this that the applicants ought not to have been content with consulting two local pleaders. They ought to have consulted a High Court pleader. And I think it follows that in the opinion of the learned Judge the applicants would have been given correct advice if they had applied to a High Court pleader.

Now I quite recognize that one has to bear in mind here the rights of both parties, and not to be led away by sympathy for a legal practitioner's error into interfering unduly with the rights which his opponent's client has already obtained under an existing decree. But in considering the rights of the parties, one must bear in mind the provisions of section 5 of the Indian Limitation Act which in effect may result in an extension of the prescribed period. I also think that the explanation to section 5 has a bearing on the intention of the Legislature as to the class of cases for which this relief was intended. The words " practice of the High Court" in that section are to my mind wide words. I think they extend in common parlance to all the habits and customs of the Court in dealing with the litigation before it. For instance, in England the two standard works—The Annual Practice and The Yearly Supreme Court Practice—contain all the corresponding Rules which are found

in our Code of Civil Procedure and in our High Court Rules and a great deal else besides. I think then it may not unfairly be said that the limit of time for an appeal in this High Court is part of the practice of the Court, even though in the present case that practice may be regulated by a Statute viz., the Indian Limitation Act. In England this limit of time is found in the Rules of the Supreme Court itself. And so for the matter of that is the time for presenting this present appeal. Under rule 8 of the Appellate Side Rules at p. 37 of the 1920 Edition that time is sixty days from the date of the decision appealed against, unless the Court in its discretion, on good cause shown, excuses the delay. But even if the period for an appeal is not strictly speaking part of the "practice" of the Court within the meaning of the explanation to section 5, it is closely analogous to it, and consequently this explanation is a useful guide in the present case.

Now it is quite clear that up to January 1, 1921, the practice of our Court was that a would-be appellant had six months in which to present his petition for the necessary certificate of appeal to the Privy Council. Does it necessarily follow that when this period was cut down to ninety days, the fact would at once be known to all competent legal practitioners? On this point Mr. Justice Shah says:—"It is a matter of common knowledge that it took some time before the curtailed period of limitation came to be generally known." And this is borne out by the evidence before us, from which it appears that in other cases even High Court pleaders were not aware of the changes effected, and the delay was excused by the Court.

Speaking from my own recollection of practice at the bar, I am well aware of the difficulty of reading immediately any changes which may be effected by Statute or by Rules, and of the practical danger of one's recollection of the past practice prevailing over some cursory glance at a new amending rule. Till the changes that are effected appear in the authorized reports or Statutes, or in the latest text books, there is often a risk of a slip being made, however careful a lawyer may be, for his former books of reference are only misleading.

In the present case, of course, the applicant himself could not know what the practice or the law on the point was. He could only take legal advice. With great deference to the contrary opinion which prevailed in the Division Court, I am of opinion that he cannot be blamed for being content with the advice of his two local pleaders on that point, and for not consulting a High Court pleader. It was not as if any doubt arose in the minds of the local pleaders. They advised, and advised correctly, on the practice as it had existed up to within a few months prior to that date. And if they were not aware of any statutory change, it would not occur to them to go to the expense of taking a High Court opinion on a matter on which no doubts were present to their minds.

I pass by the circumstances that at the first hearing before the Division Court, some erroneous facts as to Mr. Shingne's position in the case, and as to the date of the supply of the Bombay Law Reporter Statutes were stated to the Court. They were corrected in the subsequent application for a review, which application was dismissed.

But it was strongly urged before us in reliance on *In re Coles and Ravenshear* (14), that a mistake of Counsel is not a sufficient reason for extending the time in which to appeal. I recognise that the mere fact that it is Counsel who makes a mistake does not necessarily protect his client against the consequences of his blunder, but on the other hand the fact that the mistake is one made by Counsel is not necessarily fatal to his client.

During the course of the argument I told respondents' Counsel that there were cases on the other side of the line in England, and that in particular I remembered a strenuously contested case where my client was out of time with an appeal owing to a mistake of his solicitor as to the effect of the Rules, and where the Appeal Court extended the time and subsequently allowed the appeal on its merits.

Since the argument I have refreshed my memory of the English authorities, and I find that *In re Coles and Ravenshear* (14) can no longer be relied on as it is based on practice

(14) (1907) 1 K. B. 1; 76 L. J. K. B 27; 95 L. T 750; 23 T L. R. 32

which is now obsolete. That case was decided under R. S. C. O. LVIII, r. 15, as it then stood, but which Rule was altered in May 1909 by the addition of the words "Subject and without prejudice to the power of the Court of appeal under O. LXIV, r. 7." The reason for the alteration was this. Certain authorities ending with *In re Coles and Ravenshear* (14) had decided in effect that special circumstances were required to justify the Court extending the time under O. LVIII, r. 15 and that the mistake of one's own Counsel was not a special circumstance (see *International Financial Society* v. *City of Moscow Gas Comyany* (15). On the other hand the general power of extension of time given to the Court by the other Rule, *viz.*, O. 64, r. 7, did not require any special circumstance, and consequently it was held in other cases, such as, *Baker* v. *Faber* (16), that a mistake by one's own Counsel might be a sufficient excuse if the application was made under this other Rule. This led to the Full Court of Appeal (*viz.* all six Judges) considering the matter fresh in January 1909 in *Rumbold* v. *London County Council and Scott* (17). That was a case where the delay arose from the illness of Counsel. The Full Court excused the delay under O. LXIV, r. 7, and held that *Baker* v. *Faber* (16) was rightly decided, and that *In re Coles and Ravenshear* (14) was decided under O. LXIV. r. 15. Shortly afterwards, *viz.*, in May 1909, O. LIII, r. 15, was altered by making it expressly subject to O. LXIV, r. 7, in the way I have already mentioned.

So the result is that *Baker* v. *Faber* (16) approved as it is by the Full Court of Appeal in *Rumbold* v. *London County Council and Scott*, (17) and not *In re Coles and Ravinshear* (14) represents the present English practice. In *Baker* v. *Faber* (16) the plaintiff had been wrongly advised by Counsel that he had three months within which to appeal, whereas in fact he had only eight days. So it is closely in point here and in favour of the applicants.

Therefore, so far as the English authorities at present stand, they favour the applicants' contentions rather than the respondents. I recognise, however, that the English Rules were confusing, as different periods applied to final and to interlocutory appeals, and it was often difficult to say whether any particular appeal was a final or an interlocutory appeal having regard to the way in which the Rules were drafted.

But, however that may be, we have to decide this case according to the law and practice of India and not of England. And in my judgment it is clear that in India litigants are treated with more indulgence in the matter of time than in England. The decisions of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram* (18) and *Sunderbai* v. *Collector of Belgaum* (19) are clear illustrations of this. The explanation to section 5 of the Indian Limitation Act is another.

Nor if the tests of due diligence and good faith are adopted as in section 14 of the Indian Limitation Act do the applicants fail to satisfy those tests. On the contrary, in my judgment the applicants acted in good faith, and with due diligence, and were guilty of no negligence. When they presented their petition for a certificate, they were within time by some two months and a half under the old practice. The fact that they waited to obtain copies of the judgment and decree before deciding on such an important matter as the presentation of an appeal to the Privy Council, can hardly be said to be in their disfavour.

In *Dattatraya* v. *Secretary of State* (20), which is a decision of the Chief Justice and Mr. Justice Fawcett, the plaintiff acting on the erroneous advice of his pleader had preferred an appeal to the High Court, when it should have been presented to the District Court. This led to his being out of time when he applied to the right Court. Under the circumstances it was held that the plaintiff had shown sufficient cause for not preferring an appeal in time, for in acting on the advice given to him by his pleader, he had acted in good faith.

(15) (1877) 7 Ch. D. 241; 47 L. J. Ch. 258; 37 L. T. 736; 26 W. R. 272.
(16) (1908) W. N. 9.
(17) (1909) 100 L. T. 259.

(18) 42 Ind Cas. 43; 44 I. A. 218; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P.C.).
(19) 52 Ind. Cas. 897; 46 I. A. 15 at p. 23; 21 Bom. L. R. 1148; (1919) M. W. N. 254; 43 B. 376; 23 C. W. N. 758 (P.C.).
(20) 60 Ind. Cas. 744; 23 Bom. L. R. 89; 45 B 607.

There the learned Chief Justice says (pp. 90, 91):—

"I think that the appellant was entitled to rely upon the advice of his pleader that the appeal lay to the High Court and a party cannot be said to be acting without good faith because he relies upon a person whose status entitled him to give advice to litigants. It may be that the pleader ought to have known that the appeal lay to the District Judge. But there again some questions may appear to be so entirely free from doubt to one person, that only one opinion is possible, and yet another may equally well come to a different conclusion. I do not think it can be said that the appellant has acted in such a way that he should be debarred from his right to appeal. In *Ram Ravji Jambhekar* v. *Pralhaddas Subkarn* (21) their Lordships say: 'We feel unable to accept the argument for the appellant that because the mistake made in filing the suit at Cawnpore was an error of law, that the suit was not a *bona fide* one. It was a stupid, though not an unaccountable, blunder; but the ignorance of law, or the ill-advice of a pleader, does not, in our opinion, necessarily or *prima facie* establish a want of good faith."

Similarly in *Brij Indar Singh* v. *Kanshi Ram* (18) it was held by the Privy Council that the time occupied in filing a review petition ought to be allowed, although that application for a review was founded on an erroneous view of the law.

Speaking for myself, I should like to adopt what the learned Chief Justice has said in *Dattatraya* v. *Secretary of State* (20) and to apply his observations to the present case. That no doubt was a case where a mistake was made by a pleader as to the then existing law. Here the mistake arises from a different cause, *viz.*, the ignorance of recent change in the law. Personally I am disposed to think that the latter is the more excusable error of the two. But whether that be so or not my conclusion on all the facts of this case is that the delay ought to be excused here, as it was in *Dattatraya* v. *Secretary of State.* (20) Consequently I would allow the appeal so far as it relates to Application No. 615 of 1921.

A further question is whether we ought to deal now with the other Application No. 631 of 1921, namely, for a certificate of appeal to the Privy Council. Counsel on either side take different views as to whether this application is before us, the applicants contending in the affirmative and the respondents in the negative.

I think it clear that the Memorandum of Appeal No. 7 of 1922 which was filed by the applicants extends to both applications. But I recognise that page *a* of the appeal paper-book and the copy notice of appeal which were drafted by the office were not as lucid as they might have been. However, Counsel on both sides agree that it is now open to us to remit the Application No. 631 of 1921 to the Division Court for hearing on its merits. That then is the course which I think may be adopted.

I would, therefore, suggest that our order should be to the following effect, *viz*:

"Discharge the order of the Division Court of November 23, 1921. Application No. 615 of 1921 to excuse delay allowed. Application No. 631 of 1921 for a certificate of appeal to the Privy Council remitted to the Division Court for determination on its merits. Costs of both parties in both applications to date throughout to be costs in Application No. 631 for a certificate and to be dealt with by the Division Court."

Pratt, J.—As to the preliminary objection that no appeal lies I feel no doubt that the order refusing to extend time under section 5 of the Indian Limitation Act is a 'judgment' under clause 15 of the Letters Patent. The word was defined by Couch, C.J., in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2) as a decision which affects the merits of the question between the parties by determining some right or liability. That definition has been adopted by this Court in *Miya Mahomed* v. *Zorabi* (5) and in *Charandas* v. *Chhaganlal* (12) and approved by the Privy Council in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (10). *Hurrish Chunder Chowdhry's case* was an even stronger case than the present for the appeal there was from an order refusing to transmit for execution an order in Council and the Privy Council held that even if the proceedings were ministerial it was sufficient that the Judge had exercised judicial discretion and that his decision would

(21) 20 B. 133 at p. 143; 10 Ind. Dec. (N.S.) 647.

conclude the rights of the party in execution. So here a judicial discretion has been exercised and a decision taken which makes the judgment of the lower Court conclusive of the rights of the parties.

I think the Calcutta cases where an order granting leave to appeal were held not to be a judgment may be distinguished on the ground that such an order does not import a decision of any right but the leave was merely a step enabling the parties to go to Privy Council.

I am not prepared to follow *Kishen Pershad Panday* v. *Tilukdhari Lall* (12) or *Gobinda Lal Das* v. *Shiba Das Chatterjee* (13) as these cases do not seem to be consistent with *Hurrish Chunder Chowdhry's case* (10).

The precise point that we have before us has been decided in the affirmative in the case of *Ramchandra* v. *Mahadev* (3) and I think that decision is correct and binds us.

On the question whether the discretion to refuse delay was rightly exercised I am not oblivious of the rule enunciated by the Privy Council in *Jaipal Kunwar* v. *Indar Bahadur Singh* (22) that the Court of Appeal should always be slow to reverse the decision of a lower Court made in the deliberate exercise of a discretion entrusted to it by law. But the rule is not absolute and the fact that there was a difference of opinion between the judges of the lower Appellate Court is a circumstance which makes it easier for us to substitute our discretion for that of the lower Appellate Court if we think it was wrongly exercised.

The appellant applied thirteen days after time had expired in ignorance of the reduction of the period of limitation by Act XXVI of 1920 from six months to ninety days. The appellant was misled by the advice of a local pleader but I cannot agree with the learned Chief Justice that he was guilty of negligence in not consulting a High Court pleader in Bombay. A party up-country would naturally take the advice of his local pleader as to the time for filing an appeal. I do not think it can be suggested that a District Court pleader is not competent to advise on a point of limitation. It is true that the pleader is the party's agent and if the pleader is negligent the party must suffer. But I think that even a diligent pleader might overlook an obscure section in an amending Act which had come into force only a few months before he was consulted.

No doubt a mistake of law is *per se* no ground for excusing delay. But here occur the additional factors of a recent change of law and no want of diligence. The Privy Council in *Brij Inder Singh* v. *Kanshi Ram* (18) have recognized the practice of Courts in India to treat the diligence of the party as the chief test for the guidance of the Court's discretion under section 5 of the Indian Limitation Act.

The English Courts at one time followed a stricter rule in cases where wrong advice has been given by counsel: see *International Financial Society* v. *City of Moscow Gas Company* (15) and *In re Coles and Ravenshear* (14). But that rule has been relaxed as pointed out by my learned brother Marten in *Rumbold* v. *London County Council and Scott.* (17) And I would in this connection quote the remarks of Brett, M. R., in *Highton* v. *Treherne,* (23) which seem to me to express the rule favoured by the Privy Council in *Brij Indar Singh's case.* The Master of the Rolls said (p. 168):—

"In cases where a suitor has suffered from the negligence or ignorance or gross want of legal skill of his legal adviser he has his remedy against that legal adviser, and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct nor through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited. It seems to be obvious that the Court has jurisdiction to enlarge the

(22) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 149; 8 Sar. P. C. J. 625; 7 O. C. 239 (P. C.).

(23) (1878) 48 L. J. Ex. 167; 39 L. T. 411; 27 W. R. 245.

time under some circumstances. Therefore why not on the present occasion ? It has been said that when the time for appealing is past, the person who would be respondent has a vested right to retain his judgment. But obviously it is not an absolute right, and I am perfectly confident that the practice of all the Courts has been to treat it as not an absolute right, though the Courts are chary of enlarging the time when the time allowed by the rule has run out."

This judgment also disposes of the argument based on the right accruing to the successful litigant when the time for appealing has expired.

I agree in the proposed order.

Fawcett, J.—I concur generally with the two judgments just delivered.

On the question whether the appeal lies, I have only to add a few remarks.

In *Gobind Lal Das* v. *Shiba Das Chatterjee* (13) the finality of a decision under section 5 of the Indian Limitation Act is challenged on the ground that an appeal presented after the prescribed period of limitation has expired, is a dead one, and that an order refusing to excuse the delay in presenting it is, therefore, not one involving any question of the rights and liabilities of the parties but a proceeding in respect of a matter which had already come to a termination by operation of law. With great respect I do not think this argument is a sound one. Section 5 of the Indian Limitation Act says that an appeal, though not presented in proper time, "may be admitted," if the delay is excused for sufficient cause ; and the general provision in section 3 for the dismissal of appeals preferred after the period of limitation is subject to the provisions (*inter alia*) of section 5. That being so the appeal cannot be considered to be dead until the Court has definitely decided that it should not be admitted. The appeal meanwhile is merely defective, or (to use the analogy of life and death) sick and not dead. A somewhat similar case is the presentation of a memorandum of appeal insufficiently stamped. The Court has a discretion under section 149 of the Civil Procedure Code to give time for making up the deficiency of Court-fees ; and the appeal in such a case is not dead, but only liable to be rejected under O. VII, r. 11, as applied by section 107, sub-section (2), if the Court refuses to exercise its discretion in favour of the appellant under section 149, Civil Procedure Code. Again in *Krishna Ayyangar* v. *Nallaperumal Pillai*, (24) the Privy Council held that the High Court had impliedly extended the time for appeal ; and such an idea is entirely inconsistent with the proposition that the appeal, when presented, was a dead one. For these reasons, I think we should follow the ruling in *Ramchandra* v. *Mahadev* (4) in preference to the contrary view taken in *Gobinda Lal Das* v. *Shiba Das Chatterjee* (13).

On the question whether the delay should be excused under section 5 of the Indian Limitation Act, I think the ruling of the Privy Council in *Sundarbai* v. *Collector of Belgaum* (19) is applicable here. The report of that case contained in L. R. 46 I. A. p 18 shows (see p. 18) that this High Court had excused the delay, being satisfied that the appellants had acted *bona fide* and with due diligence ; and Privy Council say in their judgment that (p. 23) :—

"The High Court, after hearing the parties and considering the affidavits which were filed, were rightly satisfied that the defendants (*i. e.*, the appellants) had sufficient cause for not having preferred their appeal to the Court of the District Judge within the period of limitation. The fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation.'

In my opinion in the present case it has been shewn that the delay of the appellants was *bona fide* due to mistaken legal advice, and that there was no failure of proper diligence on their part.

On this point I have nothing to add to the judgments of my learned brothers. except to draw attention to the judgment of Aikman, J., in *Anjora Kunwar* v. *Babu* (25), that the law in India is not so strict in regard to erroneous advice on the part of a legal adviser as the

(24) 56 Ind. Cas. 163; 43 M. 550 at p. 563; 22 Bom. L. R 568; 38 M. L. J. 444; 18 A. L. J. 489; 29 M. L. T. 28; 12 L. W. 92; (1920) M. W. N. 419; 2 U. P. L. R. (P.C.) 118: 47 I. A. 32 (P.C.).

(25) 29 A. 638; 4 A. L J. 515; A. W. N. (1907) 219.

view taken in *In re Coles and Ravenshear* (14).

I also concur that this is a case where the Court can properly interfere with the discretion that has been exercised by the learned Chief Justice. As to the disposal of the application for a certificate I think the case is similar to one arising under O. XLI, r. 23, the application having been disposed of on a preliminary point as to its admissibility. I concur, therefore, in the proposed order.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1033 OF 1922.

May 20, 1924.

Present :—Mr. Justice Neave and Mr. Justice Daniels.

RADHA KISHAN—DEFENDANT—APPELLANT

versus

KEDAR NATH—PLAINTIFF—RESPONDENT.

Malicious prosecution—Test as to who is prosecutor—Evidence recorded in criminal proceedings can be treated as evidence in civil case with consent of parties. Second Appeal — Question of law not raised before lower Appellate Court, whether can be entertained in second appeal.

In a case of malicious prosecution the question is who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. [p .876, col 2]

Gaya Prasad v. *Bhagat Singh*, 30 A. 525 ; 5 A. L. J. 665; 14 Bur. L. R. 318 ; 11 O. C. 371 ; 8 C. I. J. 337 ; 35 I. A. 189 ; 12 C. W. N 1017 ; 10 Bom. L. R. 1080 : 4 M. L T 204 ; 18 M. L. J. 794 (P. C.), followed.

The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry. Therefore, though technically the prosecution may not have been instituted on the complaint of a person yet if he took a most active part in carrying it on, engaged a pleader at his expense to assist the prosecuting inspector, and through this pleader himself controlled the examination and cross-examination of the witnesses in the case, for all practical purposes he is the prosecutor. [p. 876, col. 2.]

As a general rule a record of evidence given by a witness in the previous judicial proceeding cannot be used as evidence in a subsequent judicial proceeding between the same parties, unless the conditions which are specified in section 33 of the Indian Evidence Act exist. But when in a civil suit the parties have agreed to the admission of such evidence, the irregularity of procedure is cured. [p. 875, col. 2.]

Lakshman Govind v. *Amrit Gopal*, 24 B. 591 ; 2 Bom. L. R. 924 ; 12 Ind. Dec. (N. S.) 924; *Jainab Bibi Sahaha* v. *Hyderally Saheb*, 56 Ind. Cas. 957 ; 43 M. 609 ; 38 M L. J. 532 ; 28 M. L. T. 23 ; (1920) M. W. N. 360 ; 12 L. W. 64, followed.

A civil suit is a proceeding inter parties and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be ; and when the Trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal. [p 876, col. 1.]

Where the whole result of a civil case can be determined by consent of the parties, it is equally open to them to agree to treat statements as evidence which might not otherwise be so. [p. 877, col 1.]

Questions of law dealing with the admissibility and the legal effect of evidence will not, as a general rule, be entertained in second appeal, if they have not been taken at least at the stage of the first appeal in the Court below. [p. 875, col. 1.]

Sat Narain Prasad v. *Ram Autar*, 78 Ind. Cas. 221 ; 22 A. L. J. 153, relied upon.

Appeal from the decree of the District Judge, Agra, dated the 7th April 1922.

Mr. *L. M. Banerji*, for the Appellant.

Mr. *Baleshwari Prasad*, for the Respondent.

JUDGMENT.

Neave, J.—This appeal arises out of a suit for damages for malicious prosecution. The appellant Radha Kishan and one Ganeshi Lal were the proprietors of rival cattle markets in the same village. They were constantly quarrelling, and finally a riot took place which, according to the appellant, developed into an attack on his house, in which his property was stolen and members of his household beaten. This affair was reported at the police station by a constable. Radha Kishan was sent for and his statement recorded by the Sub-Inspector. In this he named a large number of persons including Kedar Nath as having taken part

in the riot. The police not taking what Radha Kishan considered to be a sufficiently active interest in the matter, he went to the District Magistrate, who told him to file a complaint. This he did asking that a Deputy Superintendent of Police might be sent to investigate. Some enquiries were made, and the District Magistrate ordered that the case should be sent up for trial The case was heard by a Magistrate, who discharged all the accused sent up by the police. The District Magistrate, however, ordered a retrial, and some of the persons accused were ultimately committed to the Sessions Court for trial. Several of them were convicted, but Kedar Nath was acquitted, the Sessions Judge finding that he had successfully proved an alibi. Kedar Nath thereupon filed the present suit for malicious prosecution. The first Court granted him a decree for Rs. 500 as damages, and this decision has been upheld by the lower Appellate Court.

The learned Counsel for the appellant has argued two points before us. The first is that the Trial Court instead of recording the evidence of the parties' witnesses and allowing them to be examined and cross-examined in the ordinary way used as evidence in the case copies of the depositions of those witnesses made in the Sessions Court and has based its decision on that evidence. It is admitted that this was done with the consent of both parties, but it is contended that the procedure adopted was so irregular that it could not be validated by such consent, and that the appellant has been seriously prejudiced. It is to be observed that no objection to the lower Court's procedure was taken at the time, nor was it made a ground of appeal before the District Judge. In the recent case of *Sat Narain Prasad* v. *Ram Autar* (1), it was remarked that "it would be in the interests of the administration of justice in this province if it were generally understood that questions of law dealing with the admissibility and the legal effect of evidence will not, as a general rule, be entertained in second appeal in this Court, if they have not been taken at least at the stage of the first appeal in the Court below." It does not appear to have entered the appellant's head to question the admissibility of the evidence relied on by the Courts below until he filed his appeal in this Court, and we should feel ourselves justified in refusing to consider this point at this late stage of the proceedings, but as this appeal has been referred for decision to a Bench by one of us with special reference to this question of law it will be well to determine it. There can be no doubt that as a general rule a record of evidence given by a witness in the previous judicial proceeding cannot be used as evidence in a subsequent judicial proceeding between the same parties unless the conditions which are specified in section 33 of the Indian Evidence Act exist. It is not suggested that any of those conditions are to be found in this case. It has, however, been held both in Bombay and Madras that, when in a civil suit the parties have agreed to the admission of such evidence, the irregularity of procedure is cured. In *Lakshman Govind* v. *Amrit Gopal* (2) certain depositions recorded in a previous case were admitted in evidence by the Trial Court though the witnesses who made them were alive and had not been examined as witnesses in the case under appeal. The District Judge excluded this evidence. The High Court in appeal held that though no doubt the evidence was not admissible in the present suit, because the witnesses who were alive ought to have been called and examined, yet, as it had been allowed to go in without protest on the part of the defendants, and as the plaintiff had consequently cancelled his application to have his witnesses summoned, it was not fair for the Judge to question its admissibility. In *Jainab Eibi Saheba* v. *Hyderally Sahib* (3), a Full Bench of the Madras High Court held that evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties. Krishnan, J., pointed out that the question was one of mode of proof of relevant facts and the rule that such facts must be proved by the evidence of witnesses examined before the Trial Judge had several recognized exceptions, such as the examination of witnesses on commission, the use of affidavits as evidence and the use of evidence taken by one Judge by another, and that the limitations prescribed

(1) 78 Ind. Cas. 221 ; 22 A. L. J. 158.

(2) 24 B. 591 ; 2 Bom. L R. 924 ; 12 Ind. Dec. (N. S.) 924.

(3) 56 Ind. Cas. 957 43 M. 609; 38 M. L. J. 592 ; 28 M. L. T. 28 ; (1920) M. W. N. 360 ; 12 L. W. 64.

by section 33 of the Evidence Act to the use of the record of evidence taken in a former Judicial proceedings were intended to protect the opposing party from being prejudiced by such admission. He went on to say that "if such evidence is to be admitted against the opposition of a party, the Judge should be satisfied that the conditions and restrictions imposed by section 33 are fully complied with; but I can see no difficulty in holding that a party may waive the benefit of those provisions which are intended for his benefit, at any rate in a civil suit where no question of public policy is involved whatever the position may be in a criminal trial. A civil suit is a proceeding inter parties and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be; and when the Trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal." I agree with this view of the law and consider that the Courts were justified in admitting the evidence taken in the Sessions trial.

The second argument advanced on behalf of the appellant is that, as a matter of fact, the prosecution complained of by the respondent was not instituted by him. The first report was not made by him, but by a constable, and it was only at the bidding of the Sub-Inspector of Police that he made the statement in which he named the respondent and others. The actual proceedings in Court did not originate on his complaint but were set on foot by the order of the District Magistrate It was that officer's order again which gave rise to the second enquiry before the Magistrate which resulted in the commitment of the accused persons to the Court of Session. It is stated that neither the appellant nor any pleader on his behalf was allowed to conduct the proceedings either before the Magistrate or before the Sessions Judge. The witnesses were all summoned by the police and examined either by the Prosecuting Inspector or by the Government Pleader.

That these assertions are not all entirely correct is proved by the statement of a vakil who appeared on the appellant's behalf both in the Courts of the Magistrate and of the Judge. In this it is admitted that the witness himself, and from time to time four or five other vakils with him, appeared on behalf of the appellant in the Magistrate's Court. This vakil himself examined three witnesses on behalf of the prosecution and cross-examined all the witnesses produced by the opposite party and also addressed the Court acting under instructions given by the present appellant. The Prosecuting Inspector, he says, only worked for one or two days, and the rest of the time he himself did all the work in Court. He filed an application to the District Magistrate for revision of the order of the first Magistrate dismissing the case; and he received about Rs. 3,000, as remuneration for the work done by him in the case. The principles laid down by Their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh* (4), evidently apply to this case. They said (p. 534). "The question in all cases of this kind must be—who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hoc vice* represents the Crown . . . . . ." "The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry". In the present case it is clear that though technically the prosecution may not have been instituted on the complaint of the appellant, yet he took a most active part in carrying it on, engaging a pleader at considerable expense to assist the Prosecuting Inspector and through this pleader himself controlling the examination and cross-examination of the witnesses in the case. It is extremely doubtful whether the prosecution would ever have started

(4) 30 A. 525; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 35 I. A. 189; 12 C.W.N. 1017; 10 Bom. L. R. 1080; 4 M. L. T. 204; 16 M. L. J. 394 (P. C.).

without his active assistance, and it would certainly never have gone the length it did. For all practical purposes he was the prosecutor.

The appeal fails on both the points and is dismissed with costs.

Daniels, J.—I concur. On the point on which the appeal was mainly pressed the rule laid down in *Sat Narain Prasad* v. *Ram Autar* (1) is applicable. It would be inequitable and improper to upset the result of four years of litigation on a ground of admissibility of evidence which was taken for the first time in second appeal. The suit was instituted in April 1920. The parties, to save themselves trouble and expense, agreed that it should be decided on the evidence recorded in the criminal trial. There have been many instances of agreements analogous to this. The parties may agree that the case shall be decided on the evidence of a particular witness. They may agree, as they did in a recent case, that it shall be decided on the result of the Munsif's inspection of the locality. It is difficult to say that such agreements are unlawful. There is much force in the reasoning of Krishnan, J., in the Madras Full Bench case, that where the whole result of the trial can be determined by consent of the parties, it is equally open to them to agree to treat statements as evidence which might not otherwise be so. This forms a valid ground of distinction from criminal trials, where a stricter rule is applied because the public interest, as represented by the Crown, is involved.

The decision of the Trial Court was against the appellant. He filed seven grounds of appeal before the District Judge, but it never once occurred to him to suggest that the decision was bad *ab initio* because there was no legal evidence to support it. The learned Subordinate Judge to whom the appeal was made over reviewed the evidence in detail and came to the conclusion that the complaint against the plaintiff was false and malicious and made without reasonable and probable cause. The appellant's proceedings are too much like the game of "heads I win, tails you lose". So long as he had a chance of success on the facts he was quite content that the case should be decided on the evidence on which he had agreed to rest it. When a plea on the facts is no longer open to him he claims the right to repudiate his agreement. If we accepted his plea, no order which we might pass as to costs would suffice to put the plaintiff back into the position he would have occupied if the agreement had not been made. Evidence which was available in 1920 will no longer be available in 1924. Even if the witnesses are alive and subject to the process of the Court, their recollection of the events, to which they would be required to depose, will be vague and incomplete. I concur therefore in dismissing the appeal with costs.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION NO. 633 OF 1922

April 11, 1924.

Present:—Mr. Victor Murray Coutts-Trotter, Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.

KRISHNAMACHARIAR—COUNTER-PETITIONER—PETITIONER
versus
SRI RENGAMMAL AND OTHERS—PETITIONERS—RESPONDENTS

Limitation Act (*IX of* 1908), *s.* 5—*Civil Procedure Code* (*V of* 1908), *s.* 122—*O. IX r.* 13—*Application to set aside* ex parte *decree—Power to excuse delay—Rule made by Madras High Court, if* Intra Vires.

The rule framed by the Madras High Court applying section 5 of the Limitation Act to applications to set aside *ex parte* decrees under O. IX, r. 13 of the Civil Procedure Code is *Intra Vires*. [p. 880, col. 1.]

The combined effect of section 5 of the Limitation Act and section 122 of the Civil Procedure Code is to give power to the High Court to frame such a rule. [p. 880, col. 1.]

Sennimalai Goundan v. *Palani Goundan*, 32 Ind. Cas. 975, followed.

KRISHNAMACHARIAR *v.* SRI RENGAMMAL

Petition under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif, Koilpatti, in I. A. No. 15 of 1922 in O. S. No 296 of 1921, dated the 14th February 1922.

ORDER OF REFERENCE TO A FULL BENCH.

Krishnan, J.—The chief question argued in this case is whether the rule framed by this High Court as an addition to r. 13 O. IX, of the Civil Procedure Code by which the provisions of section 5 of the Limitation Act were made applicable to applications to set aside *ex parte* decrees is *ultra vires* or not. The petitioner contends that it is and that the lower Court had no jurisdiction to excuse the delay in this case and should have dismissed the application as barred by limitation. The defendants who applied to set aside the *ex parte* decree against them had all of them been duly served and under article 164 of the Limitation Act the period of limitation for setting aside the decree is 30 days from the date of the decree. The application in this case was made beyond time and if delay cannot be excused the petition should have been dismissed. The Limitation Act does not by itself make section 5 thereof applicable to applications of this sort and but for the rule framed by the High Court, the Court would have no power to set aside the decree. The question whether the rule is *ultra vires* or not, thus necessarily arises. If the rule is *intra vires* there is no ground for interfering with the lower Court's order on the merits under this Court s revisional jurisdiction. I am not prepared to say that the lower Court exercised its discretion in excusing delay and setting aside the *ex parte* decree in any illegal or improper manner if it had jurisdiction to do so.

The question of the validity of the rule has, therefore, to be considered in this case. It was framed by this Court under the power given to it by sections 122 and 128, Civil Procedure Code. The rule necessarily alters the period of limitation for applications under O. IX. r. 13, Civil Pocedure Code, fixed by the Limitation Act. Do our rule-making powers extend far enough to enable us to frame a rule which has that effect? I am inclined to think they do not. Section 122 gives us power to frame rules "regulating our own procedure and the procedure of the Civil Courts subject to our superintendence" and no more. If the rule framed falls within that category we can no doubt annul, alter or add to any rule in the first schedule of the Civil Procedure Code. Section 128 reiterates that the rule should refer to procedure of Civil Courts and adds one further restriction that the rule framed should not be inconsistent with the provisions in the body of the Code. It then gives examples of the sort of rules that may be framed. But there is no indication here that we could frame a rule to alter the limitation fixed for any application by the Limitation Act.

The question whether the rule in dispute is *ultra vires* or not was once raised before Coutts Trotter, J., sitting as a single Judge and he held that it was not (see *Sennimalai Goundan* v. *Palani Goundan* (1). He held the view that "the articles in the Limitation Act limiting applications of this nature which are almost entirely interlocutory deal clearly with matters of procedure." With all respect to the learned Judge, I feel considerable difficulty in accepting his view. I do not see how we can distinguish between the limitation for suits and the limitation for applications. If one is procedure the other must equally be procedure. I think neither of them can properly be brought under the term 'procedure.' The first schedule of the Civil Procedure Code deals with numerous kinds of applications. If we can alter the limitation for one it will follow that we have the power to alter the limitation with regard to every one of them. Can we then for example pass a rule to alter the limitation for execution applications? It seems going too far to answer the question in the affirmative.

A full Bench of the Allahabad High Court unanimously held the view that limitation could not be so affected: the learned Judges say in *Narsingh Sahai* v. *Sheo Prasad* (2) "We are unanimous in holding that this Court has no power by any rule that it may make to alter the period of imitation prescribed by the Indian Limitation Act." This view has been followed in the Lahore High Court by Mr. Justice Raoof in the case, *Madan*

(1) 32 Ind. Cas. 975.
(2) 42 Ind Cas. 855 : 40 A. 1 at p. 7 ; 15 A. L. J. 835 (F. B.).

Gopal v. *Malawa Ram* (3). He observes "the Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code; but it has no power to alter the period of limitation provided by the Limitation Act," see page 778. It was held by the Bombay High Court under the corresponding section 652 of the old Civil Procedure Code which gave power to the High Court, like the present section 122, to make rules to regulate matters connected with its own procedure and the procedure of Civil Courts subject to its superintendence, that the High Court had no power to frame a rule modifying expressly or by necessary implication any rule of limitation prescribed by the Limitation Act (see *Chunilal Jethabhai* v. *Dahyabhai Amulakh*. (4)

Our attention was drawn by the respondents' Vakil to O. XXII, r. 9, clause (3) of the Civil Procedure Code, where there is an express provision made by the legislature itself that section 5 of the Limitation Act shall apply to applications under sub-rule (2) of that rule and it was argued that this was an indication that the legislature considered the application of section 5 to any of the applications dealt with in the first schedule as merely a matter of procedure and that the High Court has, therefore, power to frame similar rules under section 122, Civil Procedure Code. On the other hand, it was urged that the legislature itself added the provision as it could not be done by any rule framed by the High Court. Neither argument seems to me to be sound and I think no inference can be drawn from it one way or the other.

Our attention was also drawn to the words of section 5 of the Limitation Act as they stood at the time the rule in question here was framed. It contemplated the section being made applicable "by any enactment or rule for the time being in force." But in my opinion this has no bearing on the question whether the rule making it so applicable is a valid rule or not. That has to be decided with reference to the scope of the rule-making power. It may be observed that section 5 has been recently amended by Act X of 1922 whereby the words "by any enactment or rule" have been changed into "by or under any enactment" the word 'rule' being taken away. There was some discussion about the effect of this alteration and the reason for it, but I think it has no bearing on the present case.

For the above reasons I am inclined to think that the rule in question is *ultra vires*. But as my learned brother takes a different view and as the question is of some importance as it refers to the scope of our rule-making powers and as he desires that the question should be referred to a Full Bench, I agree to that course.

We refer to the Full Bench the following question:—

"Is the rule framed by the High Court applying section 5 of the Limitation Act to applications under O. IX, r. 13 of the Civil Procedure Code *intra vires* or not?"

Waller, J.—I regret that I cannot agree. Section 5 of the Limitation Act may be made applicable by rule to any application. Such a rule has been passed under section 122, Civil Procedure Code. I am not prepared to dissent from Couts-Trotter, J.'s view that this is a matter of procedure and that the High Court had power to frame auch a rule under section 122, Civil Procedure Code. I agree with him that the articles in the Limitation Act limiting applications of this kind deal with matters of procedure. The rulings quoted seem to me to be not precisely in point. All that they decided was that the time requisite for getting certain copies, excluded by section 12 of the Limitation Act, could not be enlarged by implication in consequence of a rule having been passed insisting on a further copy being produced. What one Court held was that the rule was valid enough, but had no effect on section 12. That is not the point here. There is no question here of altering expressly or by implication a period of limitation. It is a question of applying by rule a section of the Limitation Act which itself provides for such application. Rule 9 (3) of O. XXII, Civil Procedure Code indicates, to my mind, that the legislature regarded the matter as being one of procedure. I am not prepared to infer from the fact that the legislature itself inserted sub-rule (3), that the High Court has no power to insert a similar rule elsewhere in Schedule I. I would

(3) 68 Ind. Cas. 777.
(4) 32 B. 14 at pp. 24, 25; 9 Bom. L. R. 1138.

therefore, hold that the rule in question is *intra vires*. In any case, it has been in force and followed for a number of years. Its validity seems to have been unchallenged since 1915 (vide *Sudalaimuthu Kudumban* v. *Andi Reddiar* (5), and I think that the best course, now that the question has been raised and we are differing on it, is to refer it for the decision of aFull Bench. I, therefore, agree that the question framed by my learned brother be so referred.

Mr. *K. S. Ramabhadra Ayyar*, for the Petitioner.

Mr. *A. Swaminatha Ayyar*, for the Respondents.

OPINION.

Coutts-Trotter, C. J.—By a rule framed by this Court in 1914 as an addition to r. 13, O. IX of the Civil Procedure Code the provisions of section 5 of the Limitation Act were made applicable to applications to set aside *ex-parte* decrees. It is suggested that that rule is *ultra vires* of the rule-making powers vested in this Court. I now propose to say very little about it, because I have already expressed my opinion on this matter in *Sennimalai Goundan* v. *Palani Goundan*, (1) and nothing that I have heard in the course of an extended argument induces me to think that that opinion was wrong. I think the strongest ground on which the rule can be supported is this: that section 5 of the Limitation Act obviously contemplates its extension by means of rules. In its old form it used the word "rule" and the section may be made applicable "by any enactment or rule." The words have been changed as follows: instead of "by any enactment or rule," the section now runs "by or under any enactment." These words though they mean the same thing obviously express it better. In my opinion, it is perfectly clear that the High Court had power under the combined effect of section 5 of the Limitation Act and section 122 of the Civil Procedure Code to apply the provisions of section 5 which after all are a relaxation of the rigour of the law to a matter so eminently suitable to such an extension as to set aside *ex parte* decrees. I agree with my brother Waller, J. and the answer to the question referred to us, is, that the rule framed by the High Court is *intra vires*.

Ramesam, J.—I agree with the judgment delivered by my Lord as to the construction of the words 'by or under any enactment' in section 5 of the Limitation Act. So far as section 5 is concerned the section itself contains an indication that it may be so extended by any other enactment or by any other rule made under any enactment. But even assuming that the contention of the learned Vakil for the appellant as to the effect of the amendment is correct, namely, that the High Court cannot by any rule in the Civil Procedure Code extend section 5 of the Limitation Act, the effect of the amendment which was made in 1922 can be that only after 1922 the High Court cannot make such alterations or additions. It cannot be contended that an amendment of 1922 repealed the rule made in 1916. All that can be said is that no such rule can be made hereafter but as I have said already I do not agree with the contention of the learned Vakil as to the effect of the words 'by or under any enactment.'

Wallace, J.—I agree with what both my learned brothers have said, but I would like to add one or two sentences. The appearance of a similar rule in O. XXII, r. 9, would indicate that such a provision of limitation was deliberately placed by the legislature in the first schedule of the Civil Procedure Code and, therefore, alterable as a matter of procedure by force of section 122. Section 122, as I read it, gives power to annul this provision in O. XXII, r. 9, and therefore, would, if that provision were not found in O. XXII, r. 9, give powers to insert such a provision in that O. XXII if advisable. If such a power can be legally exercised in case of O. XXII, r. 9, I cannot see any possible reason why it should not be exercised in the case of O. IX, r. 13.

V. N. V. *Reference answered in the affirmative.*

(5) 66 Ind. Cas. 104; 45 M. 628; 15 L. W 494; 42; M. L. J. 484; (1922) M.W.N. 266; 30 M. L. T. 342 (1922) A. I. R. (M) 186.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 368 OF 1922.

February 14, 1924.

Present :—Justice Sir Hugh Walmsley, Kt., and Mr. Justice M. N. Mukerji.

MATHURAPORE ZEMINDARY COMPANY, LIMITED—APPELLANT
versus
BHASARAM MONDAL AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16 — Bengal Tenancy Act (VIII of 1885), s. 148—Assignment of decree, what amounts to—Rent decree—Assignment of property whether operates as assignment of decree.

An assignment of a certain property with all its back and future rents does not operate as an assignment of a decree for arrears of rent obtained by the assignor, within the meaning of O XXI r. 16 of the Civil Procedure Code. [p. 884, col. 1.]

Case-law discussed.

The provisions of section 148 of the Bengal Tenancy Act impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as a rent decree. [p. 884, col. 2.]

Appeal against the order of the Subordinate Judge, Malda, dated the 19th July 1922, affirming that of the Munsiff, 1st Court, Malda, dated the 18th April 1921.

Mr. *U. N. Sen Gupta* and Babu *Apurba Churn Mukerjee*, for the Appellant.

Babu *Debendra Narain Bhattacharjee*, for the Respondents.

JUDGMENT.

M. N. Mukerji, J.—The facts which have given rise to this appeal are quite simple.

On the 4th February, 1920, Mr. G. Hennessy and others obtained a decree for rent against the respondents. The appellants, the Mathurapur Zemindary Company Limited on the 17th July, 1920 applied for execution of the said decree after being substituted in the place of the decree-holders on the basis of certain assignments in respect of the decree-holders' properties alleged to have been made in the first instance in September, 1919, and thereafter in January 1920. The learned Munsiff in whose Court the said application was made issued notice on the judgment-debtors to show cause why the substitution should not be made. The judgment-debtors appeared, denied that there was any assignment of the decree in question and challenged the *locus standi* of the appellants to get themselves substituted or proceed with the execution. The learned Munsiff held that the appellants were not transferees of the decree either by assignment in writing or by operation of law and therefore they were not competent to apply for execution and consequently dismissed the application for execution. On appeal being taken from the said order, the order was affirmed and hence the present appeal to this Court.

It was contended on behalf of the appellants that by reason of the provisions of section 148 of the Bengal Tenancy Act, a mere assignment of the decree would not have enabled them to execute the same as a rent decree, and inasmuch as they are assignees of the decree-holders' properties in respect of which the rent decree was passed, they were in a better position than mere assignees of the decree, that though there was no assignment of the decree in writing, there was one by operation of law inasmuch as the assignment of the properties had been made together with all arrears of rent and on principles of equity it should have been held that they were transferees of the decree by assignment. Reliance was placed on their behalf upon the case of *Ananda Mohan Ray* v. *Promotha Nath Ganguli* (1). It is unnecessary to refer to the other cases cited as they do not appear to bear upon the aforesaid contentions.

On the other hand, it was contended on behalf of the respondents that no consideration of equity could arise between an assignor and an assignee such as might arise between a mortgagor and a mortgagee as was the case in *Ananda Mohan Ray* v. *Promotha Nath Ganguli* (1). Reference was made on their behalf to the case of *Thakuri Gope* v. *Malik Mokhtear Ahmad* (2), in support of the contention that

(1) 57 Ind. Cas. 874 ; 25 C. W. N. 869.
(2) 69 Ind. Cas. 959 ; (1922) Pat. 256 ; 3 P. L. T. 625 ; (1922) A. I. R. (Pat.) 563.

the transferee under such circumstances could not come in to execute the decree.

At the outset, I may observe that the deeds of assignment upon which the appellants rely have not been placed before us, nor are they to be found on the record and the only indication of their contents that can be gathered is from the judgment of the Munsiff where he says that, "It is contended that the properties of the decree-holders with all balances and sums of money due and owing by the raiyats and uncollected and unpaid on the day of assignment had been transferred."

The relevant provision of the Code is O. XXI r. 16. It is not pretended in the present case that there was any assignment of the decree in writing, and it is well-settled that if it is to be a valid assignment within the meaning of this rule and one not by operation of law it must be in writing and a transferee under an oral assignment has no *locus standi* : *Parvata* v. *Digambar* (3). The Judicial Committee in the case of *Jatindra Nath Basu* v. *Peyer Deye Debi* (4) has observed that "such a transfer of the decree could by reason of section 232 of the Code of Civil Procedure 1882, (which with certain modifications which need not be referred to for our present purposes, corresponds to O. XXI, r. 16 of the present Code) be effected only by an assignment in writing.

The contention that there was an assignment by operation of law is mainly based upon the observations of this Court in the case of *Ananda Mohun Ray* v. *Promotha Nath Ganguli* (1). Transferees by operation of law ordinarily would be legal representatives of the deceased decree-holder or the Official Assignee in the case of an insolvent debtor or the purchaser of a decree at a Court sale, or a minor succeeding to the estate which was in the hands of an executor, and other instances where there is a vesting of the interest by operation of statute.

It is necessary therefore to analyse the aforesaid decision very carefully in order to see whether it really professes to extend the meaning of that expression. The facts in that case were as follows : certain properties together with all rents, issues and profits arising therefrom or appertaining thereto were mortgaged ; the mortgagee obtained a decree on this mortgage on the Original Side of this Court, and in execution of this decree the properties hypothecated together with all arrears of rent were sold and were conveyed by the Registrar to the appellants in this appeal on a certain date. On that day certain rent suits which the mortgagors had instituted previously for back rents in respect of some *jamas* held under the properties hypothecated were decided and decrees for rent passed in favour of the mortgagors. The appellants in the appeal applied for execution of the rent decrees and the question arose whether they could do so as there was no assignment of the decrees in writing or by operation of law. The learned Judges in the course of their Judgment commented on and distinguished the cases of *Ram sahai* v. *Gaya* (5) and *Dost Muhammad* v. *Altaf Hussain Khan* (6) as being inapplicable as the facts therein were different from those in the case they were dealing with. No doubt in the judgment of this Court in that case the observations of Sargent, C. J., in the case of *Purmananddas* v. *Vallabdas* (7), were quoted at length, but the decision of this Court as I read it, did not turn upon the meaning of the expression "by operation of law." This Court held that, "In the present case, there was no assignment of the decree for arrears of rent in so many words, but not only the properties under which the *jamas* in arrears were included, but also all arrears of rents which were the subject of the rent suits were assigned to the appellants. The arrears of rent were none the less arrears though suits had been brought for them and decrees were passed for them on the very day the conveyance was executed and we think that in these circumstances the appellants may be treated as assignees of this decree under O.XXI, r. 16." Reference was no doubt made to the case of *Purmananddas* v. *Vallabdas* (7), but as I read the judgment of that case the decision therein really amounted to this that applying some doctrine of equity

(3) 15 B. 307 ; 8 Ind. Dec (N. S.) 208.

(4) 34 Ind Cas. 69 ; 43 I. A. 108 ; 43 C. 990 ; 24 C. L. J. 67 ; 14 A. L. J. 527 ; 20 C. W. N. 866 ; (1916) 1 M. W. N. 403 ; 18 Bom. L. R. 509 ; 20 M. L. T. 25 ; 3 L. W. 553 ; 31 M. L J. 249 (P. C.).

(5) 7 A. 107; A. W. N. (1884) 224 ; 4 Ind. Dec. (N. S.) 305.

(6) 17 Ind. Cas. 512.

(7) 11 B. 506 ; 6 Ind. Dec. (N. S.) 393.

in the matter of interpretation of a document, the Court as a matter of fact held that "the decree had been transferred by an assignment in writing." Similarly in the case of *Ananda Mohan Ray* v. *Promotha Nath Ganguli* (1), from the fact that all arrears of rent had been assigned over, and there having been decrees passed in respect of some simultaneously with, if not before, the execution of the conveyance, the construction put upon the conveyance which was in writing was that it also meant to include the decrees.

In the case of *Purmananddas* v. *Vallabdas* (7), there was an assignment by certain executors who were trustees in respect of certain properties in favour of the *cestui que trust*, in the most general terms, the words being "all moveable property, debts, claims, things in action whatever vested in them as such executors. Sargent, C. J., observes in his judgment, "But it has been suggested that Parmanand is not a transferee of the decree under section 232 of the Civil Procedure Code, because the decree has not been transferred to him by assignment in writing or by operation of law, and therefore he is not entitled to apply for execution. There is no doubt that in a Court of Equity in England, the decree would be regarded as assigned to Purmanandas and he would be allowed to proceed in execution in the name of the assignors. Here there is no distinction between law and equity, and by the expression 'by the operation of law' must be understood the operation of law as administered in these Courts. We think under the circumstances we must hold that this decree has been transferred to Purmananddas by operation of law. *In the present case the decree has been transferred in writing as construed in these Courts.*" These last words are very important and they appear in the judgment of Sargent, C. J., himself. In my judgment it is obviously right to invoke the aid of doctrines of equity in the matter of interpretation of a document of this nature executed by a trustee under a will in favour of the *cestui que trust*. If, however, this decision purports to lay down broadly that Courts of execution have to look to equity in considering whether there has been an assignment by operation of law I regret I am unable to assent to the proposition. The Madras High Court in the case of *Bhandari* v. *Ramachandra* (8), declined to apply the doctrine of equity in somewhat similar proceedings, and observed as follows :—"We are asked to hold that in the event which happened in this case the appellant is entitled to be treated as the transferee of a decree from the decree-holder for the purpose of section 232, Civil Procedure Code notwithstanding that at the time of assignment there was no decree and no decree-holder. It seems to us that we should not be warranted in applying the doctrine of equity on which the appellant relies, which is stated in *Palaniappa* v. *Lakshmanan* (9), for the purpose of construing section 232, Civil Procedure Code. We think the words decree-holder must be construed as meaning decree-holder in fact and not as including a party who in equity may afterwards become entitled to the rights of the actual decree-holder, and that the words of the section relating to a transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the agreement." The Judicial Committee of the Privy Council had occasion to deal with a somewhat similar provision contained in section 208 of Act VIII of 1859 in the case of *Abidunissa Khatoon* v. *Amirunnissa Khatoon* (10), and their Lordships condemned the consideration of principles of equity in such proceedings. Their Lordships observed as follows :—"Then we come to section 208, which, undoubtedly is a section relating to proceedings for execution, and after judgment and decree. It is to this effect : 'If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader, and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder.' It appears to their Lordships, in the first place, that, assuming Wajed to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of

(8) 17 M. L. J. 391 ; 2 M. L. T. 157.
(9) 16 M. 429 ; 5 Ind. Dec. (N.S.) 1005.
(10) 2 C. 327 ; 4 I. A. 66 ; 1 Ind. Jur. 17[illegible] ; 1 Ind. Dec. (N.S.) 500 (P. C.).

law, from the original decree-holder. No incident had occurred on which the law could operate to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section."

"Their Lordships have further to observe, that they agree with the Chief Justice in the view which he expressed,—that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that, under section 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under section 203; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, section 208 does not apply. Even if it did apply, it would appear to their Lordships that, inasmuch as proceedings under it are not subject to appeal, probably a suit would lie for the purpose of reversing an order made in pursuance of it."

In my opinion the fact that, under the present law there is an appeal does not take away the weight that should attach to the above observations.

In the case before us the outstanding features are that there was no assignment of the decree in fact in writing, that no questions of equity arise inasmuch as it was a simple transaction between an assignor and an assignee and that the decree was not in fact in existence on the date of the assignment but came into being long after that date. Under such circumstances can the assignee come in? There was no doubt an assignment of the properties, and I may assume, with all its back or future rents but that is essentially different from the transfer of the decree itself, see the observations of Mahmud, J., in *Ramsahai* v. *Gaya* (5), and *Hansraj Pal* v. *Nukhraj Kunwar* (11). A person to whom a party agrees to transfer a decree that may be passed in a suit is not a transferee within the meaning of the rule: *Bhandari* v. *Ramachandra* (8). A transfer of the property during the pendency of the suit does not entitle the purchaser to apply for the execution of the decree unless he has taken steps to have his name substituted in the suit in the place of his vendor, and O. XXI, r. 16, Civil Procedure Code does not apply to such a case: *Dost Muhammed* v. *Altaf Hossein* (6); *Peer Mahomed Rowthan* v. *Ravuthan Ambalam* (12), *Thakuri Gope* v. *Malik Mokhtar Ahmed* (2). There having been no transfer by assignment in writing, the appellants could not by any application to the Court have kept the decree alive (see the observations of the Judicial Committee in the case of *Jatindra Nath Basu* v. *Peyer Deye Debia* (4).

The appellants' contentions based on the provision of section 148 of the Bengal Tenancy Act do not really assist them for if at all these provisions impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as a rent decree.

The appellants' contentions, therefore, fail, the orders passed by the Courts below are correct and the appeal must be dismissed with costs—hearing fee three gold mohurs.

Walmsley, J.—I agree.

Z. K. *Appeal dismissed.*

(11) A. W. N. (1907) 280.
(12) 30 Ind. Cas. 881.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 526-B OF 1922.

July 18, 1924.

Present :—R. B. M. B. Kinkhede, A. J. C.

NARAYAN—DEFENDANT—APPELLANT

versus

LAXMAN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872) s 23—Immoral consideration—Money paid to husband for divorcing his wife—Custom—Burden of proof—Erroneous finding of fact—Second appeal.

A creditor, who knows that the object of his debtor in taking the loan advanced by him is to utilize the money for payment of compensation to a husband, who is willing to divorce his wife, in case his marriage expenses are paid back to him, is not disentitled from recovering it by suit from his debtor. [p. 887, col. 2.]

There is a presumption of lawfulness of every consideration ; and as the law presumes against illegality, the burden of establishing illegality as a fact lies on the person who asserts it. [p. 888, col. 1.]

As the custom of reimbursing the late husband's relations for the expenses of a woman's first marriage is so well-known, in order to prove that a contract, to compensate the husband, with the expenses of his marriage upon his assenting to divorce his wife, is immoral or opposed to public policy, and, therefore, unlawful, it must be established that there is no such custom of compensating the husband. [p. 889, col. 1.]

However erroneous or grossly improper a finding of fact may be, it is unassailable in second appeal, provided it is supported by proper evidence. [p. 887, col. 1.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 131 of 1922, dated the 30th October 1922.

Mr. *A. V. Khare*, for the Appellant.

Mr. *G. G. Hatwalne*, for the Respondent.

JUDGMENT.—This appeal raises a somewhat difficult question of law. The defendant executed a promissory-note dated 9th January 1919 in plaintiff's favour for a consideration of Rs. 500 stated to have been received in cash. The loan is stated to be "for purposes of Farakat." The plaintiff seeks to recover Rs. 700-15-6 on account of principal and interest.

The defence in short is that the consideration was not received in cash but was paid by plaintiff to one Pandhari on defendant's behalf for getting him to execute a Farakat divorcing his wife Shengi in order that she may marry him (defendant) ; that though divorced she did not marry the defendant. It is contended that as the payment was for an object which is against public policy the plaintiff cannot maintain the suit.

Plaintiff in reply admitted that the payment to Pandhari was made through him, that he had accompanied the defendant's brother to obtain the divorce, and that the consideration was advanced to defendant for obtaining divorce of Pandhari's wife. It was, however, maintained that the consideration was good in law. That the divorce was obtained for defendant, but that Shengi married one Bulu is also admitted.

The Court of first instance framed the following among other issues :—

(1) Whether the defendant did not receive any consideration on the promissiory note in suit.

(2) Whether the consideration was for an object as stated by the defendant and if so, is the consideration unlawful or against public policy ?

(3) If so, can the plaintiff maintain the suit ?

The first Court found that the defendant received the full consideration of the promissory-note in suit ; that the consideration of the promissory-note was for an object which was immoral and opposed to public policy and as such it was unlawful, and that plaintiff cannot, therefore, maintain the suit. The suit was accordingly dismissed with costs. The plaintiff appealed against the dismissal and the lower Appellate Court reversed the dismissal and decreed the claim. The findings in appeal are as under :—

(1) That the defendant received the full consideration from the plaintiff.

(2) That the agreement in question as embodied in the promissory-note sued upon, was to give an advance of Rs. 500 and in consideration of it the defendant agreed to repay that sum with interest at the stipulated rate that the plaintiff's performance of his agreement to advance Rs. 500 to defendant was complete as soon as he paid the amount in cash, to

NARAYAN *v.* LAXMAN

him, and that after the payment nothing remained to be performed by him.

That besides the agreement in question between the parties to the suit, there was another agreement made about the same time or prior to the agreement in question, between defendant and Pandhari, under which the latter agreed, on receipt of Rs. 500 from the former, to divorce his wife Shengi. That the consideration for defendant to pay Rs. 500 to Pandhari was the latter's agreeing to divorce his wife, and that being immoral, was unlawful, and consequently the agreement between the defendant and Pandhari was void under section 23 of the Contract Act. But that there was nothing immoral or opposed to public policy in the plaintiff's agreeing to advance Rs. 500 to the defendant and in his actually paying the amount to the defendant in performance of his agreement or in the defendant's agreeing on receipt of the amount, to repay it with interest to plaintiff. That it might be that when the plaintiff agreed to advance and actually advanced the amount to the plaintiff, he had full knowledge of the fact that the defendant wanted the money to procure Shengi's divorce, but that such knowledge would not taint the consideration of the defendant's agreement to repay the loan to plaintiff. That there is no satisfactory proof on record to prove that plaintiff was instrumental in securing the divorce, or except making the payment to Pandhari on defendant's behalf he took any part in procuring the divorce, and that the taint of the consideration of the agreement between the defendant and Pandhari cannot affect the consideration of the defendant's agreement of loan which was perfectly lawful. That the two agreements and their respective considerations must be kept apart and considered separately. The agreement in question is only collateral to the agreement between the defendant and Pandhari. In short, the consideration or object of the agreement in question was not immoral or unlawful, that the agreement was not opposed to public policy and was not, therefore, void under section 23 of the Contract Act, and that plaintiff's claim was competent and must succeed.

The result of these findings was that plaintiff's claim was decreed. The defendant has come up in second appeal urging that,

(i) The lower Court should have held that the execution of the pro-note and securing of the divorce were one and the same transaction and that the object of the contract being opposed to public policy and being contrary to good morals, the contract was void and plaintiff's suit was not maintainable, especially as the defendant got no benefit out of any act of the plaintiff ;

(ii) That there was misapprehension of evidence besides failure to consider relevant admissions of plaintiff as regards plaintiff's undertakings being not merely to finance the defendant but also to see that defendant was married to Shengi after procuring her divorce from her former husband ;

(iii) The plaintiff's remedy lay against Pandhari or his wife and not against the defendant ; and

(iv) That the finding of the first Court as regards the payment of Rs. 500 to defendant and as regards the part played by the defendant in the entire transaction should not have been erroneously upset.

I will take up the points Nos. 1, 2 and 4 together. No argument was advanced before me as regards point No. 3 specifically, and so I need not consider it. If the result of the discussion of points Nos. 1, 2 and 4 leads to the conclusion that the defendant is liable, the plaintiff's claim must succeed. As regards point No. 4, it was conceded before me that the consideration was received in cash in the sense that it was paid on defendant's account and under his direction to Pandhari by the plaintiff. This settles the question that the promissory-note was for valuable consideration paid in cash. The next question is: was the payment of the consideration the only consideration of the agreement embodied in the promissory note, or it carried with it also an obligation on the plaintiff's part to do any further acts—namely—to procure the divorce and to get Shengi the divorced wife to marry the defendant as her second husband.

I am referred to the pleadings and to the evidence on record and asked to hold on it

that the plaintiff had undertaken not only to procure the divorce but also to procure Shengi as the wife for the defendant, as part of the transaction of the loan. I do not think it is open to me to consider, at this stage of the second appeal, and go into this matter, and upset the finding of the lower Appellate Court upon a point of fact. The finding that the transaction of loan was complete with the payment of the consideration and that nothing was left to be done on plaintiff's part to complete it is a finding of fact which is binding on me as a second Appellate Court. However erroneous or grossly improper that finding may be it is unassailable in second appeal provided it is supported by evidence proper for consideration. The lower Appellate Court has preferred to accept the testimony of the plaintiff on this point, and has held that the transaction of divorce was arranged for by the defendant through his brother and that there is no satisfactory proof on record to prove that plaintiff took any part in procuring the divorce except that of making payment to Pandhari on defendant's behalf. It was open to the lower Appellate Court to come to any reasonable finding one way or the other on the question of fact before it, namely, whether the transaction of loan and the transaction of divorce were parts of the same transaction or formed independent transactions, and whether the agreement to advance the loan was only collateral to the main agreement for divorce between the defendant and Pandhari. The Court thought fit to accept the view that they are separate transactions and that one has nothing to do with the other. The plaintiff's admission that he had accompanied the defendant and his brother and paid the amount on defendant's behalf does not advance the latter's case any further or fix the former with responsibility for failure of any contractual obligation. His presence at the most fixes him with knowledge of the fact that the money was required for the purpose of obtaining a Farkat as recited in the promissory note and that it was utilized for it. It has not been attempted to show that plaintiff's undertaking extends so far as even to get Shengi to marry defendant. The plaintiff may have expressed his willingness to use his best endeavours to help the defendant in getting himself married to Shengi but that does not amount to a promise on his part to procure or bring about the marriage, failure to do which would liberate the defendant from the obligation to repay to the plaintiff the debt fully incurred from him. I do not, therefore, see any grounds for interfering with the finding of fact sought to be challenged in second appeal.

The only legal question which remains to be considered, therefore, is whether a creditor, who knows that the object of his debtor in taking the loan advanced by him is to utilize the money for payment of compensation to a husband, who is willing to divorce his wife, in case his marriage expenses are paid back to him, is disentitled from recovering it by suit from his debtor. The lower Appellate Court, having considered the case from the right point of view, has held, after a careful discussion of the law bearing on the point, that the mere fact that the creditor is aware of the purpose, is no ground for holding that the contract of loan is tainted with immorality, however immoral the procuring of the divorce may be, as I put it, or even though payment of money for procuring the divorce between the wife and the husband was immoral, as the Additional District Judge puts it.

The respondent's pleader contends before me that the lower Appellate Court, was wrong in its assumption that repayment of marriage expenses to a willing husband, for passing a divorce deed, was immoral and opposed to public policy, and that the right view to take was that such payment has not been proved, to be illegal or unlawful or opposed to public policy, by the defendant on whom the burden of proof lay to establish the illegality of the consideration.

The suit is based upon a promissory note. Under the Negotiable Instruments Act there is a presumption that every promissory note is for consideration. All consideration is lawful unless it is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy. Section 23 of the Contract Act declares the consideration in each of these cases to be unlawful, and enacts that every agreement of which the consideration is unlawful is void. It would thus be quite apparent to any body who reads

it, that the very wording of section 23 of the Act shows that there is a presumption of lawfulness of every consideration. The law presumes against illegality and the burden of establishing illegality as a fact is, therefore, on the person, who asserts it. *The Hire Purchase Furnishing Company* v. *Richens* (1) *Mills* v. *Dunham* (2). *Waugh* v. *Morris* (3).

The defendant must, therefore, establish every fact necessary to prove the illegality of the transaction. He undertook to do this by trying to establish a sort of connection between the transaction of the loan and the transaction of divorce, and by urging that plaintiff was responsible for bringing about the divorce as also for arranging for his marriage. This inter-connection between the two transactions has not, however, been established by him as the lower Appellate Court's findings show. He has succeeded in proving that plaintiff had knowledge of only the purpose of the borrowing, but not that plaintiff had given any undertaking to procure or bring about the divorce and the subsequent marriage. The question is, is this sufficient to discharge the onus, or was it necessary for the defendant to have established further that the payment of compensation to the husband willing to pass a Farkat divorcing his wife was itself unlawful or immoral or opposed to public policy? In other words, was it necessary for the defendant to establish that such payment whether made to the knowledge of the creditor or not tainted the loan with immorality or illegality or made it one opposed to public policy. I think when the defendant undertook the burden of proving the illegality of the consideration, he undertook the whole burden and he was bound to prove illegality in every detail of that transaction. He had, therefore, to allege and prove that under law, which would mean both statutory as well as customary law, the repayment of marriage expenses to a husband who is willing to divorce his wife, is illegal He has not alleged it, much less has he proved it.

Roy's Tagore Law Lectures, 1908 on Customs and Customary Law in British India, page 310 contains the following observations:—

> "Divorce is not contemplated by the Hindu Law, but it is not repugnant to the principles, and if there be a well-established custom in its support it may override the general provisions of that law. Sir William Strange in his treatise on Hindu Law (Vol. I, page 52 of the 4th edition) says that in the lowest classes a divorce is attainable between a husband and wife provided it is allowed by the custom of the caste."

In the case of Mt. *Kudomee Dassee* v. *Joteeram Kolita* (4), the Munsiff had found that there was a custom for men and women to assent to divorce by deed, but the District Judge held that even if the custom were established it would not affect the Hindu Law. As he was wrong in holding such a view the High Court remanded the case to him for his finding on the custom which the Munsiff said was established.

In *Sankaralingam Chetti* v. *Subban Chetti*(5), it was held that there is nothing immoral in a caste custom by which divorce and remarriage are permissible on *mutual agreement* on one party paying to the other the expenses of the latter's original marriage (parisan). The ruling cited (*Uji* v. *Hathi Lalu* (6), in that case was distinguished on the ground) that in that case the question of the authority of the caste to sanction a woman's remarriage without divorce *i. e.*, without a proceeding to which both husband and wife were parties, was decided, while in the Madras case the question was one of divorce by *mutual consent* of the husband and wife. The case in (*Keshav Hargovan* v. *Bai Gandi* (7)), is similarly distinguishable. It involved the question whether the husband be willing or not. I again quote the following from Roy's Customs and Customary Law in British India:—

> "Amongst the lower classes of people —whether in Bengal, Bombay, United Provinces of Agra and Oudh or in Southern India divorce is allowed by caste people. . . . The divorce is usually

(1) (1888) 20 Q. B. D. 387 ; 58 L. T. 460 ; 36 W.R. 365.
(2) (1891) 1 Ch. 576 at p. 589 ; 60 L. J. Ch. 362 ; 64 L T. 712 ; 39 W. R. 289.
(3) (1878) 8 Q. B. D 202 ; 42 L. J. Q. B 57 ; 28 L. T. 265 ; 21 W. R. 483.
(4) 3 C. 305 ; 1 Ind. Dec. (N. S.) 781.
(5) 17 M. 479 ; 6 Ind. Dec. (N. S.) 582.
(6) 7 B. H. C. R. 133.
(7) 29 Ind. Cas. 952 ; 39 B. 538 ; 17 Bom. L. R. 584.

effected by mutual consent, on the payment of some compensation for marriage expenses incurred at the first marriage

* * *

"In some tracts, the custom of reimbursing the late husband's relations for the expenses of a woman's first marriage is so well-known that no marriage of a widow can be celebrated until such expenses have been paid. Such a custom is so notorious that it has become, as it were a part of the marriage contract in cases in which members of a community elect to marry widows. *Madda* v. *Sheo Baksh* (8)." The defendant was thus bound to establish that in this case there was no custom to reimburse or compensate the husband with the expenses of his marriage upon his assenting to divorce his wife, in order to prove that such payment was unlawful or immoral or opposed to public policy. It was not for the plaintiff to establish a positive custom, as the lower Appellate Court thinks, but it was the defendant's duty to establish the absence of such a custom if he desired the Court to regard the consideration as immoral or opposed to public policy and, therefore, unlawful.

Ismay. J. C., in *Local Government* v. *Pilaji* (9), makes the following observations—at pages 70 and 71 which are pertinent to the point involved in this appeal :—

"In considering the question whether the object of an agreement is unlawful as being opposed to public policy it is impossible to shut one's eyes to the danger of reasoning from borrowed analogies and of allowing undue weight to considerations which are sentimental rather than real. It is no doubt very difficult to specify exactly what is contrary to public policy. In *Richardson* v. *Mellish* (10), Mr. Justice Burrough said :—"Public policy is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail'."

(8) 3 A. 385; A. W. N. (1881) 7; 2 Ind. Dec. (N. S.) 182.
(9) 14 C. P. L. R. 67.
(10) (1824) 27 R. R. 603; 2 Bing. 229; 9 Moore 485; 3 L. J. C. P. 265; Ry. & Moo. 66; 1 C. & P. 241; 130 E. R. 294.

In this case the defendant has pleaded that the agreement is against public policy but has given no evidence to show how it is so and still expects the Courts to give a verdict in his favour. The observations of Lord Bramwell in *Mogul Steamship Company* v. *Mc. Gregor, Grow & Co.* (11), very fittingly apply here and I, therefore, quote them below :—

"No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the Judge do that without any evidence as to its effect and consequences?"

In the absence of any evidence to prove the plea of the defendant that the consideration or object of the agreement in question was immoral or against public policy and, therefore, unlawful, I hold that the mere fact that a creditor is aware that the object of his debtor in borrowing the loan from him, is to pay compensation to the husband who was willing to forego his claim on his wife and pass a Farkat evidencing such a transaction, does not necessarily entitle the Court to regard the consideration paid under such an agreement as immoral or opposed to public policy, and that as in this case the illegality has not been established by the defendant I further hold that the consideration or object of the agreement in suit was not unlawful, and that the present suit was maintainable.

In this view of the case the decree appealed against is correct and the same is upheld. The result is that this appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(11) (1892) App. Cas. 25 at p. 45; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp. M. C. 120; 56 J. P. 101.

LAL UMRAO SINGH *v.* LAL SINGH

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 110 OF 1923.

June 30, 1924.

Present:—Mr. Walsh, Acting Chief Justice, and Mr. Justice Boys.

LAL UMRAO SINGH—JUDGMENT-DEBTOR—APPLICANT
versus
LAL SINGH—DECREE-HOLDER AND CHITTU MAL—PURCHASER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI. r. 46, 89—Simple hypothecation bond—Attachment—Sale—"Moveable property"—"Immoveable property"—Setting aside of sale—General Clauses Act (X of 1897), s. 3 (25)—"Benefits to arise out of land"—Security under simple mortgage.

A simple hypothecation bond is "moveable property" not only for the purposes of attachment but also for the purposes of sale and O. XXI, r. 89 has no application. In other words, the bond is "moveable property" for all three purposes, attachment, sale and setting aside the sale under O. XXI, r. 89. [p. 891, col. 2.]

A simple mortgage bond carries with it two rights; a right to a decree for money and to a decree for sale. The latter gives the mortgagee a right to be recouped from the sale proceeds but gives absolutely no right of any sort to or in the land. He has not even a right to all the sale proceeds but to only so much as may be necessary to meet his debt. In other words, a debt due on a simple motgage is a debt though it is secured on land; the security is merely collateral. In short, a simple hypothecation bond does not create "an interest in immoveable property." [p. 891, col 2.]

In the absence of a clear intention to the contrary, what is held to be 'moveable property' at the time of the attachment may reasonably be considered to continue to be 'moveable' at the time of the sale. Even assuming that a simple hypothecation bond creates an interest in 'immoveable property' and as such is 'immoveable property' itself, there is a clear indication of the intention of the Legislature that for the purposes of the Code of Civil Procedure it should be treated as 'moveable property.' [p. 892, col. 1.]

In the definition of "immoveable property," in section 3, (25), General Clauses Act, the expression "benefits to arise out of land" was never intended to cover such a matter as the security held by the mortgagee under a simple mortgage-bond. [p. 892, col. 1.]

Revision from an order of the Additional District Judge, Aligarh, dated the 28th March 1923.

Mr. *K. N. Laghate*, for the Applicant.

JUDGMENT.

Boys, J.—Lal Umrao Singh judgment-debtor (the applicant in revision here) held a simple mortgage-bond which was attached and sold by Lal Singh, the first opposite party here, in execution of a decree. On the 23rd of October 1922, the judgment-debtor sent the money by telegraphic money-order but it arrived after the sale. The 24th being a Sunday he deposited the money on the 25th and on the 28th filed an application under r. 89 to get the sale set aside. The decree-holder objected that the simple mortgage-bond not being "immoveable property" the sale could not be set aside. The Munsif disallowed this objection holding that a mortgagee's rights, whether the mortgage was simple or usufructuary, constituted "an interest in immoveable property," that the fact that the property attached was attached as moveable did not render it moveable once for all and that it was immoveable within the meaning of the term in the Transfer of Property Act.

The District Judge on appeal relying on *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly* (1) and *Karim-un-nissa* v. *Phul Chand* (2) allowed the appeal holding the simple mortgage-bond to be moveable property and held that, that being so, the sale could not be set aside. The judgment-debtor asks us to revise this order.

For the applicant no serious attempt has been made to show that a simple mortgage-bond is not "moveable property" for the purpose of determining the procedure appropriate to attachment and that such procedure is not contained in O. XXI, r. 46 (section 268 of the old Code). That is a position he could hardly take up in face of the provisions of the Code of Civil Procedure and adverse authority. Compare *Karim-un-nissa* v. *Phul Chand* (2), *Tarvadi Bholanath Harishanker* v. *Bai Kashi* (3), *Bantu* v. *Ganda Singh* (4), *Nataraja Iyer*

(1) 13 Ind. Cas. 91; 37 M. 51; 10 M. L. T. 508; (1911) 2 M. W. N. 590; 22 M. L. J. 105.
(2) 15 A. 134; A. W. N. (1893) 51; 7 Ind. Dec. (N.S.) 808.
(3) 26 B. 805; 4 Bom. L. R. 18
(4) 1 Ind. Cas. 450; 18 P. R. 1909; 22 P.W.R. 1909.

v. *The South Indian Bank of Tinnevelly* (1) *Shah Muhammad Yusuf* v. *Lachmi Narain* (5).

Karim-un-nissa v. *Phul Chand* (2), was referred to in *Sheocharan Lal* v. *Sheo Sewak Singh* (6), but not overruled and (*Bantu* v. *Ganda Singh* (4) was referred to and distinguished but not overruled in *Sewa Ram* v. *Dheru Shah* (7). The applicant, however, contends that while a simple hypothecation bond may be treated as moveable property for the purpose of attachment and the procedure of O. XXI, r. 46 be applicable, it does not follow that it is not "immoveable property" for the purpose of the sale and setting aside of the sale under O. XXI, r. 89 and he has referred to *Bhawani Kuar* v. *Gulab Rai* (8), *Sheo Charan Lal* v. *Sheo Sewak Singh* (6), *Mutsaddai Lal* v. *Muhammad Hanif* (9), *Sewa Ram* v. *Dheru Shah* (7), *Ram Sarup* v. *Harpal* (10) and *Hafizuddin* v. *Jadu Nath* (11).

Of these *Bhawani Kuar* v. *Gulab Rai* (8) was shown in *Karim-un-nissa* v. *Phul Chand* (2) to be no longer law. Of the others, *Sheo Charan Lal* v. *Sheo Sewak Singh* (6), *Mutsaddi Lal* v. *Muhammad Hanif* 9), *Hafizuddin* v. *Jadu Nath* (11) and *Ram Sarup* v. *Harpal* (10) have very little bearing, if any, on the point. But the ruling of Kensington, J. in *Sewa Ram* v. *Dheru Shah* (7) does go the whole length of his contention. The learned Judge held

> "It does not follow that because a mortgage debt is to be treated as moveable property for the purpose of attachment under rule 46, it should, therefore, be considered as moveable property in all cases."

and for that as well as for another reason ordered the lower Court to hear the application for setting aside the sale. In support of his view the learned Judge relied only upon *Sant Singh* v. *Jowala Singh* (12), in which it was held, in a case dealing with the rights of a Hindu female heir to alienate that a mortgage-debt is immoveable property.

The opposite-party, on the other hand, contends that the bond being certainly attached as moveable property must be held to be sold as moveable property. The first part of this contention is, as I have already said, well established and in effect admitted. In support of the conclusion it may be said that in two of the cases quoted *Karim-un-nissa* v. *Phul Chand*, (2) and *Nataraja Iyer* v. *South Indian Bank of Tinnevelly* (1), language was used which suggests that, in the minds of the learned Judges, what was moveable for the purposes of attachment was moveable for the purposes of sale. A consideration of these authorities and another to which I shall refer and particularly of the nature of a simple hypothecation bond leaves no doubt in my mind that the contention of the opposite party is correct, that the bond is moveable property for all three purposes, attachment, sale and setting aside the sale under O. XXI, r. 89.

The learned Munsif has held that the bond constitutes an "interest in immoveable property" and is, therefore, "immoveable property" within rule 89. Is the premise correct? A simple mortgage-bond carries with it two rights; a right to a decree for money and to a decree for sale. The latter gives the mortgagee a right to be recouped from the sale proceeds but gives absolutely no right of any sort to or in the land. He has not even a right to all the sale proceeds but to only so much as may be necessary to meet his debt.

In *Tarvadi Bholanath Harishankar* v. *Bai Kashi*. (3) Chandavarkar, J. said at page 311 "A simple mortgage creates a right to recover the debt due on it from land; a mortgage with a right of foreclosure creates a right to recover the land itself. Therefore, a debt on a simple mortgage is a debt, though it is secured on land, and the security is merely collateral." What justification is there for holding that a simple hypothecation bond creates "an interest in immoveable property."?

Next we have the consideration clearly stated by Jenkins, C.J. in the case *Tarvadi Bhalanath Harishankar* v *Bai Kashi*(3) just referred to and concurred in by Chandavarkar, J.,

(5) 50 Ind. Cas. 157; 21 O. C. 400; 6 O. L. J. 49.
(6) 18 A. 469; A. W. N. (1896) 154; 8 Ind. Dec. (N. S.) 1018.
(7) 18 Ind. Cas. 318; 125 P. L. R. 1918; 79 P. W. R. 1918.
(8) 1 A. 848; 1 Ind. Jur. 704; 1 Ind. Dec. (N. S.) 288.
(9) 15 Ind Cas. 853; 10 A. L. J. 167.
(10) 89 Ind. Cas. 663; 15 A L. J. 33, at p. 37; 39 A. 200.
(11) 12 C. W. N. 820; 35 C. 298; 7 C. L. J. 279.
(12) 58 P. R. 1899.

quoting *Balde Dhanrup Marvadi* v. *Ramchandra Balvant* (13) that the debt has been sold and that certainly the sale of the debt cannot be set aside, and that the security must go with the debt. It is urged for the applicant that from the mere fact that for the purposes of the procedure for attachment it is convenient to treat the bond as moveable, it does not follow that other considerations as to the attributes of the property to be affected or possibly affected did not determine its nature when the legislature was considering its sale and the consequences to follow from its sale. This may be conceded but there is no evidence to show that this consideration did weigh with the legislature or that effect was given to such considerations. On the other hand, it must be conceded that, in the absence of a clear intention to the contrary, what is held to be moveable property at the time of the attachment may reasonably be considered to continue to be moveable at the time of the sale, and I find myself in agreement with the view, of Chandavarkar J. in *Tarvadi Bholanath Harishankar* v. *Bai Kashi* (3), where he further says, that even assuming that " it is an interest in immoveable property and as such is immoveable property itself, we have as I said at the outset a clear indication of the intention of the legislature that for the purposes of the Code of Civil Procedure it should be treated as moveble property."

Lastly, to hold that it is not immoveable property is consistent with the definition of "immoveable property " to be found in the General Clauses Act, section 3 (25). The expression "benefits to arise out of land " was never intended to cover such a matter as the security held by the mortgagee under a simple mortgage-bond, but such benefits as the right to a ferry.

For these reasons I have no hesitation in holding that a simple hypothecation bond is " moveable property " not only for the purposes of attachment but also for the purposes of sale and O. XXI, r. 89 has no application.

It is not clear that any question affecting the jurisdiction of the District Judge arises in this case, such as would justify this Court in interfering in revision, were we otherwise inclined to do so, but we had heard much argument before this point emerged and we thought it desirable then to hear the argument out as the matter appears not to have been definitely determined by this Court and is one which might arise again at any time. I would dismiss the application.

Walsh, A. C. J.—I have read the judgment of my brother Boys and I agree with it.

By the Court.—The order of the Court is that the application is dismissed with costs on the higher scale, (if any).

S. D. *Application dismissed.*

(13) 19 B. 121; 10 Ind. Dec. (N. S.) 81.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 257 OF 1923.

March 11, 1924.

Present :—Mr. Justice Krishnan.

CLAN LINE STEAMSHIP COMPANY LIMITED
—DEFENDANT—APPELLANT
versus
R. SRINIVASA PAI (DIED) AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 70—Bill of lading—Carriage of goods from Liverpool to Cochin—Clause exempting ship-owners from liability in case of "restraint of rulers" — Freight paid in advance by shippers — Steamer commandeered by Government at Bombay—Goods forwarded to Cochin by Master of ship—Consignee taking delivery on payment of charges—Suit for refund against ship-owners—Right of Master to act for cargo-owners.

The defendant steamship Company undertook with the plaintiff to carry certain goods from Liverpool to Cochin and received the advance freight therefor in England. There was a provision in the bill of lading for termination of voyage in case of " restraint of rulers", and for non-liability of the Company for any loss or damage thereby. The goods were put on board one of defendant's steamers and duly arrived at Bombay Harbour but there the steamer was commandeered by the Government of India for the use of transport. In consequence all the cargo was discharged in the port and notice given to the consignee. There was some correspondence between the defendant's agents at Bombay and the plaintiff on a dispute at to who should bear the charges for tran-

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shipment between Bombay and Cochin. Finally the goods were transhipped by the defendant Company from Bombay to Cochin The plaintiff took delivery of the goods and paid the charges. In a suit by the plaintiff against the defendant Company for refund of the sum so paid,

Held, that (1) The " restraint of rulers " being one of the excepted causes, the master of the ship was entitled, on the steamer being commandeered, to land the goods at Bombay and the ship-owner's responsibility ceased as soon as notice was given to the shippers, that even though the voyage had not been completed, the company was not bound to refund any portion of the advance freight paid or carry the goods to Cochin at their expense; [p. 894, col 2.]

(2) The " law of the flag " which governed the contract of the bill of lading, meant in this case the English law, at any rate till the contract came to an end by the goods being landed in Bombay. [p. 895, col. 1.]

(3) The defendant Company having intended throughout to hold the consignee responsible for the charges from Bombay to Cochin and never having intended to act gratuitously and the plaintiff never having repudiated the company's action in sending the goods to Cochin, the company could not be held to have acted voluntarily or gratuitously .[p. 894, col. 2.]

(4) In any case, under section 70 of the Contract Act, the defendants, being carriers, were bound to make arrangemants for the disposal of the cargo that, therefore, they must be held to have acted lawfully in sending the goods from Bombay to Cochin and that the plaintiff having enjoyed the benefit was bound to pay the charges. [p. 893, col. 2.]

Appeal against the decree of the District Court, South Malabar at Calicut, in A. S. No. 319 of 1920, preferred against the decree of the Court of the Subordinate Judge, Cochin, in O. S. No. 19 of 1918.

Messrs. *R. N. Aiyangar* and *O. T. Govinda Nambiar*, for the Appellant.

Messrs. *T. R. Ramachandra Iyer* and *S. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—In this second appeal the Clan Line Steamship Co., Ltd., is the appellant; the respondents are certain merchants in Cochin who were consignees of certain goods which the defendant Company had undertaken to carry from Liverpool and London to Cochin under bills of lading Exs. 50, 51 and 52. The language of all these bills is exactly similar and it will be sufficient to refer to one of them in considering the case. The total freight to Cochin was paid as advance freight in England and the goods were put on board of one of the defendant Company's steamers, "*SS. Clan Mackellar.*" The ship duly arrived at the Bombay harbour, but when it arrived there it was commandeered by the Government of India for use as transport and in consequence its voyage with cargo had to be terminated and all its cargo was discharged in that port. The steamship agents gave notice of what happened to all the consignees including the plaintiffs by Ex. 24 and asked them to make arrangements to take delivery in Bombay. Some correspondence passed between the parties the effect of which will have to be considered presently. Finally plaintiffs' goods were forwarded to Cochin by the defendant Company's agents in Bombay on Board *SS. Upanda*, a vessel, belonging to the B. I. S. N. Co. and were taken delivery of by the plaintiffs on payment of the freight and other charges, amounting to Rs. 1,720 and odd, for the carriage of the goods from Bombay to Cochin. Plaintiffs aver that these charges were wrongfully collected from them and that they are not liable for them and they seek in this suit to get a refund of that money with a small sum for damages for short delivery.

The Subordinate Judge who tried the suit dismissed it, but on appeal the District Judge has given the plaintiffs a decree for part of the amount claimed, made up of the freight and incidental charges connected with the transhipment of the goods from Bombay to Cochin, and of the damages claimed. The plaintiffs have not appealed as regards the amount disallowed but the defendant Company has appealed and has contended before me that the suit should have been dismissed.

The main question for decision is whether the defendant Company was entitled to call upon the plaintiffs to pay the charges for the carriage of goods from Bombay to Cochin. There can be no doubt that when *Clan Mackellar* was commandeered in Bombay its voyage terminated as the result of " restraint of rulers", the words used in paragraph 3 of the bill of lading-Ex. 50, and the ship-owners were not liable for any loss or damage occasioned thereby. The restraint of rulers being one of the excepted causes under paragraph 5, the master of the ship was entitled under that paragraph to land the plaintiff's goods in

Bombay at their expense and risk, and the ship-owners' responsibility ceased as soon as notice was given to the shippers by Ex. 24. Though the voyage to Cochin had not been completed the shipowners were not bound to refund any portion of the advance freight paid or to carry the goods to Cochin at their expense. These propositions are laid down in a recent decision of this High Court with reference to this very voyage of ss. *Clan Mackellar* and the bill of lading there was in the same terms as here. The learned Judges have referred to the English authorities on the points and have discussed the questions at length and as I respectfully follow that ruling it is not necessary for me to discuss these questions again. It was urged that the learned Judges were wrong in applying the English Law to the case and that as soon as *Clan Mackellar* entered the Indian territorial waters, where the commandeering took place, the Indian Law applied and that section 65 of the Indian Contract Act governed the case. I am unable to accept this argument. The parties have expressly covenanted by the very first clause in the billl of lading that their contract was to be judged by "the law of the flag" and that certainly meant in this case the English Law till the contract came to an end by the goods being landed in Bombay. The further dealings between the parties may be governed by the Indian Law, but it is not necessary to decide it definitely as it makes no difference in the result.

In the case above cited the learned judges dismissed the shipper's claim against the Clan Line Co., for the payment of the charges incurred by them in carrying their goods from Bombay to Mangalore, which was the port of destination in that case. The only difference between that case and this case is that whereas in that case the shippers paid the carrying charges here, the Clan Line Co. paid them and collected them from the shippers on delivery of the goods. I do not think this makes any real difference as to the result. It was, however, argued that as the plaintiffs did not ask the defendant Co., to send their goods from Bombay to Cochin their action in so sending must be treated as one taken by them gratuitously and voluntarily and of their own accord, as a piece of officious interference by them with plaintiffs' goods and, therefore, they were not entitled to be repaid in law the expenses they were put to. This argument was accepted by the District Judge and he directed the money collected for such charges to be refunded. It seems to me that this is an entirely wrong view to take of the case. Within 2 days after the goods were landed in Bombay, the 1st plaintiff wrote Ex. V to the defendants' agents in Cochin and asked when the goods will be transhipped to Cochin. He wrote against Ex. VI to the defendants agents immediately to despatch his goods by country craft as no steamers were then available. The plaintiffs. no doubt, offered to take delivery of the goods in Bombay but it was on condition that the company should pay the difference with the freight and the transhipment and other charges. The defendant Co., never agreed to pay these as they were not bound to, under the law. The plaintiffs were apparently under the impression that if the Company sent the goods themselves they would not have to pay the expenses. They again wrote Ex. AA where they say "as no steamers are available" they will take delivery in Bombay if charges would be paid by the Company. Defendant's agent wrote in reply Ex. D wherein they repudiated their liability to pay any difference in freight and offered to deliver in Bombay only on a guarantee being given freeing them from all claim for charges. In reply to a further letter from the plaintiffs they sent a telegram insisting on the guarantee. Though the plaintiffs wrote Ex. CC on 10th January to say that they would take delivery they did not actually do so. On the 20th a steamer became available to tranship these goods to Cochin and the defendant Company's Bombay agents took advantage of the opportunity and transhipped the goods by *s.s. Upada.* In the meanwhile they had received instructions from their home office to forward the goods to the port of destination, but at the cost of the consignees from whom the charges were to be collected before delivery, as shown by Ex. 36. It is clear from all this correspondence that the defendants agents never intended to tranship the goods gratuitously but always intended to hold the consignees responsible for the charges. The plaintiff asked the defendants' agents to send the goods to Cochin even by country craft if no steamer was available. Even

when they proposed to take delivery in Bombay they did so only because it was thought no steamers were available. See Ex. AA. It seems to me that the correspondence shows that plaintiffs did want their goods to be sent by the defendant's agents to Cochin, whatever dispute their might be as to who should bear the charges. The plaintiff's proposal to take delivery themselves in Bombay was conditional on there being no steamers available. Defendant's agents were, therefore, justified in sending the goods by s. s. *Upada* when that steamer became available and I agree with the Subordinate Judge that the defendant acted as plaintiffs' agents in doing so. The dispute as to the liability to pay the charges has really nothing to do with the authorisation to send the goods by steamer. That dispute has to be decided not on the ground whether the defendant Company sent the goods voluntarily but on the ground as to who was responsible to pay those charges under the law. Plaintiff's subsequent conduct, after they knew that the goods had been sent on to Cochin, clearly shows that even, if they did not actually authorise such sending they acquiesced in and accepted the defendant's action and ratified it Second plaintiff wrote to the defendants' agents Ex. XI to say that he was entitled to the delivery of the goods and not one Liladhur who was disputing his right and that he would pay the charges on receipt of particulars; the 1st plaintiff wrote Ex. VII the next day to the same effect. Subsequently the plaintiffs took delivery of the goods and paid the charges. They say in their plaint that they paid under protest but that was denied, and on the evidence it does not appear that they made any protest. They did not in any way repudiate defendant's action in bringing the goods to Cochin nor did they insist on delivery in Bombay. If the defendants were bound to pay the expenses for carrying the goods to Cochin under the law, the absence of protest at time of payment may not be material, but it is very material in considering whether the parties treated the defendants' action in carrying the goods as a voluntary and gratuitous one.

It seems to me further that even if the defendant Company had no authority to send the goods for the plaintiffs to Cochin and that plaintiffs' subsequent action did not amount to a ratification, defendant Company will still be entitled to claim compensation under section 70 of the Contract Act. No doubt as stated in *Damodara Mudaliar* v. *Secretary of State for India* (1) quoted by the District Judge and approved of in *Jarao Kumari* v. *Basantakumar* Roy (2) "the section should not be so read as to justify the officious interference of one man with the affairs or property of another.' But this is not a case of that sort at all. The defendant Co. were carriers for the plaintiffs and but for the unforeseen action of the Government of India, they would have carried the goods to Cochin. In such cases the master has power and ought to act for the cargo owners and make such arrangements with regard to the cargo as prudence dictates. See Carver, 6th Edition, P. 421. It is true he ought to obtain instructions from the cargo owners if it is practicable to do so; but in this case the instructions were, if anything, in favour of sending the goods. Even if he fails to obtain instructions his action cannot be treated as unlawful nor was it so treated by the plaintiffs themselves. Nor can the defendant Co. be looked upon as mere officious interferers in sending the goods. It seems to me they acted lawfully and as they clearly did not intend to act gratuitously in the matter and as plaintiffs have enjoyed the benefit they are bound to pay the charges claimed as compensation.

In any view the plaintiffs are not entitled to the refund claimed. No separate argument has been adduced before me regarding the claim for damages for short delivery. That is a claim that should have been made against the B. I. S. N. Co., and not against the defendant Co. in the view I take. The second appeal is, therefore, allowed and the decree of the lower Appellate Court is set aside and the decree of the first Court restored with costs here and in the Court below.

V. N. V. *Appeal allowed.*
S. D.

(1) 18 M. 88 ; 4 M. L. J. 205 ; 6 Ind. Dec. (N. S.) 410.
(2) 32 C. 374.

SAJID-UN-NISSA BIBI *v* HIDAYAT HUSAIN

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 889 OF 1922.

February 28, 1924.

Present :—Mr. Justice Mukerji.

Musammat SAJID-UN-NISSA BIBI—DEFENDANT—APPELLANT

versus

Sayed HIDAYAT HUSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easements Act (*V of* 1882) *ss.* 5, 13 (*f*)—*Continuous easement—Easement to flow rain water and bath room water—Interpretation of Statutes—Illustrations to sections.*

The right of flowing rain water through a masonry drain is a continuous easement within the meaning of section 5 of the Easements Act and therefore, falls under section 13 (*f*). But the right of flowing the bath room or latrine water through a masonry drain is a discontinuous easement within the meaning of section 5, and, therefore, does not fall under section 13 (*f*) of the Act. [p. 897, col. 1]

Where the meaning of a section of a Statute is doubtful a reference to an illustration of the section is justified. But if there is a conflict between the section and its illustration, the illustration must give way to the section. [p. 897, col 2.]

Appeal from the decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 6th March 1922.

FACTS appear from the following Orders of Remand :—

ORDER.—The respondents were the plaintiffs in the Court of first instance. They brought the suit out of which this appeal has arisen for the establishment of a certain right of easement of flowing rain water and water from a bathroom. The plaint did not specifically allege on what ground the suit was based but evidence was led to show that the parties who come from the same stock, separated 40 years age and a partition took place at that date. The suit was, therefore, really based on a right acquired by prescription. But the Court of first instance found that the partition took place within 10 or 12 years of the suit and no case could be based on right acquired by prescription. The plaintiffs then claimed to succeed on the ground that the easement was an apparent, continuous and necessary one for the enjoyment of the share as it was enjoyed at the time of partition. The Court of first instance thought that this point though raised at the time of the arguments, could be disposed of without any fresh evidence on the point and allowed the claim to succeed. But it directed the parties to pay their own costs on the ground that the basis of the claim had been changed. An appeal was taken by the present appellants to the lower Appellate Court and the first ground taken was that the plaintiffs should not have been allowed to change their case. The same point has been raised before this Court.

The learned Counsel for the respondents has argued that nowhere the record shows that the appellant asked for an opportunity to adduce fresh and additional evidence. But I think what I have already stated above, goes to show that the appellant never agreed that the case should be decided on the material on the record.

Looking to clause (*f*), section 13 of the Easements Act, I find that the point whether a right of easement exists or not, has to be decided on several points of fact to be clearly found.

I do not propose to dismiss the suit on the ground that the point urged was urged late in the Court of first instance. If the Court of first instance had framed a fresh issue at once and given the parties an opportunity to adduce fresh evidence, I think it would have done an act of justice. An award of costs would have compensated the other party. A second suit by the plaintiff would very likely be barred under the provisions of the Civil Procedure Code.

I, therefore, remand the following issue to the lower Appellate Court :—

> "Whether the plaintiffs are entitled to any right of easement to flow water under the provisions of clause (*f*), section 13 of the Easements Act ?"

The parties will be allowed to adduce fresh evidence. The finding and evidence will be submitted to this Court within two months 10 days will be allowed to file objections.

SAJID-UN-NISSA BIBI *v.* HIDAYAT HUSAIN

Dr. *K. N. Katju*. for the Appellant.
Mr. Iqbal Ahmad, for the Respondent.

JUDGMENT.—An issue was remanded by this Court in the following language under the provisions of O. XLI, r. 25, Civil Procedure Code :

" Whether the plaintiffs are entitled to any right of easement to flow water under the provisions of cl. (*f*), section 13 of the Easements Act ?"

The facts of the case are stated in my judgment ordering the remand and need not be recapitulated. The learned Subordinate Judge has answered the issue in the affirmative and exception has been taken to this finding.

It will be remembered that the case, as at first instituted, was based on acquisition of the right of easement by prescription. This case was changed, later on, and the right of easement was claimed under the provisions of section 13, cl. (*f*) of the Easements Act. So the definite question, which I have to answer before me is, " whether under the said provisions the plaintiffs are entitled to the easement ?" This easement involves the flow of water through a permanent drain. The water is of two kinds, namely, rain water and sullage water coming out of a latrine. The plan on the record will show that water from the courtyard of the plaintiffs and water from the latrine join and then flow into the drain which passes through the defendant No. 1's house. The drain through which the water flows is a masonry drain and is therefore an apparent one within the meaning of section 5 of the Easements Act. The drain is continuous easement in so far as the flow of rain water is concerned. For the flow of rain water no act of man is needed. But so far as the flow of water from the latrine goes, it requires the act of man and to that extent the easement to flow such water is not a continuous easement. It would, therefore, follow that the plaintiffs have no right to flow of latrine water on foot of the provisions of cl. (f), section 13 of the Easements Act.

The learned Subordinate Judge who heard the Appeal first and the learned Judge who decided the remanded issue, both quoted the case *Bishambhar Nath* v. *Jagan Nath Prasad* (1). In that case a part of the house had been sold and the question arose as to flow of water. The learned Judges of this Court held that the drain was necessary for the enjoyment of a house. Evidently they were dealing with cl. (*e*) of section 13 and not with cl. (*f*). There is no discussion on the point to be found in the judgment as reported and I cannot take the case as an authority on the question now before me.

Reference has been made to illustration (*h*), section 13. There it is stated that the owner of the transferred house is entitled to the benefit of all the gutters and drains common to the two houses. If we accept the wide language used in the illustration we really vary the rule of law enacted in the main section itself. *Only such easements are allowed under cl. (f) as are continuous.* If the easements be not continuous within the meaning of cl. (*f*). it is difficult to see how the benefit of all the gutters and drains mentioned in clause (*h*) of the illustration can be enjoyed in respect of matters which require an act of man for enjoyment. I am therefore of opinion that illustration (*h*) cannot be accepted to modify the law itself. If the meaning of the enactment itself were doubtful, a reference to the illustration in order to clear the meaning, would have been justified. But, if there be any conflict between the illustration and the main enactment, the illustration must give way to the latter.

I hold that the plaintiffs have established their right to easement for the flow of rain water alone and not to the flow of any latrine water from their house.

I need not repeat that the present case has not been fought on the ground that the easement was a necessary one and no evidence on that point was led by the parties. There is however a statement of opinion in the appellate judgment which would go to show that it is possible for the plaintiffs to open a drain to carry off the latrine water, though the process may involve some trouble and expense. But as I have said, this is a question which was not raised in any of the Courts below and has not been raised before me.

The result is that the appeal is partly allowed. The plaintiffs respondents' right to easement is hereby restricted only to the flow of rain water. Having regard to the partial success of the parties I order that they will bear their own costs throughout.

S. D. *Appeal allowed in part.*

(1) 29 Ind. Cas 635.

LAL GHOSH *v.* NILKANTHA DAS

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2223 OF 1921.

April 14, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice Mukerji.

Babu LAL GHOSH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NILKANTHA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Tenancy origin of, unknown—Ambiguity in terms—Nature of tenancy, how determined—Evidence, whether admissible—Conduct of parties, Effect of.

In a case where the origin of the tenancy is unknown or where the document creating the tenancy is equivocal or ambiguous in its terms, one has got to take into consideration the attendant circumstances, and evidence as to the mode of enjoyment of the tenancy is also admissible and may be considered in order to arrive at a proper conclusion. [p. 898, col. 2].

A tenancy created for a particular purpose may subsequently by conduct of parties be converted into a tenancy of a different character. [p. 898, col. 2].

Appeal against the decree of the Subordinate Judge, Bankura, dated the 27th July 1921, reversing the decree of the Munsif, 2nd Court, Bankura, dated the 28th February 1921.

Babu *Bejoy Coomar Bhattacharjee*, for the Appellants.

Babu *Panchanan Ghose*, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit in ejectment wherein the plaintiffs were unsuccessful in the Court of first instance in getting a decree of *khas* possession against the defendant, and only succeeded in getting a decree for rent for three years at a certain rate. This decree was set aside on appeal by the plaintiffs, the learned Subordinate Judge having allowed the plaintiff's claim in full and given them *khas* possession by eviction of the defendants. The defendants are the appellants in this Court.

The question which arises for consideration in the present appeal is what are the respective status of the plaintiffs and the defendants in this case, with regard to a question of this description, decided cases afford us very little assistance. There are certain principles which are applicable to such cases and they are well settled. In a case where the origin of the tenancy is unknown or where the document creating the tenancy is equivocal or ambiguous in its terms, one has got to take into consideration the attendant circumstances, and evidence as to the mode of enjoyment of the tenancy is also admissible and may be considered in order to arrive at a proper conclusion. Another principle is that a tenancy created for a particular purpose may subsequently by conduct of parties be converted into a tenancy of a different character. Now, in the present case, it is true that the tenancy of Nimai Babu, who was the predecessor of the present plaintiffs, was an occupancy holding: and it is also true that no presumption arises from the area of the holding so as to show that it was anything but an occupancy holding in its inception. Originally therefore, it was an occupancy holding and it retained that character until it was purchased by the original plaintiff Madhab Das in the name of his mother-in-law. Then Madhab Das obtained a settlement from the landlord by a confirmatory lease, dated the 28th *Katick* 1275 B. S. It is necessary to investigate if the tenancy underwent any change in its character when it came into the hands of Madhab Das. It will appear from the recitals in the aforesaid document that at the time when it was executed the lands were in the possession of the original plaintiff Madhab Das through tenants and the landlord settled the same with Madhab Das at a yearly rental of Rs. 16 fixed in perpetuity. The predecessor of some of the defendants was already on the land at the date of this *Potta*. In the *Potta* the occupation of Madhab Das was described as money-lending. It gave Madhab Das the right to hold the lands either by cultivating them himself or by others. Since then at any rate, the defendants or their predecessor have been in possession of the lands by acutal cultivation for a period of nearly 50 years, while Madhab Das never had the

lands in his *khas* possession and to continue to be in possession merely by receipt of rent. So far as the plaintiffs are concerned therefore they never treated, their interest in the tenancy as anything else than that of a tenure holder.

Then again as for the defendants, there is no document creating their tenancy. The origin of their tenancy, therefore, is unknown ; that their predecessor was in possession of the lands by actual cultivation was recognised by Madhav Das in the *potta* referred to above, and they have been, as I have said above, actually cultivating the lands for a period of nearly 50 years.

Under the circumstances it would be wrong, in my opinion, to hold that the plaintiffs ever treated the tenancy belonging to them as otherwise than that of a tenure-holder and the rights of the defendants otherwise than those of occupancy ryots. In my judgment, the defendants are occupancy ryots in this holding and, therefore, they are not liable to eviction. The decree passed by the learned Subordinate Judge should in my opinion, be set aside and that of the Court of first instance restored with costs in this Court and in the Court of appeal below.

When the above judgment was being delivered learned Vakil for the appellants drew my attention to the fact that defendants' predecessor was first inducted into the lands by Madhab Das. This is not inconsistent with anything that has been said above and does not, in my opinion, alter the aspect of the case.

Walmsley, J.—I agree.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 155 OF 1923.

June 30, 1924.

Present :—Mr. Justice Daniels.

RAM PRASAD SINGH—PLAINFIFF'
—APPELLANT
versus
JANKI PRASAD SINGH AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Sir *rights—Proprietary rights—Transfer of* Sir *rights—Joint undivided village—Each proprietor's right to have separate* Sir—*Agra Tenancy Act (II of 1901), Ss. 10, 34, 58—Ejectment—Sale of rights by 3 out of 4 joint* Sir-*holders—*Sir *rights of 4th co-sharer, whether affected—U. P. Land Revenue Act (III of 1901), ss. 4, (12), 36.*

Sir rights, though they can only be held by a proprietor, are something beyond and apart from the mere proprietary right. The right of *Sir*-holder is a right to exclusive possession coupled with the fact that no person cultivating under him can acquire occupancy rights. In a joint and undivided village each proprietor may have his own separate *Sir* although the proprietary rights in the whole village are joint. [p. 900, col. 1].

Sir rights cannot be acquired by purchase. Where the entire *Sir* has been sold and the purchaser has obtained actual cultivatory possession, the land is treated as his *khudkasht* and not as his *Sir*. [p. 900, col. 2].

Where there out of four brothers, the joint *Sir*-holders of a *Sir Khata*, sell their rights, they lose their *Sir* rights by the sale and obtain instead exproprietary rights in a proportionate share of the holding. The 4th brother, who has not sold his rights, does not lose his *Sir* rights in the remaining portion of that holding and if the purchaser from his brothers takes possession of that portion, he is liable to be ejected from that plot. [p. 900. col. 2]

Appeal against the decree of the District Judge, Azamgarh, dated the 25th October, 1922.

Mr. *Mukhtar Ahmad*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—Though the value of this appeal is only Rs. 3, it involves a question of principle of some importance. The suit was one for ejectment in the Revenue Court under section 58 read with section 34 of the Agra Tenancy Act. Section 34 was not specifically pleaded, but the suit was clearly brought in

reliance on that section as no specific contract of tenancy between the parties was either alleged in the plaint or proved. The real question in dispute is whether the land is or is not the plaintiff's *sir*. If it is his *sir*, he is entitled to treat the defendant as his tenant and to eject him under section 34, the defendant having occupied the land without the plaintiff's consent. The plaintiff's father Lohari Singh was one of four brothers who were proprietors and joint *sir* holders of a *sir khata*. The three brothers other than Lohari Singh sold their rights to the defendant. The three brothers there by obtained exproprietary rights in a proportionate portion of the holding under section 10 of the Tenancy Act, and proceedings were duly taken under section 36 of the Land Revenue Act to demarcate the area in which these rights arose. The remaining portion of the holding continued to be *sir* under the definition contained in section 4 (12) of the U. P. Land Revenue Act. Under the first proviso to the section so much of the holding as became the subject of exproprietary tenancy ceased to be *sir*, but the portion of the holding in which no such rights arose clearly continued to be *sir* under the definition. The plot in dispute, No. 876, was a portion of the area which continued to be *sir*. The question is whether it became a joint *sir* of the purchaser and of the plaintiff's father, or whether the *sir* rights vested exclusively in the plaintiff's father whose share was not sold. So far as the proprietary right is concerned, the purchaser became jointly entitled to it, as the holding was undivided. This is not disputed. But *sir* rights, though they can only be held by a proprietor, are something beyond and apart from the mere proprietary right. The right of a *sir*-holder is a right to exclusive possession coupled with the fact that no person cultivating under him can acquire occupancy rights. In a joint undivided village each proprietor may have his own separate sir although the proprietary rights in the whole village are joint.

The plot in suit has been recorded from the time of sale as the *sir* of the plaintiff's father and after him of the plaintiff. On this ground the Assistant Collector who tried the case held that the land continued to be the plaintiff's sir and that the defendant, who obtained possession of it without the plaintiff's consent, was liable to ejectment. The officiating District Judge, on the other hand, held that as the defendant is a co-sharer in a proprietary right, the land must be treated as his *khudkasht*, and the suit for ejectment must fail. It appears to me that the learned District Judge has not sufficiently considered the question whether the land retained the character of *sir*. It has generally been held (there are numerous decisions of the Board of Revenue to this effect) that *sir* rights cannot be transferred by purchase. Where the entire *sir* has been sold and the purchaser obtained actual cultivatory possession, the land is treated as his *khudkasht* and not as his *sir*. In the present case the defendant in his written statement does not claim to be a *sir*-holder. His claim in para. 4 of the statement is that the land is his *khudkasht*.

It appears to me, therefore, that the decree of the Assistant Collector was correct and should be restored. Lohari Singh's brothers lost their *sir* rights by the sale to the defendant and obtained instead an exproprietary right in a proportionate share of the holding. Lohari Singh never sold his interest and, therefore, never lost his *sir* rights in that portion of the holding which was not separated off by proceedings under section 36 of the Land Revenue Act. He is, therefore, entitled to treat the defendant as his tenant under section 34 and to get a decree for his ejectment. I, accordingly, set aside the decree of the Court below and restore that of the Assistant Collector with costs in this Court and in the Court below.

S. D. *Appeal allowed.*

ABDUL HADI *v.* KABULTUNNISSA

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER
No. 226 OF 1923.

June 17, 1924.

Present:—Mr. Justice Das, and
Mr. Justice Ross.

Shaikh ABDUL HADI—PETITIONER—APPELLANT
versus
Musammat KABULTUNNISSA—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (V. of 1908), ss. 17, 38, 39—Mortgage comprising properties in two Districts—Execution of mortgage decree—Jurisdiction of Court in one District to sell property situated in other District—Mortgage decree, nature of—Specific performance.

Where mortgaged properties are situated in two Districts, and the mortgage decree is executed in the Court of one District, that Court has jurisdiction to sell the property which is situated in the other District. [p. 901, col. 2].

No Court can execute a decree in which the subject matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. But in cases ofdecrees for sale of mortgaged properties an exception has been recognized. [p 901, col. 2].

Obiter:—A mortgage decree "is practically a decree for specific performance of the contract between the mortgagor and mortgagee" and where that is so "the authority given by section 17 of the Code of Civil Procedure must include the authority to make an order of this kind, that the property shall be sold, and to direct the mode in which the sale shall take place." [p. 901, col. 2].

Appeal from an order of the Subordinate Judge of 1st Court, Gaya, dated the 27th August 1923.

Mr. *Abani Bhusan Mukharji*, for the Appellant.

Mr. *Kailashpati*, for the Respondent.

JUDGMENT.

DAS, J.—It has been contended before us that the Subordinate Judge of Gaya had no jurisdiction to sell the property which was in Patna. It must be remembered that the decree which was being executed in the Gaya Court was a mortgage decree and that the mortgage comprised properties situated both in Gaya and Patna. In these circumstances the question arises whether the Subordinate Judge of Gaya had jurisdiction to sell the property in Patna. No doubt the provisions of section 38 of the Code read with those of section 39 indicate the acceptance of the view by the legislature that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. But as was pointed out by Mookerjee J. in *Begg Dunlop & Co.* v. *Jagannath Marwari* (1). "In cases of decrees for sale of mortgaged properties an exception has been recognized."—See *Meseyk* v. *Steel & Co.* (2), *Kartick Nath Pandey* v. *Telukdhari Lall* (3), *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (4), *Tincouri Debya* v. *Shib Chandra Pal Chowdhury* (5), *Lakman Pundeh* v. *Maddan Mohun Shey* (6) and *Jahar* v. *Kamini Deb* (7). Sir W. Comer Petheram in the case in *Meseyk* v. *Steet & Co.*, (2) clearly indicated the principle upon which the Court acts in cases of this nature. He pointed out that a mortgage-decree "is practically a decree for specific performance of the contract between the mortgagor and mortgagee" and where that is so" the authority given by section 19 of the Code of Civil Procedure must include the authority to make an order of this kind, that the property shall be sold, and to direct the made in which the sale shall take place." In my opinion, the authorities are conclusive on this point. It makes no difference that the property at Gaya had been sold at a previous execution case. The original authority remains and the Gaya Court could execute that authority by directing the sale of the Patna property. It is also contended that the Gaya Court could not direct its peon to serve the sale processes in Patna. I can find no merit whatever in this argument.

The result is that the order passed by the learned Subordinate Judge must be affirmed and this appeal must be dismissed with costs.

ROSS, J.—I agree.

S. D. *Appeal dismissed.*

(1) 11 Ind. Cas. 417 ; 14 C. L. J. 223 ; 39 C. 104 ; 16 C. W. N. 402.
(2) 14 C. 661 ; 7 Ind. Dec (N. S.) 439.
(3) 15 C. 667 ; 7 Ind. Dec. (N. S) 1028.
(4) 19 C. 13 ; 9 Ind. Dec. (N.S.) 455.
(5) 21 C. 639 ; 10 Ind. Dec. (N.S.) 1057.
(6) 6 C 513 ; 7 C. L. R. 521 ; 5 Ind. Jur. 414 ; 3 Ind. Dec (N S.) 383.
(7) 28 C. 238 ; 5 C. W. N 150.

BENI MADHO TEWARI *v.* RAM SUNDER TEWARI

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL
No. 1382 OF 1922.

May 23, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

BENI MADHO TEWARI AND OTHERS—
DEFENDANTS—APPELLANTS
versus
RAM SUNDER TEWARI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Custom—Pre-emption— Wajib-Ul-Arz *entry—Internal evidence against custom, effect of—Custom of pre-emption recorded in* Wajib-ul-arz—*Presumption—Rebuttal.*

There can be no pre-emption where the pre-emption clause in the *Wajib-ul-arz*, furnishes internal evidence negativing the custom of pre-emption. [p. 902, col. 2]

The ordinary presumption raised by an entry in a *Wajib-ul-arz* regarding the custom of pre-emption is not rebutted by the fact that hundred years ago the village was owned by a single proprietor and that even to-day it is only the descendants of that proprietor who are co-sharers in the village. [p. 902, col, 2].

APPEAL from the decree of the Subordinate Judge, Jaunpur, confirming a decree of the Munsif, Kerakat.

Messrs. *Haribans Sahai* and *Kailas Nath Katju*, for the Appellants.

Mr. *Peary Lal Banerji*, for the Respondents.

JUDGMENT.—This is a defendants' appeal arising out of a suit for pre-emption. The claim related to shares in four villages. With the fourth village we are not now concerned in appeal. Both the Courts below have decreed the claim in respect of the whole share sold in Hasanpur and half of the shares sold in Pauni and Walipur. They have, however, found that the consideration of Rs. 7,000, mentioned in the sale-deed, was not the true consideration and have fixed it at Rs 3,000.

As regards the village Walipur, we are of opinion that the claim cannot be decreed. The plaintiffs, in order to prove that a custom of pre-emption exists in the village, relied upon a *wajib-ul-arz* of the year 1881 which contains a pre-emption clause similar to the clause in the *wajib-ul-arz* which was before the Full Bench, in the case of *Randhir Singh* v. *Rajpal Missir* (1), (F. A. F. O. No. 85 of 1923, decided on the 18th of December, 1923). It was held therein that such a clause furnished an internal evidence negativing the existence of a custom. We must, therefore, hold that no custom of pre-emption has been proved to exist in Walipur. The claim as regards the share sold in Walipur must be dismissed.

As to Hasanpur and Pauni, the first point raised on behalf of the defendants-appellants is that the *dakbandi* shows that in the year 1201 Fasli, corresponding to 1796 A. D., the villages were owned by a single proprietor named Subsa *Tewari*. It has also been proved by the defendants' witnesses that at the present moment it is only the descendants of Subsa Tewari who are co-sharers in these villages. The plaintiffs relied on the *wajib-ul-arz* of 1881, which is still the *wajib-ul-arz* of the current settlement, the district of Jaunpur being permanently settled, and which *wajib-ul-arz* contains a clear entry of a record of custom. We are of opinion that the presumption raised by the entry in the said *wajib ul-arz* has not been rebutted by the circumstance that more than 100 years ago the villages were owned by a single proprietor. The Court below has pointed out that the two sales which are known to have taken place, are such that the first one had taken place in favour of a co-sharer and as to the second one, though it had taken place in favour of a stranger, ultimately a part of the property was returned to the vendors. It was of opinion that these two instances furnished proof that the custom was at least being observed in the villages. Whether this is so or not, we are of opinion that the ordinary presumption which arises from the entry in the *wajib-ul-arz* has not been rebutted.

As regards the village Hasanpur, there can be no doubt that there is a clear preference given to co-sharers in the same *patti* as against the co-sharers in the other *patti*. Defendants Nos. 4 to 7 are co-sharers in the village but they are not co-sharers in the same *patti* in which the vendors and the plaintiffs own shares. Defendants Nos. 1 to 3

(1) 81 Ind. Cas. 25; 22 A. L. J R. 561; 46 A. 478; (1924) A. I. R. (A.) 321.

are perfect strangers. The plaintiffs have, therefore, a preference as against all the vendees.

In the village Pauni the *wajib-ul-arz* gives the right of pre-emption to two categories of pre-emptors. The first is an *ekjaddi* co-sharer and the other is a co-sharer in the village. The Courts below have found that the plaintiffs cannot bring themselves within the first category of the *ekjaddi* co-sharers. They are therefore, mere co-sharers in the village. Defendants Nos. 4 to 7 also are co-sharers in the same village while defendants Nos 1 to 3 are not co-sharers at all. The plaintiffs' claim as against defendants Nos. 1 to 3 must, therefore, be decreed but should be dismissed as against defendants Nos. 4 to 7. We find it, however, that there is a clear specification in the sale-deed that each set of vendees has taken only one-half of the share sold. The plaintiffs' claim, therefore, with regard to Pauni must be decreed for half of the property sold as against defendants Nos 1 to 3. It is necessary to clear the point as the decree which has been passed by the Court below is not very clear.

There was a dispute as to the price in the Courts below. The bulk of the sale consideration recited in the sale-deed was shown before the Sub-Registrar, but the Courts below were not satisfied that it represented the true consideration and were of opinion that the consideration had been immensely inflated. They then proceeded to work out the true value of the property sold. The Court of first instance thought that inasmuch as 11 *bighas*, 8 5|13 *biswas* of *sir* land had been sold, the price at the rate of Rs. 250 per *bigha* came to Rs. 2,955. It then added to this sum Rs. 45 as representing the value of the *sir* income. The total, in its opinion, came to Rs. 3,000. The lower Appellate Court has accepted that figure and said that this seems to be correct, if the area of *sir* land sold is taken to be about 12 *bighas* and the rental Rs. 8 per *bigha*. As we are now dismissing the claim with regard to a part of the property, it is apparent that the value of the portion decreed will have to be calculated afresh. We are not satisfied that the way in which the Courts below have arrived at the figure of Rs. 3,000 is necessarily correct. They appear to have ignored the areas of uncultivated land, about which only Rs. 45 had been allowed. We are not in a position to ascertain and apportion the sale consideration or the market value of that portion of the property, in regard to which the claim of the plaintiffs is to be decreed. It is, therefore, necessary that the market value of the shares in respect of Hasanpur and Pauni with regard to which the claim of the plaintiffs is being decreed, should be ascertained with due regard to the profits derivable from the same. We direct the lower Appellate Court accordingly to determine after taking such additional evidence as the parties may adduce—

(1) What is the market value of the share sold in Hasanpur? and (2) What is the market value of half the share sold in Pauni?

Two months' time will be allowed for return of the findings and ten days will be allowed from the date of receipt of the findings to file objections.

S. D. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2273 OF 1921.

February 14, 1924.

Present :—Mr Justice Suhrawardy, and Mr Justice Chotzner.

Moulvi AHIDANNABI—APPELLANT

versus

NAGENDRA LAL GANGOPADHAYA AND OTHERS—RESPONDENTS.

Second Appeal—Finding not based on legal evidence—High Court whether can interfere.

The High Court can, in second appeal, revise a finding recorded by the lower Appellate Court which is not based on legal evidence. [p. 904, col. 2].

Where, therefore, a plaintiff rests his case upon establishment of title, the mere fact that the adjoining plot happens to be a courtyard or outer compound of a house and belongs to a certain person does not show that the plot on which the house stands must also belong to that person and a finding to that effect can be set aside in appeal. [p. 904, col. 2].

AHIDANNABI *v.* NAGENDRA LAL

Appeal against the decree of the Subordinate Judge, 2nd Court, Faridpur, dated the 13th July 1921, modifying the decree of the Munsif, Faridpur, dated the 27th April 1920.

Babu *Jahnabi Charan Das Gupta*, for the Appellant.

Babu *Gunada Charan Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for recovery of possession of three plots of land on declaration of their title thereto-the plots being $\frac{169}{1551}$, 169 and 136. With regard to the first plot, the Court of first instance held that they had right to that land but that right was extinguished by limitation On appeal the learned Subordinate Judge has found that the plaintiffs were able to prove their possession within 12 years of the suit and has given the plaintiffs a decree in respect of that plot. The present appeal in respect of that plot has not been pressed and we do not think that on the findings come to by the lower Appellate Court we are entitled to interfere with that portion of the judgment.

As regards plot No. 169 the learned Munsif found that it did not belong to the plaintiffs' jote and dismissed the plaintiffs' suit. On appeal, the learned Subordinate Judge has given the plaintiffs a decree and hence the appeal by the defendants. The finding of the first Court was based upon several items of evidence one of which was the admission by the father of plaintiffs Nos. 1 and 2, who was a witness on their behalf. His evidence is that Saritulla, the admitted tenant of the land, held his homestead and *palan* under both Surjamani and Ratanmoni. The plaintiffs claim their title through Surjamani and the defendants through Ratanmani. This evidence shows that plots 169 and 169/1551 which taken together formed a complete tract in the possession of Saritulla and it has been found that plot 169/1551 belonged to Surjamani and therefore, to the plaintiffs. The learned Munsif found that the other plot 169 must belong to Ratanmani's share. In this conclusion he is supported by the record of rights in which this plot is recorded as in the possession of defendant No. 1. The learned Subordinate Judge has dealt with the evidence relating to plot 169/1551 and has found that it belongs to the plaintiffs and that they were in possession of the same through their tenant Saritulla up to 1907. This plot he finds to be *palan* and plot No. 169 is a house attached to it. He, therefore, draws the conclusion that plot 169 must also belong to the same person to whom the former plot belonged. This opinion is also based upon the admission by the defendants that both the plots form really one bigger plot. The learned Subordinate Judge however, has not found the source of the plaintiffs' title and has not referred to any documentary evidence in support of this. He has not taken into consideration the admission made by the plaintiffs' witnesses on which the learned Munsif relied, nor has he expressly stated anywhere that there is sufficient evidence on the record in respect of plot 169 which successfully rebuts the presumption in favour of the correctness of the Record of Rights We do not think that the learned Judge was right in the way in which he has treated this portion of the case. It is urged by the respondents that as the conclusion which the learned Judge has drawn from the fact that when the adjoining plot is *palan* and belongs to the plaintiffs, this plot must also belong to the plaintiffs, is an inference of fact and we ought not to interfere with it in second appeal. We do not think that we are unable to revise a finding recorded by the Court of appeal below which is not based upon any legal evidence. The conclusion of fact must be drawn from certain other facts from which it may legitimately be drawn. In our opinion, from the mere fact that the adjoining plot happens to be a courtyard or outer compound of a house and belongs to a certain person, it ought not to be concluded in a case where the plaintiffs' suit rests upon establishment oftitle, that the plot on which the house stands must also belong to that person. We hold that the finding arrived at by the learned Subordinate Judge upon this point is not satisfactory as not based on legal evidence, and should therefore be set aside. In this connection the question of limitation may be considered. It appears that Saritulla was a tenant holding both these plots and he was treated as a tenant by both the parties. The plaintiffs claim him as their tenant whereas the defendants obtained a decree against him in the Civil Court and brought the *jote* to sale in execution.

It is, therefore, possible that this man was a tenant of both parties in respect of two different plots ; but we express no opinion upon the evidence. We only wish to point out that it may have a bearing upon the consideration of the question of title as well as on the question of limitation. With regard to limitation the finding on the learned Judge is that though the defendants brought the holding of Saritulla to sale in 1906, there is no evidence as to when they took possession of it through Court. But there is evidence that they settled the land of Saritulla with other persons in October 1907. The present suit was brought in April 1919 and the learned Judge holds that the suit is not time-barred on the ground that Saritulla continued to be the tenant of the plaintiffs down to 1907, when the land was settled with other persons. This piece of evidence that Saritulla had possession of this plot in 1907 as a tenant under the plaintiffs and the question of limitation are so mixed up that it would not be possible to consider one of them disassociated from the other. We are therefore of opinion that the learned Subordinate Judge should consider the question of the title and limitation together in respect of plot No. 169. This disposes of the appeal.

There is a cross-objection filed by the plaintiffs in respect of plot No. 136. Their grievance is that the learned Subordinate Judge has not considered the evidence relating to that plot fully. With reference to this plot, the finding of the Subordinate Judge is in these terms : "Then first I deal with plot No. 136. The plaintiffs fired blank shots only. There is not a title of documentary evidence in plaintiff's favour. Then from documents before this Court plaintiffs sadly and signally failed to prove their shadow of title and interest or that this land falls within their *jama* and this land necessarily should go to defendants." The plaintiffs have drawn our attention to five documents on record, the earliest being of 1877, which, they allege, show their title to and possession of, this property. This plot is not mentioned in these documents as the cadastral survey was made after them ; but it can be ascertained from the description and evidence if this plot was included in those documents. The learned Munsif has not considered the recitals in those documents on the ground that they were contradicted by the evidence of the plaintiff's father. The learned Subordinate Judge, however, does not appear from what he has stated in respect of that plot to have considered these pieces of evidence. It is just possible that on a consideration of those documents he may be of opinion that this plot is not covered by those documents. But it is desirable that he should say something more than what he has already said, *viz.*, "that there is not a title of documentary evidence." After expressing himself thus the learned Judge again refers to the same documents and says "then from documents before this Court plaintiffs sadly and signally failed to prove their title." We think that this part of the case has not been properly dealt with by him.

The result, therefore, is that this appeal is allowed, the decree of the lower Appellate Court in so far as it relates to plots Nos. 169 and 136 is set aside and the case remitted to that Court for a re-hearing of the appeal in respect of plots Nos. 169 and 136 in accordance with the observation contained in this judgment. Each party should bear its own costs of this appeal. In other respects the decree of the Court below will stand.

K. S. D. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 332 OF 1922.

July 25, 1924.

Present :—Rao Bahadur Kinkhede, A. J. C.

KHAIRULLA AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

SETH DHANRUPMAL—JUDGMENT-DEBTOR—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 48, O. XXI, rr. 60, 63—Effect of orders—Suit—*Lis pendens*—Execution—Attachment—Release—Fraud—Absence from jurisdiction of execution Court—Limitation, fresh start of—*Res judicata *in execution proceedings.*

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The effect of the judgment in a suit brought in accordance with O XXI, r. 63 Civil Procedure Code, is to supersede the order passed upon a claim made under r. 58 and to render it inconclusive. [p. 908, col. 2.]

Kisorimohun Roy v. *Hassukh Das*, 17 C. 486; 17 I A. 17 ; 13 Ind. Jur. 452 : 5 Sar. P. C. J. 472 ; 8 Ind. Dec. (N.S.) 830 (P.C.), referred to.

A suit under O. XXI, r. 63, Civil Procedure Code is a continuation of claim proceedings. It is a suit to set aside the order passed upon the claim and is merely a form of appeal in the guise of an original suit. [p. 909, col. 1.]

Veera Pannadi v. *KaruppaPannadi*, 2 Ind. Cas. 980; 6 M. L. T. 154 ; *Phul Kumari* v. *Ghan Thyam Misra*; 35 C. 202 at p. 207; 7 C. L. J. 36 ; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618 ; 2 M. L. T. 506 ; 14 Bur. L. R. 41 ; 35 I. A. 22 (P. C.); *Jamahar Kumari Bibi* v. *Askaram Boid*, 30 Ind. Cas. 855 ; 22 C. L. J. 27; *Krishnappa Chetty* v. *Abdul Khader Saheb*, 25 Ind. Cas. 11 ; 26 M. L. J. 449 ; 38 M. 535, referred to.

A private transfer of the attached property, after the date of its release, at the instance of a claimant or objector, is bad on the ground of *lis pendens*, and does not affect the right of the party in whose favour the suit may be decided. [p. 909, col. 1.]

Krishnappa Chetty v. *Abdul Khader Saheb*, 25 Ind. Cas. 11; 26 M. L. J. 449 ; 38 M. 535, relied upon.

An order of release under O. XXI, r. 60, Civil Procedure Code, is not final but provisional, and although it operates to prevent the attaching creditor from proceeding to sell the attached property, it does not operate so as at once to remove the attachment and leave the judgment-debtors free to deal with the property as they like. If they do deal with it, they and those with whom they deal, do so subject to the result of the suit as to the attachment being maintained. [p. 909, col. 1.]

Bonomali Rai v. *Prosunno Narain Chowdhry*, 28 C. 829 at pp. 833, 834 ; 12 Ind. Dec. (N.S.) 551, relied upon.

Ordinarily, for a decree-holder to execute his decree for money two things are at least essential. Either the person or the property of the judgment-debtor must be made available against which the execution could issue; if his property be not available, at least the arrest of his person must be possible. [p. 912, col. 1.]

Conduct is the best proof of intention. [p. 912, col. 1.]

Under section 48, Civil Procedure Code, the word "fraud", is used in a much wider sense than that in which it is generally used in English Law. Locking up the house so as to prevent attachment of moveable property ; or evading arrest by any contrivance ; or dishonestly evading payment by eluding service of warrant, is a fraud within the meaning of the section. Similarly, a fictitious transfer of property made by a judgment-debtor to defeat or delay the execution of a decree, that may be passed against him, amounts to fraud within the meaning of the section. [p. 913, col 1.]

Bhagu Jetha v. *Malek Bawasaheb*, 9 B. 318; 5 Ind. Dec. (N. S.) 211 ; *Visalatchi Ammal* v. *Sivasankara Taker*, 4 M. 202 ; 1 Ind. Dec. (N.S.) 1039, referred to.

Fraud on the part of a judgment-debtor at any stage of the execution gives a new starting point for the period of limitation. Therefore, a judgment-debtor's continued absence from the jurisdiction of the executing Court is a continuing fraud, and keeps the right of the decree-holder to apply for execution alive, from day to day during his period of absence from the jurisdiction of the Court. [p. 913, col. 1 & 2.]

If an Executing Court holds rightly or wrongly that a decree is executable, even after the twelve years have elasped, and orders execution to issue and the judgment debtor does not challenge the order by way of appeal, review or revision, the order is binding on him and on principles analogous to those of *res judicata* strictly so-called, he is precluded from challenging the order at a subsequent stage of execution proceedings.

Palancheri Govinda Menon v. *Pookote Kunti Krishna Mummadiar*, 72 Ind Cas. 397 ; 45 M. L. J. 71 ; 17 L. W. 566; (1923) M. W. N. 299 ; (1923) (M) 649; *Jagannath* v. *Behari Lal*, 72 Ind. Cas. 473 ; (1923) A. I. R. (N) 236, referred to. [p. 913, col. 1 & 2.]

Appeal against the decision of the District Judge, Jubbulpore, in Miscellaneous Appeal No. 7 of 1921, dated the 22nd April 1922.

Mr. *M. Y. Sharif*, for the Appellants.

R. B. N. G. Bose, for the Respondent.

JUDGMENT.—This appeal arises out of an order rejecting the decree-holders' application for rateable distribution upon an objection of the judgment-debtor that it is barred by limitation on the ground that the decree dated 25th January, 1899 was not executable owing to the bar of section 48, Civil Procedure Code.

On the 26th September 1898 one Dhanrupmal executed a usufructuary mortgage of his entire estate in favour of his relative one Chandmal. He was indebted to other several creditors and while his affairs were in a critical condition the aforesaid mortgage was brought into existence. This led to the institution of several suits against him by his creditors. The Civil Suit No. 133 of 1898 out of the execution proceedings in which the present appeal has arisen was one of such suits. The plaintiff, Mirza Amir Beg, got a decree in it on 25th January 1899. The very first application for execution was made on 30th January 1899. It was followed by another one dated 28th August 1900 but nothing could be recovered. It appears

that after the negotiations between the creditors and Dhanrupmal's agent at Jubbulpore at some of which Chandmal's representative was also present for the purpose of discussing the terms of the proposed composition had failed owing to Dhanrupmal's insistence that the creditors should make a payment of Rs. 15,000 to enable him to get the mortgage revoked, Chandmal put in a claim in each action under section 278 of the old Civil Procedure Code for exemption of Dhanrupmal's property from attachment on the ground that the same was in his own possession as a usufructuary mortgagee. The claims were summarily rejected on the 10th of May 1901. Chandmal, therefore, instituted suits against the attaching creditors for setting aside the summary decision in the objection cases. Suit No. 34 of 1902 was the suit filed against the decree-holder in Suit No. 133 of 1898 referred to above. That suit was decreed by the District Judge on 31st October 1905 holding that the mortgage was a *bona fide* transaction. Chandmal had joined Dhanrupmal and his sons as parties to the suit apparently with the idea of having an adjudication as between all persons interested in the result of the litigation. Against this judgment Mirza Amir Beg, the predecessor-in-title of the present appellants before me, filed on 15th January 1906 Civil Appeal No. 2 of 1906 in the Court of Divisional Judge, Jubbulpor and pressed for the reversal of the decree on the ground amongst others that the mortgage was a fraud practised by Dhanrupmal in collusion with Chandmal on the whole body of creditors and that it was not a *bona fide* transaction. Dhanrupmal and his sons were made parties co-respondents to this appeal.

Amongst the other suits against the other creditors was the one against Munshi Jankiprasad which gave rise to First Appeal No. 11 of 1906. That appeal and other First Appeals, Nos. 5, 6, 7 and 8 of 1906 were consolidated together and decided by the Additional Judicial Commissioner on 16th March 1907. It was held therein that the mortgage was fraudulent and not a *bona fide* transaction. The appeals were, therefore, allowed and the mortgagee's suit and other claims were dismissed. The decision of the Additional Judicial Commissioner was ultimately confirmed by their Lordships of the Privy Council in their judgment dated 23rd January 1919, which is reported as *Ghunsham Das* v. *Uma Pershad* (1).

After the First Appeals, Nos. 5, 6, 7, 8 and 11 of 1906 were instituted by the creditors in the Court of the Judicial Commissioner, the Divisional Judge on 21st March 1906 passed an order dated 21st March 1906 submitting the record of Civil Appeal No. 2 of 1906 along with four other regular and Miscellaneous appeals filed in his Court for such orders of the Judicial Commissioner in regard to their transfer as he may see fit to pass. No orders for transfer were, however, passed and the records were returned with the following suggestion : " It will be open to the Divisional Judge to keep the appeals pending and to await the decision of the connected appeals by this Court". (Vide Registrar's Letter No. 3670, dated 23rd April 1906). On receipt of this letter the Divisional Judge kept the appeals before him pending to await the decision of the cases in his Court. Consequently Civil Appeal No. 2 of 1906 remained pending from 8th May 1906 to 4th April 1907 to await the decision of this Court. As stated above First Appeal No. 11 of 1906 was decided on 16th March 1907. The appeal before the Divisional Judge was, therefore, heard and decided on 13th April 1907 as between Mirza Amir Beg as the appellant and Chandmal as the sole respondent, the other respondent Dhanrupmal and his sons having been given up by the appellant. The Divisional Judge thinking that the judgment of the Additional Judicial Commissioner in the connected cases decided on the same evidence in one " judgment must obviously govern " this appeal found that " the mortgage of Chandmal must stand postponed to the claims of, the plaintiff, and the decree holders, in the connected cases, and setting aside the two decrees and the three orders of the lower Court dismissed Chandmal's two suits and three objections which gave rise to the two regular civil appeals and three Miscellaneous civil appeals made to his Court. How far this procedure was correct is not for me to consider at this stage. But the matter had come up before this Court in connected Second Appeals Nos. 275 to 279 of 1907 and was disposed of by a judgment dated

(1) 50 Ind. Cas. 264 ; 15 M. L. R. 68 ; 17 A. L. J. 410 ; 36 M. L. J. 483 ; 21 Bom L. R. 472 ; 23 C. W. N. 817 ; (1919) M. W. N. 513 ; 10 L. W. 511 (P.C.)

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28th November 1907 in Second Appeal No. 275 of 1907. The particular second appeal, which was preferred against the decision in Civil Appeal No. 2 of 1906 and with which we are concerned, is Second Appeal No. 276 of 1907. Stanyon, A.J.C., who had disposed of the first Appeal No. 11 of 1906 heard these second appeals also. He writes regarding his own judgment in F.A. No. 11 of 1906 as follows:—

> "My judgment is in terms expressly confined to such cases as were before me and could not be and was not a judgment in any case whereof I was not seised."

It could not, therefore, be the basis of the Divisional Judge's judgment. The parties (the attaching creditor and the mortgagee) therefore, realised the difficulties of a remand and thought fit to come to a compromise. A decree in terms of the compromise dated 22nd November 1907 was accordingly ordered to be drawn in the second appeal. One of the terms of the compromise was that the first Court's decree dated 31st March 1905 was to be deemed as reversed or confirmed or varied and the first appellate Court's decree dated 13th April 1907 confirmed or reversed or varied according as Chandmal's appeal will be dismissed or allowed by the Judicial Committee of the Privy Council and also that neither party shall be entitled to apply for the execution of this decree or of the decree of the Divisional Judge and District Judge in this and other cases, pending the receipt in this Court of the decision of their Lordships of the Privy Council in the case of Jankiprasad in First Appeal No. 11 of 1906.

Their Lordships of the Privy Council decided the case of Jankiprasad on 23rd January 1919 as already stated above. It is not, however, clear when the above decision was received in this Court. The reversal of the first Court's decree in this case, which the Divisional 'Judge had ordered was thus expressly declared to be only provisional and subject to confirmation by the Judical Committee of the Privy Council in Jankiprasad's case, and it is thus clear that the decree of the Divisional Judge was not to be executable until it became confirmed on 23rd January 1919 by the terms of the decision of the Privy Council in the connected case, the power to execute being suspended till then. This means that the success of the attaching creditor was really no success until the mortgagee's appeal to the Privy Council was unsuccessful. O. XXI, r. 60 and 61, Civil Procedure Code provide that according as the Court is satisfied that the property was, or was not, at the time it was attached, in the possession of the judgment-debtor as his own property, on account of, or not on account of, any other person, or, was, or was not, in possession'of, some other person in trust for him, the Court shall allow or disallow the claim. The order allowing or rejecting the claim contemplated by these provisions is a summary order. Such a summary order disallowing the claim was passed in this case on 10th May 1901 and it was conclusive subject to the result of a suit under O. XXI, r. 63, Civil Procedure Code. Their Lordships of the Privy Council have laid down in *Kissorimohun Roy* v. *Harsukh Das* (2), that the effect of the judgment in the suit brought in accordance with this rule is to supersede the order passed upon a claim made under r. 58 and to render it inconclusive. The mortgagee succeeded in obtaining such a judgment in Suit No. 34 of 1902 on 31st October 1905 and the order dated 10th May 1901 was rendered inconclusive, so that the claims of the attaching decree-holders to obtain satisfaction of their decrees out of the property attached were superseded by the claim of the mortgagee Chandmal, and the property was, therefore, not saleable in execution of the decree dated 25th January 1899. In appeal, that judgment was reversed and the order passed in the objection case rejecting the claim was restored, with the result that the said decree dated 25th January 1899 could be executed against it. The decision in second appeal, however, was that the decree of the Divisional Judge's Court upholding the attaching decree-holder's right to execute the decree dated 25th January 1899 was not to be operative until the receipt of the Privy Council decision. It would thus be clear that the decision in the suit contemplated by O. XXI, r. 63, Civil Procedure Code, which renders the summary order on the claim petition inconclusive, was inoperative and was not to take effect until 23rd January 1919. In short, the decree dated 25th January 1899 remained

(2) 17 C. 436; 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec, (N.S.) 830 (P.C.).

incapable of execution against the property covered by the mortgage in spite of the apparent success attained on 13th April 1907 by the attaching creditor in his appeal to the Divisional Judge's Court, until 23rd January 1919, as the right of the decree-holders to show the decree of the Divisional Judge to the executing Court and to move it to revive the attachment of the property and proceed with the execution of the decree was treated as non-existent until 23rd January 1919.

This position will be clear if one knows what the object and scope of a suit under O. XXI, r. 63, Civil Procedure Code, is. In *Veera Pannadi* v. *Karuppa Pannadi* (3), it has been held that a suit under this rule is one to set aside the order passed upon the claim and is "*a form of appeal therefrom.*" It has similarly been held that a plaint in such a suit is "*a* plaint for review of a summary decision" see *Phul Kumari* v *Ghan Thyam Misra* (4), *Jamahar Kumari Bibi* v. *Askaran Boid* (5).

In *Krishnappa Chetty* v. *Abdul Khader Saheb* (6), it was held that a suit under this rule is "*a continuation of claim proceeding.*" It is merely "*a form of appeal in the guise of an original suit.*" In this Madras case it was held further that a private transfer of the attched property after the date of its release at the instance of a claimant or objector, was bad on the ground of *lis pendens* and would not affect the right of the party who may be successful in the suit.

In *Bonomali Rai* v. *Prosunno Narain Chowdhry* (7), it was laid down that 'the order for release at the instance of a claimant, is not final but *provisional*, as this rule declares it to be subject to the result of any suit which the attaching creditor may bring "to establish the right which he claims to the property in dispute." And although an order under rule 60 operates to prevent the attaching creditor from proceeding to sell the attached property, it does not operate so as at once to remove the attachment and leave the judgment-debtor free to deal with the property as they like. If they do deal with it, they and those with whom they deal, do so subject to the result of the suit as to the attachment being maintained." The same reasoning will hold good even where the order is passed under O. XXI, r. 61, Civil Procedure Code.

In this view of the case the decree made in Suit No. 34|1902 by the District Judge on 31st October 1905, which would have rendered the order dated 10th May 1901 inconclusive and raised the attachment was itself rendered inconclusive by the decree of the Divisional Judge's Court dated 3rd April 1907, but the operation of this decree was again in its turn suspended by the decree in second appeal until 23rd January 1919 with the result that the attachment already effected and which remained in full force and effect by the rejection of the claim on the execution side became revived on 13th April 1907, but was not to bear any fruit for the decree-holders' benefit or bring any assets until the same became confirmed by decision of the Privy Council on which it was contingent. The success was in short illusory or certain according as the Privy Council would declare the mortgage to be bogus and fraudulent or otherwise. The right of the decree-holder to proceed or not to proceed with the execution of the decree dated 25th January 1899 on the strength of the said attachment would, either become revived as it were on 23rd October 1919, or be lost for ever on that day, so far as the property covered by the mortgage was concerned. It is needless to say that it was not necessary that the judgment-debtor must be joined as a party to such a suit. See *Ghasiram* v. *Mangal Chand* (8) and *Durga Charan Sarkar* v. *Jotindra Mohan Tagore* (9). The decree-holder's right to execute the decree thus remained suspended and in the air, all along ever since the date of the objection based on the bogus or fraudulent mortgage was made, and although it became revived on 13th April 1907 (not 10th March 1907 as stated by the Subordinate Judge in his order dated 9th April 1922) temporarily up to 28th November 1907, it became suspended again until 23rd January 1919 when alone the claim proceedings

(3) 2 Ind. Cas. 980 ; 6 M. L. T. 154.
(4) 35 C. 202 at p. 207 ; 7 C. L. J. 36 ; 12 C. W. N. 169 ; 10 Bom. L. R. 1 ; 5 A. L. J. 10 : 17 M. L. J. 618 ; 2 M. L. T. 506 ; 14 Bur. L. R. 41 ; 35 I. A. 22 (P. C.)
(5) 30 Ind. Cas. 855 ; 22 C. L. J. 27.
(6) 25 Ind Cas. 11 ; 26 M. L. J. 449 ; 38 M. 585.
(7) 23 C. 829 at p p. 833, 834 ; 12 Ind. Dec. (N.S.) 551.

(8) 28 A. 41 ; A. W. N. (1905) 172 ; 2 A. L. J. 491.
(9) 27 C. 498 ; 14 Ind. Dec. (N.S.) 325.

may be said to have come to a legal termination. The decree-holder was seeking to establish that the property was liable to atachment and sale as the property of the judgment-debtor free of incumbrance, while the mortgagee sought to establish that it was subject to the mortgage and, therefore, liable to be released from attachment and sale. The decree-hoder's right which had been declared 10th May 1901 in the claim proceedings took all this time until 23rd January 1919 to become conclusive as against the mortgagee. The decree-holder thus became free to execute the decree on 23rd January 1919 and not till then. I may at once say that whether the decree-holder kept the decree alive or not during all this interval the decree became executable on 23rd January 1919 and no question of limitation would at all arise, the attachment already effected revived and with it the right under section 73 Civil Procedure Code to claim rateable distribution also sprang into existence. In this view of the case it is unnecessary to see whether the decree was kept alive or not, because I am quite positive that had the judgment-debtor not executed the mortgage dated 26th September 1898 it would not have been possible for the mortgagee to prefer the claim and delay the execution of the decree. The mortgage was found to be a fraud practised in conjunction by the judgment-debtor and the mortgagee on the several creditors including this decree-holder. It could not be that it was a fraud on the part of the mortgagee only and not of the judgment-debtor. A very plausible inference, from this finding is that the decree-holder was "prevented from executing the decree" by "the fraud of the judgment-debtor."

The decree-holder was, however, not negligent in the discharge of his duty. He made his best endeavours to keep his decree alive in order that he may get satisfaction of his decree dated 25th January 1899 otherwise than by proceeding against the property covered by the mortgage, if any other property were to become available or if the judgment-debtor were to come within the jurisdiction of the execution Court and thus be amenable to the process of the Court. In order to leave no room for any objection on the score of want of diligence on his part he used to apply for execution of the decree from time to time as the following summary of the execution proceedings would show. For the sake of convenience the period may be divided into 2 parts (1) before the date of the Divisional Judge's decree and (2) after that date and down to the date of the Privy Council decision.

[The summary of execution proceedings being immaterial is omitted ED.]

After the Privy Council appeal of Chandmal was decided on 23 January 1919 and the decrees of the A. J.C. were finally upheld, this decree-holder again applied for execution of the decree on 27th August 1919. The question is whether in connection with this fresh application for execution the judgment-debtor is debarred from pleading that the decree was not executable under section 48, Civil Procedure Code. The executing Court *suo motu* again took the objection that the execution of the decree was barred under section 48, Civil Procedure Code (vide order dated 28th August 1919). On 21st November 1919 it recorded an order that the decree-holder appears to have rateable distribution out of the assets that may be realized in execution of other decrees and ordered notice to issue to judgment-debtor to show cause why further proceedings towards realization of the decretal sum should not be undertaken on the petition and the case was fixed for 16th January 1920. The notice to judgment-debtor was returned unserved, and he was absent at the hearing. The papers were ordered to be filed, pending receipt of assets by sale of the villages in execution of the other decrees the proceedings wherein had remained stayed pending decision of the Privy Council. On 26th July 1920 the decree-holder accordingly made an application for rateable distribution of the assets realized by sale as per order dated 16th January 1920. The judgment-debtor made his first appearance in this case on 21st January 1921 and through Mr. Kasturchand, Pleader, on 25th January 1921, a plea was raised to the effect that the last application for execution was barred by limitation under Article 182 and section 48, Civil Procedure Code, and that the decree-holder was not entitled to claim rateable distribution of the assets. Issues were framed and the Subordinate Judge after a scrutiny of the previous execution proceedings held in his order dated 4th October 1921 that the Judges who

passed the orders dated 2nd December 1916 and 16th January 1916 had considered that the applications for execution were in time, but that it was doubtful whether they would operate as *res judicata*. He also held that the applicant had been taking steps for the execution of the decrees from time to time but was evidently prevented, by the fraud practised by the judgment debtor in executing the bogus mortgage of his property, from executing his decree fully within the prescribed period of 12 years, and that this fraud was exposed finally by the decree passed by the Privy Council. He accordingly held that the application was not barred by time under section 48, Civil Procedure Code, and directed that the decree-holder shall get rateable distribution. The District Judge, however, upset this order on appeal on the ground that the decision on the question of fraud being upon a mixed question of law and fact hah taken the judgment-debtor by surprise, and remanded the case for the trial of the following issue and called for findings after taking evidence if any :—

"Was the decree-holder Mirza Ami Beg prevented by the fraud of the judgment-debtor Dhanrupmal from executing his decree full within the prescribed period of 12 years?"

After remand no evidence was offered although a date was given but certain statements were recorded. The Subordinate Judge held that the execution of the decree was delayed until 10th March 1907 by the execution of the fictitious mortgage, but that the decree-holder was not prevented by the fraud of Dhanrupmal from executing his decree fully within the period of 12 years. The appeal preferred by the decree-holder against this order, to the District Judge's Court was unsuccessful. The decree-holder has, therefore, come up in second appeal and urges that this application should be held to be within time. The case has been very fully argued before me and I am of opinion that the appeal must succeed.

In view of the findings of the Subordinate Judge it is clear that it was the judgment-debtor's fraud which prevented the decree-holder from executing his decree up to 10th March 1907. The question, therefore, narrows down to the period subsequent to 10th March 1907 or more correctly 13th April 1907 and ending with 25th January 1911 when the 12 years' limit laid down by section 48, Civil Procedure Code, expired and also the period following after 25th January 1911 down to 23rd January 1919.

During the whole of the period between 13th April 1907 and 23rd January 1919 or major portion thereof the judgment-debtor appears to have been away from his villages and estate, and gone to live beyond British India. It is argued for the decree-holder that the judgment debtor's absence had prevented him from realizing the fruits of his decree. Besides, by reason of his agreement with Chandmal which was embodied in this Court's decree dated 28th November 1907, the decree-holder could not proceed against the property covered by the mortgage. He could not also similarly apply for arrest of the judgment-debtor as he was away from the jurisdiction of the Court. In this way it is said for the decree-holder that the judgment-debtor prevented the execution of the decree, right from the date it was passed to the disposal of the last application dated 24th August 1917 which was struck off as infructuous.

On the other hand on behalf of the judgment-debtor it is urged that after the decree-holder got a decree from the Divisional Judge's Court declaring that the mortgage was bogus and fraudulent, it was open to him to execute his decree, but if he voluntarily and of his own accord and without the consent or request of the judgment-debtor binds himself by an independent compromise with Chandmal not to execute his decree so long as the Privy Council decision was out, it is his own fault if he put off the execution. He cannot fasten the blame on the judgment-debtor and say that he was *prevented by the fraud* of the judgment-debtor from executing his decree. Reliance is placed on *Govinda* v. *Umrao Singh* (10). I do concede the position that the judgment-debtor was, technically speaking, not a party to the compromise and was not bound by its terms. Similarly, he could not take advantage of its terms as well. The judgment-debtor, however, appears to have taken full advantage of it because we have found him going away from

(10) 54 Ind. Cas. 279 ; 8 N. L. J. 238.

the jurisdiction of the executing Court as if he had secured a sort of immunity from attachment of his property and from arrest of his own person. Ordinarily, for a decree holder to execute his decree for money two things are at least essential. Either the person or the property of the judgment-debtor must be made available against which the execution could issue; if his property be not available, at least the arrest of his person must be possible. If he keeps himself away from the jurisdiction of the Court, how is it to be possible for the decree-holder to execute the decree even by arrest. Had the judgment-debtor been actuated by a desire not to prevent the several decree-holders from taking out execution of their decrees against him, but wished to act fairly and honestly towards them, we should have expected him to act quite differently. The initial act of mortgaging the whole of the estate however fraudulent and collusive it may have been, was declared in this Court on 16th March 1907 to be bogus and fictitious against the decree-holders. This declaration cleared the cloud cast by his own act upon his own title, and he was once more told, as it were, by that Court that his property was free from the incumbrance and he could satisfy his debts out of the estate. Like an honest man he could have accepted the adjudication as binding and beneficial in his interests, and also for the ultimate benefit of his creditors, and arranged for the satisfaction of the several decrees outstanding against him or for a composition of their claims. But he did nothing of the kind. On the contrary he kept himself out of the way and also away from the jurisdiction of the Court. Such conduct on the judgment-debtor's part could not be looked upon except with disfavour. It smacks of a deep-laid fraud to defeat and delay the creditors and to obstruct the execution of the decrees already passed, and to put them off, as far as possible on the half chance of success of the appeal preferred to the Privy Council by his confederate Chandmal with whom he was clearly hand and glove, in the matter of shielding the property against the creditors. I have absolutely no doubt about the intentions of the judgment-debtor and I cannot infer anything but a deliberate fraud on the judgment-debtor's part. His conduct is the best proof of his intention.

The appellant's Counsel argues on the strength of *Abdul Khadir* v. *Ajiyur Ahammad* (11) that his client was vigilant in that he made repeated applications for execution of the decree within 3 years of the date of each previous application, and sometimes served notices on the judgment-debtor, and even obtained decisions on the very point of the bar of section 48, Civil Procedure Code, and also secured orders for attachment of the judgment-debtor's property, and that the decree still remained unsatisfied for no fault of his own. He also urges that it was the judgment-debtor's duty to attend before the executing Court and show cause against the applications for execution as also against the orders for execution passed thereon in spite of the bar of section 48, Civil Procedure Code, but he did not attend and raise any objections, and that this failure on the judgment-debtor's part now precludes him from urging that the decree is not executable after the lapse of 12 years from its date. Except so far as the property covered by the mortgage against which by virtue of the compromise he had bound himself not to execute the decree until Chandmal's appeal to the Privy Council was decided, he had done his best and been vigilant enough. In spite of his vigilance he could realize nothing. The facts and circumstances above referred to clearly show that he was "prevented from executing the decree by the fraud of the judgment-debtor" against the other property or the person of the judgment-debtor. Neither of them was available during the long interval between 13th April 1907 and 23rd January 1919.

It is next urged by or on behalf of the judgment-debtor that the mere execution of the mortgage-deed dated 26th September 1898 could not amount to a fraud on the part of the judgment-debtor so as to prevent the decree-holder from executing his decree dated 25th January 1899 especially after that mortgage has been held to be fictitious. Further it is said that nothing has been pointed out to shew that the judgment-debtor took any active part in perpetuating or keeping up the fraud once committed during the subsequent stages. Suffice it to say that the word 'fraud'

(11) 12 Ind. Cas. 679 ; 35 M. 670 ; 10 M. L. T. 418 ; (1911) 2 M. W. N. 434 ; 22 M. L. J. 35.

used in section 48, Civil Procedure Code, has to be interpreted in a much wider sense than that in which it is generally used in English Law.

The case of *Pattakara Annamalai Goundan* v. *Rangasami Chetti* (12), lays down that fraud on the part of the judgment-debtor at any stage of the execution gives a new starting point for the period of limitation. *Venkayya* v. *Raghava Charlu* (13), *Mohsin Ali* v. *Masoom Ali* (14) and Second Appeal No. 224-B of 1918 by Mitra A. J. C., Mulla's Civil Procedure Code, page 143 (7th Edition).

Looking up the house so as to prevent attachment of moveable property, *Bhagu Jetha* v. *Malex Bawasaheb* (15) *Venkayya* v. *Raghata Charlu* (13), or evading arrest by any contrivance, or dishonestly evading payment by eluding service of warrant *Pattakara Annamalai Goundan* v. *Rangasami Chetti* (12), is a fraud within the meaning of this section. Similarly a fictitious transfer of his property made by a judgment-debtor to defeat or delay the execution of a decree that may be passed against him amounts to fraud within the meaning of this section see *Visalatchi Ammal* v. *Sivasankara Taker* (16). It is thus clear that the full execution of the decree within 12 years was prevented by the fraud of the judgment-debtor.

Moreover by reason of his omission to appear and object at the earlier stage, the judgment-debtor is precluded from raising objection to the executability of the decree at the subsequent stage of the case. See *Palancheri Govinda Menon* v. *Pookota Kunti Krishna Mannadiar* (17) see also Batten, J. C.'s decision in *Jagannath* v. *Behari Lal* (18), where it is held that on principles analogous to those of *res judicata* strictly so called, an order that an execution application is not time-barred though wrong could not be questioned in subsequent proceedings. Rightly or wrongly the executing Court had held that the decree was executable even after the 12 years had elapsed and ordered execution to issue. These orders are binding against the judgment-debtor as they had not been challenged by him by way of appeal or by review or revision. I am fully satisfied that even on the record of this case as it stands there is sufficient material for holding that the judgment-debtor by his fraud prevented the execution of the decree during the 12 years period ending 25th January 1911 and that even during the period that elapsed since then the execution of the decree was similarly prevented. The decision of Mitra A. J. C., in Second Appeal No. 244-B of 1918 on which the judgment-debtor's pleader relies is, therefore, distinguishable. It is also clear that the judgment-debtor is precluded, by reason of his omission to object to the previous execution applications being granted after the lapse of 12 years, from challenging the correctness of the previous orders which became binding as against him, by his own default.

The order dated 16th January 1920 holding the appellant entitled to rateable distribution was no doubt passed behind the back of the judgment-debtor but the question is not material as I have held that the judgment-debtor's continued absence from the jurisdiction of the Court was sufficient proof of his fraud down to 23rd January 1919 and onwards. The fraud was a continuing fraud, and kept the right of the decree holder to apply for execution alive, from day to day so long as the judgment-debtor kept himself away from the jurisdiction of the Court. He made his first appearance before the Court on 21st January 1921.

The property was attached by other decree-holders and was kept under the management of Receiver vide order dated 17th September 1907 in the execution proceedings arising out of Suit No. 120 of 1898. It is said that this Receiver was appointed by Collector, and that this management by the Collector also prevented the decree-holder from executing his decree in view of the provisions of Schedule III, r. 11 Civil Procedure Code, vide *Shyam Karan* v. *The Collector of Benares* (19). I have not been able to trace the Collector's proceedings. Assuming this to be a fact, the

(12) 6 M. 365 at p. 367 ; 2 Ind. Dec (N.S.) 534.
(13) 22 M. 320 ; 9 M. L. J. 28 ; 8 Ind. Dec. (N S.) 228.
(14) 11 Ind. Cas. 672 ; 34 A 20 ; 8 A. L. J. 1020.
(15) 9 B. 318 ; 5 Ind. Dec. (N.S.) 211.
(16) 4 M. 292 ; 1 Ind. Dec. (N.S.) 1039.
(17) 72 Ind. Cas. 397 ; 45 M. L. J. 71 ; 17 L. W. 566 ; (1923) M. W. N. 299 ; (1923) (M.) 649.
(18) 72 Ind. Cas. 473 ; (1923) A. I. R. (N.) 236.
(19) 52 Ind. Cas. 742 : 42 A. 118 ; 17 A. L. J. 1140.

power of the decree-holders to execute the decree was certainly suspended until the Privy Council decision was out. The present decree-holder who was merely entitled to rateable distribution was not competent to proceed against that property until the Receiver actually sold the property and realized the sale proceeds or was in a position to realise them. This was not possible until the Court of final appeal had given its adjudication. I am prepared to go to the length of holding that by executing the martgage-deed the judgment-debtor must be deemed to have constituted Chandmal the instrument for practising fraud, not only against the decree-holders who went up before the Privy Council but also against others whom he through Chandmal practically forced to await the decision of the Privy Council. Dhanrupmal must, for all intents and purposes, be deemed to be substantially represented by Chandmal as if he was a party expressly by name to all the subsequent stages of the litigation which gave rise to the Privy Council appeal and on the final decision of which all the decree-holders had agreed to state the ultimate satisfaction of their several decrees.

I, therefore, hold that the decree-holder was prevented by the fraud of the judgment-debtor from executing his decree fully within 12 years and that he got a fresh start of limitation from day to day, and that the fraud continued down to the date when it was finally decided by the Privy Council on 23rd January 1919 that the mortgage was bogus and fraudulent. I, therefore, hold that the decree-holder is entitled to claim rateable distribution out of the assets realized in execution of the other decrees. The order appealed against, which has the force of a decree, is set aside and the case is remanded to the first Court with directions to admit the appellant as one of the persons entitled to rateable distribution. Costs in all Courts will be paid by the judgment-debtor. Counsel's fee Rs. 75.

S. D. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 466 OF 1922.

May 15, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

MOZHARUL ISLAM—DEFENDANT —APPELLANT

versus

ABDUL GANI ALA—PLAINTIFF —RESPONDENT.

Indian Majority Act (IX of 1875), s. 2—"Acting in the matter of dower," meaning of—Muhammadan Minor, whether can enter into contract for dower—Contract Act (IX of 1872), s. 11.

The words in section 2 of the Indian Majority Act 'to act in the matter of dower' mean to do all acts in relation thereto, including entering into a contract for payment of dower, which are permissible under the personal law of the party free from the restriction of age put by the Indian Majority Act. [p. 916, col. 1.]

Section 11 of the Indian Contract Act does not militate against this view. [p. 916, col. 1.]

If a Mahomedan minor who is a major by his personal law but a minor under the Indian Majority Act enters into a marriage, as he is capable of doing, he must enter into a contract for payment of dower. Even if he does not do so, the law will presume such contract. [p. 915, col. 2.]

Abi Dhunimsa Bibi v. *Muhammad Fathiuddin*, 44 Ind. Cas. 293 ; 41 M 1026 ; 23 M. L T. 78 ; (1918) M. W. N 246 ; 25 M. L. J 466, not followed.

Section 2 of the Indian Majority Act has reserved to those who have under their personal law attained majority but have not yet attained it under that Act the right to act as majors in matters of marriage and dower and the fixing of the amount and nature of dower is an act in the matter of dower. [p. 916, col. 1.]

Appeal against the decree of the Sub-Judge, Bogra in District Pabna and Bogra, dated the 21st November 1921 affirming the decree of the Munsiff, 1st Court, Bogra, dated the 21st July 1920.

Babu *Girija Prasanna Sanyal*, for Babu *Atul Chandra Gupta*, for the Appellant.

Mr. *Nural Huq Chowdury*, for the Respondent.

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JUDGMENT.

Suhrawardy, J.—This appeal raises a question which to my mind does not demand an elaborate, though it needs, careful consideration. The suit was brought by the father of a deceased Mahomedan wife against the husband for his share of the dower due to the deceased wife. At the time of the marriage the appellant, who had a guardian of his person and property appointed by the Court was 20 years of age and legally his age of majority under the Indian Majority Act was postponed to 21 years. The defence was that at the time of the marriage the defendant was a minor under the Indian Majority Act and, therefore, incompetent to enter into a contract for payment of the dower. Both the Courts below have overruled the plea and held that the plaintiff is entitled to a decree The only point argued in this appeal is that despite anything in section 2 of the Indian Majority Act, 1875 a Mahomedan husband who is a minor according to the other sections of that Act read with section 11 of the Majority Act, is not competent to enter into a contract of dower. The whole argument was directed to the constructon of the words "to act in the matter of dower" occurring in section 2 of the Indian Majority Act. The learned Vakil for the appellant has been at pains to construe the words as not covering a contract for dower ; but I must express my inability to follow the forced construction attempted to be put upon them. His interpretation is that while payment of cash dower by such a minor is a good and valid payment, a contract for deferred dower cannot be entered into by such a minor. It is difficult to conceive that the meaning can be this as the capacity to pay a debt of dower, whether prompt or deferred presupposes the capacity to contract the debt. As I understand it this expression "to act in the matter of dower" means to act or do such acts as may relate to the dower. Section 2 of the Indian Majority Act also declares that the Act would not apply to any person acting in the mater of marriage. It is indisputable that dower is a necessary concomitant in a Mahomedan marriage. Some authorities have chosen to call it 'consideration for the marriage,' while others as payment' in honour of the wife. But there can be no Mahomedan marriage without a dower either fixed by the parties or presumed under the law. It is not disputed that 'acting in the matter of marriage,' means entering into a contract of marriage. If a Mahomedan minor who is a major by his personal law but a minor under the Indian Majority Act enters into a marriage, as he is capable of doing, he must enter into a contract for payment of dower. Even if he does not do so, the law will presume such contract. Reference has been made to the case of *Abi Dhunimsa Bibi* v. *Muhammad Fathiuddin* (1). There a minor Mahomedan wife a major according to her personal law but a minor according to the Indian Majority Act relinquished her dower on her husband's death-bed. The question was whether she had the capacity to do this and the learned Judges held that relinquishment of dower is not an act in the matter of dower This view may be correct though its correctness has been questioned by the recent learned editor of Sir Rowland Wilson's work on Anglo-Mahomedan Law, but it does not give us any assistance in deciding the present point. The remark in one passage of the judgment in that case gives some indications as to what the learned Judges had in mind in construing the words 'acting in the matter of dower'. The passage is as follows :—" Therefore in our opinion when the Legislature permitted a person to act in the matter of that dower it only intended to let person who was not otherwise competent under the law to act in the matter to initiate to the religious act or ceremony which under the personal law of the subject, he or she, was capable of initiating." Though this passage is not very clear I think it means that acting in the matter of marriage and dower is doing all things necessary for a valid marriage of which dower is a part. It is a matter of common knowledge that hundreds and hundreds of Mahomedans are in this country contracting marriage who have not attained majority under the Indian Majority Act but are competent under their personal law to do so and such persons by entering into marriage contracts take upon themselves the liability for payment of the dower. The view that has been placed before us by the appellant, if adopted, would revolutionise the Mahomedan

(1) 44 Ind. Cas. 293 ; 41 M. 1026 ; 23 M. L. T. 78 ; (1918) M. W. N. 246; 35 M. L. J. 468.

society as it stands at present. I think that the words in section 2 of the Indian Majority Act 'to act in the matter of dower' mean to do all acts in relation thereto, including entering into a contract for payment of dower, which are permissible under the personal law of the party free from the restriction of age put by the Indian Majority Act. I am further of opinion that section 11 of the Indian Contract Act does not militate against this view. Therefore I hold that there is no substance in this appeal which must be dismissed with costs.

Duval, J.—I agree. It appears to me that section 2 of the Indian Majority Act has referred to those who have under their personal law attained majority but have not yet attained it under that Act the right to act as majors in matters of marriage and dower and the fixing of the amount and nature of dower is an act in the matter of dower. I agree that the appeal should be dismissed with costs.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 154 OF 1923.

June 26, 1924.

Present :—Mr. Justice Daniels.

Musammat AISHAH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
ABDUL GHANI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901) s. 159—Lambardar—Co-sharer—Revenue paid by lambardar *on behalf of co-sharer—Revenue also paid by co-sharer direct into treasury*—Lambardar, *whether entitled to recover from co sharer.*

Where a *lambardar* pays revenue on behalf of a co-sharer under him and after payment by the *lambardar* the co-sharer also pays it direct into the treasury, without informing the *lambaraar*, the *lambardar* is entitled to recover from the co-sharer the amount paid by him on his behalf. [p. 917, col. 1.]

Appeal from a decree of the Additional District Judge, Saharanpur, dated the 20th December 1922.

Mr. *Nehal Chand*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—This is a suit under section 159 of the Tenancy Act to recover revenue paid to Government by the plaintiff as *lambardar* on behalf of the defendant who is a co-sharer under his *lambardari*.

The facts of the case are unusual. The *lambaraar* is the person primarily responsible under section 144 of the Land Revenue Act for paying the revenue into the *tahsil*. It is the duty of the co-sharers to pay their quota through the *lambardar*. If the revenue is not paid, it is the *lambardar* who in the first instance will be subject to coercive process. In this case the revenue in dispute relates to the years 1325 and 1326 *Fasli*. The revenue of 1325 was paid by the *lambardar* into the *tahsil* in two instalments on 5th February 1918 and 7th June 1918 respectively. A week later on 11th February 1918 the defendant paid into the treasury direct her share of the first instalment which had already been paid by the *lambardar*. The second instalment was similarly paid by her on 2nd July 1918, nearly a month after the payment by the plaintiff. The defendant in making the payment did not state that it was being made on account of the share held under the *lambardari* of the plaintiff. She wrongly entered her own name as *lambardar*, and instead of recognising that the payment was being made twice over, the *tahsil* officials by mistake credited the revenue to the account of two other *lambardars*, this being a village in which there is more than one *lambardar*. In 1320 the plaintiff paid the revenue due from him, including the defendants share, in three instalments, on 1st February, 8th July and 16th August 1919 respectively. The defendant paid in two instalments, on 3rd March and 27th June 1919. The plaintiff, when he paid his second and third instalments, had not been informed and was not aware that any payment had been made by the defendant. The defendant again failed to inform the *tahsil* officials that the money was being paid on account of the share held under the plaintiff's *lambardari*, and the *tahsil* officials again made a mistake in entering the amount to the credit of another *lambardar*. In the lower Court a reference was made to rule 13 of the Board of Revenue

Circular 1-III reprinted by Dr. Agaarwala on p. 347 of his Land Revenue Act, 6th edition, which says that, though it is the duty of the co-sharers to pay through the *lambardar*, any payment made direct into the treasury by a co-sharer shall be credited to the account of the *lambardar* and be deemed to have been made through him. The learned Additional Judge rightly held that this rule does not affect the case. It is primarily a direction to the Revenue Officials and any rules made under the Act must under section 234 be consistent with the Act and cannot in any way affect the duty of a co-sharer to pay through the *lambardar* as provided by section 144.

The money having been paid into the *tahsil* twice over, the question is who is to suffer, the plaintiff, who complied with the law in every respect, or the defendant, who made the payments irregularly contrary to section 144 did not inform the *lambardar* and give incorrect information to the *tahsil* officials, which may have been partly responsible for their error in crediting the amounts. Under these circumstances there can be no question that if any one has to suffer it must be the defendant. The plaintiff has paid in good faith and in accordance with law the money due from him on account of the defendant's share, and he is entitled to recover it under section 159. I must, therefore, and hereby do, dismiss the appeal with costs including in this Court fees on the higher scale.

At the same time I see no reason why it should not be within the power of the Revenue Officials to repay to the defendant the excess payment made by her. It is purely due to the mistake of the *tahsil* officials that the money has been credited to a wrong *khata*. I direct that a copy of this judgment be sent to the Collector with a recommendation that steps should be taken to give the defendant a refund of the money paid by her which had already been paid on her account by the *lambardar*.

S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 790 OF 1922.

May 16, 1924.

Present :—Mr. Justice Greaves and Mr. Justice Chakravarti.

SAROJ BANDHU BHADURI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANIK SHEIKH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Procedure—Relief available in suit or in execution of decree—Fresh suit, whether maintainable.

It is not permissible to a party to a suit to bring a separate suit to obtain the reliefs which were available to him in the previous suit itself or in execution of the decree in that suit [p. 918, cols. 1 and 2.]

Appeal against the decree of the Sub-Judge, Second Court, Pabna and Bogra, dated the 21st November 1921, modifying the decree of the Munsif, First Court, Serajgunj, dated the 29th September 1920.

Babu *Birendra Kumar De*, for the Appellants.

Babu *Jatindranath Lahiri*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the defendants and arises out of a suit brought by the plaintiffs for a declaration that the two decrees obtained by the common manager of the estate of the defendants were obtained by fraud and that the decrees were void and ineffectual as against the plaintiffs. The Munsif dismissed the suit in its entirety but the lower Appellate Court has made a modified decree in favour of the plaintiffs. The facts shortly stated are as follows: The defendants' estate was represented by a common manager who brought a suit against the plaintiffs in the year 1914. The suit was decreed on the 17th July 1915. An appeal to the first lower Appellate Court was dismissed on the 21st March 1916 and the judgment of the first Court was confirmed. A second appeal against that decree by the present plaintiffs

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was disposed of on the 10th March 1919. But it appears that the other suit to which the plaintiffs' claim relates was brought in the year 1917 and the present plaintiffs contested that suit. Ultimately the defendants gave up their defence and there was an *ex parte* decree in favour of the common manager. The decree was made on the 25th May 1918. But it appears that the common manager was discharged on the 24th July 1917. The contention of the plaintiffs was that, so far as the first suit was concerned, the decision of the High Court was after the common manager had been discharged. So far as the second suit was concerned, the decree by the first Court was passed after the discharge of the common manager. The present plaintiffs wanted, as we have stated before, a declaration that both the decrees were not binding on them because the common manager had been discharged before the decrees. The Court of first instance found that the fraud alleged in respect of the said decrees was not established and it further held that the remedies claimed by this suit were not available by a separate suit. The lower Appellate Court on appeal by the plaintiffs, agreed with the first Court, so far as the question of fraud was concerned; but it gave a declaration to the plaintiffs so far as the decree in the second appeal in the first suit was concerned and also as regards the decree of the first Court in the second suit, on the ground that the manager had been dismissed before those dates. Against that part of the decree which was made in favour of the plaintiffs, the defendants have preferred this second appeal and it is contended on their behalf by the learned Vakil who appears for them that the suit, for the purpose of the reliefs, which were granted by the lower Appellate Court, was not maintainable by the plaintiffs. We think that this contention is correct. So far as the first suit is concerned the lower Appellate Court pointed out that the decree in the first Court and in the lower Appellate Court was rightly obtained and so far as the second appeal is concerned the present plaintiffs, who were the appellants then, took no steps to get the present defendants brought on the record and allowed the suit to proceed as it was originally brought by the common manager. It is not permissible to a party to a suit to bring a separate suit to obtain the reliefs which were available to him in the previous suit itself or in execution of the decree in that suit. The plaintiffs having failed to prove that there was fraud vitiating the decrees in the previous suits, they are not entitled to question the validity of the decrees and to get a declaration in this suit that those decrees were not binding. We think that such a remedy cannot be obtained by a party to a suit in which the decree was made against him.

The result is that this appeal is dismissed. In the circumstances, we make no order for costs.

Greaves, J.—I agree.

M. B. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 247 OF 1923.

August 1, 1924.

Present :—Mr. Wazir Hasan, J. C.

TEJA SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

MOTI SINGH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Grant—Maintenance—Life-estate or absolute estate —Power of alienation given to grantee, effect of... T. P. Act (IV of 1882), s 10—Restraint on alienation— Absolute restraint void.

Where the object of a grant is maintenance or *Guzara* the *prima facie* import of the grant is that it is for the life of the grantee in spite of the words "for ever" or "in perpetuity." [p. 919, col. 2.]

Raja Rameshar Bakhsh Singh v. *Babu Bhagwan Bakhsh Singh*, 7 O. C. 90 : *Rameshar Bakhsh Singh* v. *Arjun Singh*, 23 A. 194, 28 I. A. 1 ; 7 Sar. P. C. J. 804, referred to.

But if the grantee has been given the right of alienation, the intention is to confer an absolute estate. [p. 919, col. 2.]

Where by the terms of a grant the grantee is restricted to sell or mortgage the property in the first instance to the nearest relatives and in the event of their refusal to other *pattidars*, and not to a stranger the restriction of alienation is absolute and, therefore, void both in law and equity.

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Muschamp v. *Bluet Bridgm. J.* 132 at p. 137; 123 E. R. 1253; *In re Maclay* (1875) 20 Eq. 186; 44 L. J. Ch. 441; 32 L. T. 682; 23 W. R. 718; *In re Rosher, Rosher* v. *Rosher*, (1884) 26 Ch. D. 801; 53 L. J. Ch. 722; 51 L. T. 785; 32W. R 820; *Faiyaz Husain Khan* v. *Nilkanth*, 4 O. C. 163, referred to. [p 919, col. 2.]

Appeal from the decree of the Subordinate Judge, Kheri, dated the 21st May 1923, in an appeal preferred against the decree of the Munsif, Kheri, dated the 5th March 1923.

Mr. *Puttu Lal*, for the Appellants.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal in a suit for possession of 2·98 acres of land and of a one-third grove situate in Barkhera Kalan, Pargana Mohamdi, in the District of Kheri. The defendants are admittedly in possession of the land and the grove in suit. The plaintiff's case is that the property in dispute was granted by their ancestors to Ranjit Singh, Dwarka Singh, Niaranjan Singh and Hem Singh under a compromise dated the 20th September 1886 (Ex. 1) arrived at in a litigation between them in the Court of the Munsif of Kheri; that the 1st survivor, Ranjit Singh, in the array of the grantees died a little over two years before the institution of the suit and that the grantees had merely a life interest which came to an end on the death of the last survivor. The only defence, with which I am concerned at present, was that the compromise conferred an absolute estate. The Court of first instance held that the tenure created by the compromise was only a life estate. In view of this finding the plaintiffs' suit was decreed. On appeal by the defendants the learned Subordinate Judge of Kheri disagreed with the interpretation placed by the Court of first instance on the language of the compromise and came to the conclusion that it conferred an absolute estate. The result was that the appeal was allowed and the plaintiffs' suit dismissed.

I am of opinion that the judgment of the Court below is correct. The Court of first instance rested its decision on the sole ground that the compromise expressly says that the property in suit was granted by way of *guzara* and cited the case of *Raja Rameshar Bakhsh Singh* v. *Babu Bhagwan Bakhsh Singh* (1) in support of it. It is a well settled rule of construction that where the object of a grant is maintenance or *Guzara* the *prima facie* import of the grant is that it is for the life of the grantee in spite of the words "for ever" or "in perpetuity". See the judgment of the Privy Council in the case of *Rameshar Bakhsh Singh* v. *Arjun Singh* (2). But in the compromise under consideration there is much more than the mere expression of the object of the grant being the maintenance of the grantees. The important part of the compromise bearing on the question under consideration is as follows;—"The plaintiffs will have the "right of sale and mortgage in the first instance in favour of the nearest relatives and in the second instance in the event of their refusal, in favour of other *pattidars* and that they will have no power of selling it to a stranger". These words are in my judgment sufficiently expressive of the intention to confer an absolute estate. That those words convey the right for alienation is perfectly clear, and the condition that the said right shall be exercised only in favour of a certain class of persons and in favour of no others is a restraint on that right. If this restraint is absolute then it must be held both in law and in equity to be void.

The principle on which this view rests is enacted in section 10 of the Transfer of Property Act (IV of 1882). I have therefore to see whether the condition operates as an absolute restraint. In my judgment it does. In *Muschamp* v *Bluet* (3), and *In re Macleay* (4), it was held that a restraint not to alienate except to a certain person was void as being absolute. It was observed in that case that to restrain generally and to restrain from alienating except to one person was the same in effect. In *Rosher* v. *Rosher* (5), it was held that the condition that the devisee, in case he wanted to sell, must offer the property to a certain other person, who was at liberty to buy it at a fixed value was held to be in absolute restraint

(1) 7 O. C 90
(2) 23 A. 194; 28 I. A. 1; 7 Sar. P. C. J. 804
(3) Bridgm. J. 132; at p 137; 123 E. R. 1253.
(4) (1875) 20 Eq. 186; 44 L J. Ch. 441; 32 L. T. 682; 23 W. R. 718.
(5) (1884) 26 Ch. D. 801; 53 L. J. Ch. 722; 51 L. T. 785; 32 W. R. 820.

against the power of sale. These cases were applied by Mr. Spankie, A. J. C, to the case of *Faiyaz Husain Khan* v. *Nilkanth* (6). In the case decided by Mr. Spankie the condition in restraint of alienation except to B, and his heirs and representatives was held to be in absolute restraint of alienation and void as such. Two more features of the compromise may be noted in support of the conclusion at which the Court below has arrived. The claim of the plaintiffs in the case in which the compromise was made was one for a declaration of proprietary title in a one *biswa* share of *Zamindari* and in a grove in the village Barkhera Kalan and one of the conditions of the compromis was that the grantee shall not be liable to pay any rent in excess of the proportionate Government revenue. On these grounds the appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(6) 4 O. C. A. 163

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 91 OF 1922.

July 29, 1924.

Present:—Rao Bahadur Kinkhede, A.J.C.

CHANDRASHEKHAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABIDALLI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 44—Transfer of share by one co-owner—Conditions, subsequent how far can affect—Repairs not made—Loss—Negligence—Presumption.

If one co-owner transfers his right or interest in the joint property, the other co-owners cannot impose on the share or interest transferred any conditions or liabilities not affecting it, (*i. e.*, not existing) at the date of the transfer. [p. 923, col. 2.]

In other words, they cannot saddle any new conditions or liabilities, which come into existence after the date of the alienation and bind the alienees by them; [p. 923, col. 2.]

Nor can the transferees be made to suffer for the negligence or misdeeds of their transferor or his legal representative, not of a date prior to their transfer but subsequent to the date of the alienations in their favour. [p. 923, col. 1.]

If one co-owner transfers his right or interest in the joint property, the other co-owners cannot impose on the share or interest transferred any conditions or liabilities, not affecting it, (*i.e.*, not existing) at the date of the transfer. In other words, they cannot saddle any new conditions or liabilities, which come into existence after the date of the alienation and bind the alienees by them; nor can the transferees be made to suffer for the negligence or misdeeds of their transferor or his legal representative, not of a date prior to their transfer but subsequent to the date of the alienations in their favour. [p. 923, col. 2.]

One co owner cannot exclusively be saddled with the loss caused by his negligence in repairing the joint property in time, if the other co-owner had access to the property and could arrange himself for the repairs being made. [p. 924, col. 2.]

Neglience cannot be presumed; it is rather to be presumed that ordinary care has been used. [p. 924, col. 1.]

Appeal against the decree of the Additional District Judge, Wardha, dated the 31st July 1922, in Civil Suit No. 44 of 1918.

R. B. N. G. Bose, for the Appellants.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—This judgment will govern First Appeal No. 91 of 1922 preferred by defendants Nos. 9 and 10 Chandrashekhar and Balakram son of Bhagwandin Brahmin and defendant No. 12 Bapuji Sonar, and also First Appeal No. 102 of 1922 filed by Walibhai, defendant No. 11 against Abidalli the plaintiff, Abdul Karim and others defendants respondents. The plaintiff brought the suit out of which these appeals arise, for partition of the joint property against Meharali and other relations who were joined as defendants Nos. 1 to 6 and 16, they being co-owners with himself; the transferees from Meharali and Rahimulla were also joined as co-defendants. Plaintiff asked for a decree for separate possession of his 2 annas share in the joint property. The suit was disposed of by a preliminary decree dated 29th November 1921 passed by Mr. Kolhatkar, Additional District Judge. After the passing of the preliminary decree the defendants Nos. 3 to 6 and 16, who are the other members of the family of Meharali, also requested the Court to effect a partition and to

give them separate possession of their own shares. Their request was granted on 19th January 1922 by the Court. Mr. Deshpande was appointed Commissioner for effecting the partition according to the directions contained in the preliminary decree. He submitted two alternative proposals for a general partition to be made on the lines of any one of them. These proposals were submitted by the Commissioner on 5th April, 1922 and 24th July 1922 respectively. The principle adopted in each of them may be stated as under :—

First proposal dated 5th April 1922.

This proposal suggested that separate division of moveables and immoveables providing for a personal decree against defendants Nos. 1 and 2 for the price of moveables admittedly in their possesssion be made.

Second proposal dated 24th July 1922.

This proposal was for dividing moveable and immoveable property in one lot as a whole according to the valuations set out by the judgment and the preliminary decree.

The Judge after hearing the objections, held that the second proposal of dividing moveables and immoveables together in one lot as a whole according to the valuation set out in the decree was more fair and correct, and ordered a final decree to be drawn up in terms of the same. It is against this final decree dated 31st July 1922 that these appeals have been preferred by the transferees.

In the preliminary decree as also in the *patties* made by the Commissioner the several items of property are marked as A. B. C. D. and so on. The items in dispute in these two appeals are referred to in the grounds of appeal by an alphabetical enumeration on the same lines. The grievance in the appeal of defendants Nos. 9, 10 and 12—First Appeal No. 91 of 1922—is as regards property *P*, allotted to plaintiff in lieu of compensation for damage to property F and also as regards property N, allotted to defendants Nos. 3 to 5 in lieu of similar compensation for damage to property *I*. Similarly the grievance in defendant No. 11's First Appeal No. 102 of 1922 —is as regards property *O*, allotted to defendants Nos. 6 and 16 as a part of their substantive share. It will thus be seen that the dispute which requires consideration in these two appeals is confined to items *N*, *O*, *P*. It may be useful to know at a glance what the properties *N*, *O*, *P* and *F* and *I* are and so I reproduce their description as given in the preliminary and final decrees : —

F is a bungalow worth Rs. 6,000 allotted to plaintiff's share (item 1V of *patti I*).

I is a stone building, a *Chawl* of 20 rooms worth about Rs. 1,2000 allotted to the share of defendants Nos. 3 to 9 (item No. I of *patti* No. III).

N is a house sold by Meharali defendant No. 1 to appellants Chandrashekhar and Balakram, worth about Rs. 2,000 now allotted to defendants Nos. 3 to 5 as compensation for damage to property *I*.

O is a house sold by Meharali to appellant Walibhai worth about Rs. 1,500 now allotted to the share of defendants Nos. 6 and 16 (item No. IV *patti* No. II) as a part of their substantive share.

P is a house similarly sold to appellant Bapuji worth about Rs. 1,000 now allotted to plaintiff as compensation for damage to property *F*.

It will thus be seen that both these appeals dispute the propriety of allotting property alienated in favour of strangers to the share of the other co-owners instead of to the share of the alienor or alienors and the appeal of defendants Nos. 9, 10 and 12 raises the further question as to how far they are liable to make good, the loss that may be due to the neglect of the alienor's legal representative to take proper care of the estate left in his possession after the date of the alienation ; in other words whether they are responsible to contribute to the costs of repairs to the bungalow *F* and the *Chawl I*.

I will take up the second question first. As regards this question, namely, of awarding compensation to the plaintiff and to defendants Nos. 3 to 5 for damage to properties *F* and *I*, I must state for the sake of clearness that the question was raised for the first time at a very late stage, *viz.*, on 27th February 1922, while the proposals for partition were being discussed by the Commissioner. The plaintiff urged then that properties *F* and *I* were damaged after institution of the suit and that the cost of repairing these damages should be awarded and considered while allotting the shares. Plaintiff claimed that Rs. 2,000 for repairs to the bungalow *F* and Rs. 2,000 for

CHANDRASHEKHAR *v.* ABIDALLI

repairs to *Chawl I* should be fixed as compensation. Statements were recorded on this point on 27th February 1922 wherein the transferees objected to the matter being enquired into by the Commissioner. Plaintiff also made an application on similar lines to the Court of the Additional District Judge for issue of instructions to the Commissioner to take up the question. The Court by an order dated 28th February 1922 endorsed on the petition itself (passed apparently without notice to or hearing other parties, for there is no reference to the petition in the Court's own order-sheet directed the Commissioner to take up the question. In the statements recorded on 27th February 1922 I do not find any claim being put forward by or on behalf of defendants Nos. 3 to 5 for damages. The question was enquired into and the Commissioner after taking evidence adduced by the parties and making a local inspection of the bungalow and the *chawl* on 24th March 1922, and examining a sub-overseer of the Wardha District Council as a Court witness, reported that Rs. 2,000 would be a proper and reasonable amount to be awarded as cost of repairing the *Chawl* and Rs. 1,000 as costs of repairs to the bungalow. The opinion of the Commissioner as regards the person responsible for these damages, was that defendant No. 2 had intentionally neglected these properties and allowed them to be damaged, and also failed to make the necessary repairs since the date of the suit.

The suit was instituted as far back on 20th September 1918 and the report of the Commissioner is dated 29th March 1922. From the evidence recorded by the Commissioner it seems he inferred, and I think very rightly, that the defendant No. 2 had joined hands with the plaintiff. The appellants contend that this amounts to collusion. I am not prepared to go to the length of holding that they colluded with a view to defraud the appellants. But this does not mean that defendant No. 2 was acting fairly towards the transferees. His admissions in the witness-box do show that he wanted to advance the case of the plaintiff on the point of compensation. The plaintiff's statement dated 27th February 1922 attributed the damage to the neglect of defendant No. 2, and his deposition as P.W. 1 before the Commissioner also shows that he asserted that the damage was due to the deliberate negligent management of defendant No. 2. He says that it commenced from the date of the suit, but this does not appear to be correct. As pointed out by the Court in its endorsement dated 28th Febuary 1922 on the petition, defendant No. 1, Abdul Karim as II D. W. 4 had stated that the bungalow and the stone *chawl* were in good condition and no portion of the same was destroyed when he left Wardha in 1920. (See his deposition dated 28th June 1921 page 139 of the record). The damage must have been subsequent to 1920. At what time the damage was caused is not also proved satisfactorily. Assuming it was caused between 1918 and 1920 the question is was it not possible for the plaintiff to prevent it by taking proper steps in time. He did nothing in 1918-1920. It was as well the duty of plaintiff, who was cognisant of this fact and says he saw the damaged condition almost every day, to take some steps in time to prevent damage or to restrain the defendant No. 2 against causing any further damage or loss to the buildings. He is forced to admit that he did not bring this fact to the notice of the Court till the date of his application made on 27th April 1922. He no doubt adds that he made a petition to the Court for the appointment of a Receiver. But that too was so late as 12th April 1921. Notices of the petition were ordered to be given to the defendants and it was to be heard at the hearing fixed for evidence, which fell on 18th, 19th and 25th July. Notices were not served on the defendants and the plaintiff thought fit to voluntarily withdraw the petition on 25th July 1921, the case being closed for argument that day. There is thus negligence on the part of plaintiff as well. Defendants Nos. 3 to 5 have neither cared to make any complaint in respect of the damage nor did they support the plaintiff's demand. They seem to have been quite indifferent in this matter. Nothing has been brought to my notice from the record to show that defendant No. 2 was charged with any special duty to look after the estate by arrangement between the parties or by any order of the Court imposing upon him any special obligation like those of manager to take care of the property. As one of the persons entitled to possession as a co-owner he owed the same duty and was under the same obligation of preservation of self-interest as any other co-owner like the plaintiff and the two sets of

defendants Nos. 3 to 5 and defendants Nos. 6 and 16 was or were. The evidence on record falls short of proving that the neglect on defendant No. 2's part was deliberate or wilful or culpable. It is not shown that defendant No. 2 was possessed or put in possession of sufficient funds to enable him to execute the necessary repairs. Thus though I hold that there was negligence I am not prepared to hold that it was on defendant No. 2's part alone. There was negligence all round on the part of the plaintiff, defendant Nos. 1 and 2 and 3 to 5, and 6 and 16 *i.e.*, of all persons interested as co-sharers in the properties *F* and *I*, held by them.

The transferees, who are appellants before me, had no concern with or control over those items of properties, nor has it been alleged or shown that they had influenced the defendant No. 2 to commit the alleged acts of waste or mismanagement in respect thereto in order to cause loss to the claimants. They have not been shown to have contributed to the neglect on the part of defendant No. 2. The defendants Nos. 9, 10, 11 and 12 cannot, therefore, be made responsible for any acts of mismanagement or waste or for damage caused by the defendant No. 2's neglectful dealing with the property. It is simply absurd to make the transferees suffer for the negligence or misdeeds of their transferor or his legal representative, not of a date prior to their transfer but subsequent to the date of the alienations in their favour ; mush less could they be held answerable for acts of waste done by the legal representative, or for his omission to do the necessary repairs, after the date of the institution of suit for partition. It would be very inequitable and unjust to impose upon an innocent party an obligation to pay compensation for meeting the cost of repairs occasioned either by the neglect of another party to do the necessary repairs in time. or by the wilful waste committed by such negligent party. The allotment of properties *P* and *N* purchased and improved since the purchase by the appellants in First Appeal No. 91 of 1922, by way of compensation to the shares of plaintiff and defendants Nos. 3 to 5 is thus wholly unjust and inequitable and cannot be supported on any principle of law.

Section 44 of the Transfer of Property Act says that a transferee from one co-owner acquires as to the share or interests acquired and so far as is necessary to give effect to the transfer, the transferror's right, but that it is "*subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.*" The word '*at the date of the transfer*' in the clause "subject to the conditions and liabilities, at the date of the share of interest so transferred" are very important. The negative the claim of the other co-owners to impose on the share or interest transferred any conditions or liabilities, not *affecting it* (i. e., not existing) *at the date of the transfer.* They cannot saddle any new conditions or liabilities, which come into existence after the date of the alienation and bind the alienees by them.

In First Appeal No. 35 of 1906 Drake-Brockman, J. C., in dealing with the question of the propriety of debiting time-barred debts to the share of the managing partner by whose neglect their recovery by suit had become time-barred, held that the loss occasioned to the partnership by neglect of any one co-owner or partner could not be debited to his share, because it was equally within the power of and open to the other co-owners to be vigilant and to take steps to prevent the loss. In support of this view he relied upon and quoted with approval certain passages from Lindley on Partnership 7th edition, pages 416 and 417 which correspond to pages 441 and 445 of the 8th edition which I reproduce here: The general principle, however, that partners must contribute rateably to their shares towards the losses and debts of the firm is not open to question . . . (p. 444). Even if a loss sustained by a firm is imputable to the conduct of one partner more than to that of another, still, if the former acted *bona fide* with a view to the benefit of the firm and without culpable negligence, the loss must be borne equally by all (p. 445). In *Cragg* v. *Ford* (1), whereupon a partnership being dissolved the defendant on whom the winding up of its affairs delayed selling certain assets though the plaintiff had requested an immediate sale thereof, and the delay in sale fetched a much lower price, the plaintiff's contention that the loss sustained by the postponement of the sale ought to be borne by the defendant

(1) (1842) 1 Y. & C. C. C. 280 ; 57 R. R. 320 ; 62 E. R. 889.

alone, was overruled, it was held that the plaintiff if he had chosen, might himself have sold the same and that as the defendant in delaying the sale had acted *bona fide* and in the exercise of his discretion, the loss ought not to be thrown on him alone but ought to be shared by the plaintiff.

The learned J. C. remarked upon the facts of the case before him as follows : —

" The plaintiff had access to the accounts and they could have ascertained the condition of the debtors and moved the Court to arrange for suits being filed."

One has only to substitute the words ' property " bungalow ' and ' *Chawl* ' and ' repairs being made' respectively for the words ' accounts' ' debtors ' and ' suits being filed' for making these remarks applicable to this case. I think, the judgment of the Court below upholding the Commissioner's allotment of properties *P* and *N* by way of compensation for meeting the cost of repairs to properties *F* and *I* assigned to the shares of plaintiff and defendants Nos. 3 to 5 respectively cannot stand because it would be debiting the loss to the share of defendants Nos. 1 and 2 alone though the same was debitable to the shares of all.

It is well settled that as a rule negligence is not to be presumed ; it is rather to be presumed that ordinary care has been used. Even in cases of accident this rule of presuming negligence, which is commonly expressed by the phrase *res ipsa loquitur* is not of invariable applicability. Bramwell, B., said in *Byrne* v. *Boadle* (2) " No doubt in every case where such an occurrence (accidental falling of a barrel of flour from an upper window upon a man walking in the street in front of a flour dealer's premises) as this causing injury happens the presumption of negligence is not raised but in some it is. We must judge of the fact in a reasonable way, and in that light we know that injuries do not happen without a cause, and that generally that cause is negligence." There is an obvious distinction between the injuries caused by such an event as that which happened in *Byrne* v. *Boadle* (2), and a loss caused by failure to recover a debt within a given time or to execute repairs at the proper time. As held above the negligence was not wilful or culpable on the part of defendant No. 2 ; nor could it be attributable to a breach of duty on the part of defendant No. 2 alone, any more than on the part of the other co-owners or partners. Moreover the loss occasioned by the negligence appears to have not been objected to at the proper time. Under these circumstances the loss must fall on all and must be shared by all in proportion to their respective shares. The aggregate value of the assets must, therefore, stand reduced to the extent of Rs. 3,000 ,which is found to be the estimated cost of putting the properties *F* and *I* in a fit state of repairs. The loss would thus be distributed with reference to the main shares as follows :—

Plaintiff's 2 annas share	Rs. 375
Defendants Nos. 1 & 2's 4 annas share	Rs. 750
Defendants Nos. 3 to 5's 4 annas share	Rs. 750
Defendants Nos. 5&16's 6 annas share	Rs. 1,125
	Rs. 3,000

The appellants-defendants Nos. 9, 10, 11 and 12 must also suffer their own proportionate share of the loss of Rs. 750 shown above as falling to the 4 annas share of defendants Nos. 1 and 2. This disposes of the second objection, which prevails.

I will now consider the first objection, namely, the common question involved in both the appeals regarding the propriety or otherwise of alloting properties *P*. *N*. and *O*. to the share of defendants Nos. 1 and 2 in order that the alienees may *as far as possible* be left to enjoy the properties purchased by them free from the claims of other co-owners. I may at once remark that both the Commissioner as also the Court have gone wrong and have contravened the instructions contained in paras. 3 and 4 of the preliminary decree which runs as follows :—

3. The said Commissioner will exclude as far as possible the property transferred by Meharali and Rahimtullah to defendants Nos. 7 and 8 and the property transferred by Meharali to defendants Nos. 9. 10,11 and 12 from the share of the plaintiff provided that such exclusion does not operate to the prejudice of the plaintiff,

(2) (1863) 33 L. J. Ex. 13 at p 15 ; 2 H. & C. 722; 9 L. T. (N. S.) 450 ; 12 W. R. 279 ; 133 R. R. 761 ; 159 E. R. 299.

The property so transferred is mentioned in Schedules Nos. 5 and 16 hereto annexed.

4. That if the said Commissioner finds that partition cannot be made according to the instructions in para. 3 without destroying the intrinsic value of the property, he shall report the amount of compensation to be made by defendants Nos. 1 to 5 for equality of partition.

The benefit of these instructions for the preservation of the rights of the alienees has been made available even as against defendants Nos. 3 to 5 and defendants Nos. 6 and 16 by the amendment of the decree made at the instance of the aforesaid defendants. At the very outset I cannot help remarking that the demand of the plaintiff and that of his co-sharers (defendants Nos. 3 to 5 and 6 and 16) that only immoveable property should be assigned to his or their shares is simply preposterous and sounds so very unjust and absurd that I am surprised to find that it was so readily acceded to in the Court below. I am not satisfied that there will be any "prejudice" to the plaintiff or to other claimants in carrying out the instructions contained in para. 3 of the decree; nor can it be said that the "partition cannot be made according to the aforesaid instructions without destroying the intrinsic value of the property." The instructions are meant as an enabling and not a disenabling provision; they could not be interpreted as laying down any prohibition much less an absolute prohibition against allotting the properties transferred for valuable consideration to the share of the transferrors. The appellants being transferees for valuable consideration have strong equities in their favours which it is the duty of the Court to respect, as far as possible, since they entitle them under law to ask the Court to so marshal the various properties between the several sharers as to allocate the particular properties purchased by them to their alienor's share in order that their possession over the same may not be disturbed. There is overwelming authority of law to support this position. It is needless to state that the insertion of the instructions in paras. 3 and 4 of the decree was because of the existence of such authority and for giving effect to it if possible while distributing. It is thus neither just nor equitable to uphold the allotment or properties P, N and O in the manner made by the Court. I cannot similarly uphold the allotment of property O purchased by defendant No. 11 to the share of defendants Nos. 6 and 16.

As the appeals succeed the decree appealed against requires to be modified so as to bring it into conformity with this judgment. As this will involve a readjustment of the assets I invite the parties to look up this preliminary judgment and submit their respective proposals for my consideration within 20 days from this day. If the parties or any of them fail to make their suggestions within the time hereby limited I will proceed to make the readjustment or re-allotment in such manner as may appear to me just and reasonable in the circumstances of the case. I will then draw up my final judgment and a decree will follow in each of these appeals with necessary orders for costs.

S. D. *Appeals allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 68 OF 1922.

March 25, 1924.

Present:—Mr. Justice Venkatasubba Rao.

S. R. JAYA RAO—PLAINTIFF—APPELLANT

versus

VENKATANARAYANA CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 73—Relief against penalty, doctrine of, whether applies to compromise decrees embodying contracts between parties.

The doctrine of "relieving against penalty" applies to decrees. [p. 926, col. 1.]

As the adoption of a contract by a Court amounts to an adoption by it with all its legal incidents, the considerations, which would arise if a mere contract were in question, would equally apply to the enforcement of a decree embodying the contract. A Court is, therefore, entitled to relieve against a penalty on breach of a condition in a compromise decree containing the contract between parties. [p. 926, col. 1.]

RAMSARAN MAHTON v. SYED MUHAMMAD ARADUT HUSSAIN

Nagappa v. *Venkat Rao*, 24 M. 265; *Sheikh Mohidin Tharagan* v. *Vadivalagianambia Pillai*, 22 Ind. Cas. 37 ; (1914) M. W. N. 92, relied on.

Appeal against the appellate order of the District Court, Coimbatore, dated the 23rd February 1922, in A. S. No. 42 of 1922, preferred against the order of the Court of the District Munsif, Dharapuram, in E. P. R. No. 669 of 1921, in O. S. No. 76 of 1921.

Mr. *M. Krishna Bharati*, for the Appellant.

Mr. *T. N. Seshachella Iyer*, for the Respondents.

JUDGMENT.—Both the lower Courts have treated the sum payable under the decree on a breach of the condition, in the nature of a penalty and relying upon *Sheikh Mohidin Tharagan* v. *Vadivalagianambia Pillai* (1), have dismissed the plaintiff's application.

The question to be decided is: Is the doctrine of relieving against penalty to be applied to decrees? In *Nagappa* v. *Venkat Rao* (2), it has been held that the adoption of a contract by a Court amounts to an adoption of it with all its legal incidents and that the considerations which would arise if a mere contract were in question would equally apply to the enforcement of a decree embodying the contract. As the court would have relieved the defendant from the penalty if the question had arisen in respect of a mere contract, it was likewise justified in relieving him from the penalty in the compromise decree containing the contract between the parties. The order, therefore, of the lower Court is correct and this appeal is dismissed, but in the circumstances without costs.

V. N. V. *Appeal dismissed.*

S. D.

(1) 22 Ind. Cas. 37; (1914) M. W. N 92.
(2) 24 M. 265.

PATNA HIGH COURT.

CIVIL APPEALS NOS. 170 AND 276 TO 278 OF 1922.

July 3, 1924.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

RAMSARAN MAHTON AND OTHERS —DEFENDANTS —APPELLANTS

versus

Syed MUHAMMAD ARADUT HUSSAIN PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 50, 115—"Thereafter," Meaning of in s. 115—Record of rights published—Presumption under s. 50.

The word "thereafter" in section 115 of the Bengal Tenancy Act refers to a period subsequent to the publication of the record of rights, but what is provided is that the presumption under section 50 shall not thereafter, that is to say after the particulars mentioned in section 102 have been recorded, apply. [p. 927, col. 2.]

Once the record of rights has been finally recorded as provided in section 115 of the Act, then the presumption under section 50 is no longer open to the tenants whether they are relying upon a payment of rent at a uniform rate either before or after the publication of the record of rights. [p. 928, col. 1.]

Maharaja Bahadur Kesho Prasad Singh v. *Ramjas Pande*, 79 Ind. Cas. 199 ; 2 Pat. 92 ; (1923) A. I. R. (Pat.) 324 ; *Govinda Lal Sijuar* v. *Ram Sahu*, 68 Ind. Cas. 433 ; 2 P. L. T. 642, followed.

Appeal from a decision of the Additional Subordinate Judge, Patna, dated the 1st December 1922, modifying a decision of the Munsif, Patna, dated the 30th March 1921.

Mr. *A. K. Rai*, for the Appellants.

Mr. *S. C. Mitter*, for the Respondent.

JUDGMENT.

Miller, C. J.—These appeals arise out of suits instituted by the landlord the proprietor of *mouza* Dhanaut against a number of his tenants claiming enhancement of rent under section 30 of the Bengal Tenancy Act.

The learned Munsif after hearing the evidence arrived at the conclusion that the land-

RAMSARAN MAHTON *v.* SYED MUHAMMAD ARADUT HUSSAIN

lord was entitled to enhancement at the rate of 2 annas in the rupee.

The tenants appealed from this decision and the landlord filed a cross-appeal claiming that the rate of enhancement ought to be more than the 2 annas found by the Munsif. The learned Subordinate Judge dismissed the appeal of the tenants and allowed the appeal of the landlord. He found by calculation under section 32 of the Bengal Tenancy Act that the rate at which the enhancement should be allowed worked out at 3 annas 8 pies in the rupee and that the Munsif had taken too lenient a view of the case in favour of the defendants by reducing it to 2 annas. He considered that the Court had no option; that it could not reduce the enhancement which was found by calculation under section 32 to be the proper rate of enhancement. He considered, therefore, that the plaintiff was entitled to the full enhancement worked out in accordance with that section but as he had only claimed 3 annas 6 pies he decreed enhancement at that rate.

From this decision the tenants have appealed. It would appear that they called evidence to shew that they had been in occupation of their holdings for a period of 20 years before the suit paying rent at the same rate. They further contended that they were not liable to enhancement at all as they were tenants at fixed rates. In support of this contention they prayed in aid the provisions of section 50 of the Bengal Tenancy Act. The learned Subordinate Judge, however, considered that that section in the circumstances of the case had no application, because the Record-of-Rights had been finally published and recorded within the meaning of section 115 of the Bengal Tenancy Act and that the presumption arising under section 50 no longer existed after final publication of the Record-of-Rights. It has been argued on behalf of the appellants before us that section 115 of the Bengal Tenancy Act applies only in bar of the tenants' right to rely upon the presumption under section 50 in so far as they rely upon occupancy for 20 years after the publication of the Record-of-Rights and that if they can shew that they have been in occupation paying the same rent for 20 years before the publication of the Record-of-Rights then section 115 has no operation. According to what I should consider to be the ordinary and natural interpretation of section 115 the presumption under section 50 ceases to apply in all cases except in so far as the Act may otherwise determine once the particulars mentioned in section 102, clause (*b*) have been recorded under Chapter X. In support of their contention the appellants rely upon a case decided in the year 1908 in the Calcutta High Court by Mr. Justice Doss, *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali*.(1) In that case the landlord brought a suit for enhancement of rent. It was held that notwithstanding the provisions of section 115 of the Act the tenant was entitled upon proof of uniform payment of rent for 20 years before the Record of-Rights was framed to the benefit of the presumption arising under sub-section (2) of clause 50. The learned Judge considered that the word "thereafter" in section 115 referred to a period subsequent to the publication of the Record-of-Rights. There can be no doubt, in my mind, that the word "thereafter" does refer to a period subsequent to the publication of the Record of-Rights, but what is provided is that the presumption under section 50 shall not thereafter, that is to say after the particulars mentioned in section 102 have been recorded, apply. This decision so far as I am aware has not received any support in other cases. It was referred to in a latter case of the Calcutta High Court in *Parthichand Lal Chowdhry* v. *Basarat Lal* (2) and on that occasion a Full Bench of the Calcutta High Court expressed the view that the wording of section 115 was plain enough and might without anything else lead to the conclusion that as soon as a final record is framed under section 103-A clause (2) the particulars mentioned in section 102 clause (*b*) should be taken to have been recorded and the presumption under section 50 should cease to apply thereafter to that tenancy. The question, however, in that case was whether the presumption arising under section 50 was still available to the tenant in proceedings under section 105 although the Record-of-Rights had been finally published. Their Lordships considered the history of the matter and pointed out that from 1885 up to the year 1898 the

(1) 12 C. W. N. 904.
(2) 3 Ind. Cas. 449; 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 348.

tenant always had the benefit of the presumption under section 50 in all proceedings under sections 105 and 106 and they did not think that section 115 was intended to take away that benefit. They regarded proceedings under section 105 as proceedings which would have to be recorded eventually and when a decision was given under that section the Record-of-Rights might be amended and was always liable to amendment until proceedings under that section had come to an end. That case, however, is no authority in support of the plaintiff's contention in the present case. Indeed in so far as this Court is concerned the matter has been considered on more than one occasion. At least four cases have been drawn to our attention which are to the same effect. I need only refer to two of them. In *Maharaja Bahadur Kesho Prasad Singh* v. *Ramjas Pande* (3), it was decided by a Division Bench of this Court that after the the publication of the Record-of-Rights the tenants are not in view of section 115 of the Bengal Tenancy Act entitled to the benefit of the presumption which arises under section 50, clause (2) and, therefore, in order to establish that they are entitled to their holdings on payment of a fixed rent in perpetuity they must prove by evidence that they have held the land at a rate of rent which has not been changed since the time of the Permanent Settlement. Incidentally they found that production of rent receipts shewing payment at a uniform rate for 33 years was not sufficient to prove that the rate of rent had not changed since the date of the Permanent Settlement. Again in the case of *Gobind Lal Sijuar* v. *Ram Sahu* (4), it was decided that under section 115 of the Act a tenant cannot rely upon the presumption under section 50, clause (2) after the final publication of the Record-of-Rights except in a suit instituted under section 106 challenging the entry itself within three months from the date of final publication. These cases and others which it is unnecessary to refer to seem to shew that there has been a uniform course of decisions in this Court which lay down the view that once the Record-of-Rights has been finally recorded as provided in section 115 then the presumption under section 50 is no longer open to the tenants whether they are relying upon a payment of rent at a uniform rate either before or after the publication of the Record-of-Rights. In my opinion this point must be decided against the appellants.

The only other question which was raised was that the learned Judge in arriving at the rate of enhancement had not stated any particulars or figures shewing how he arrived at it. What he does say is that by calculation under section 32 of the Act the rate at which the enhancement should be allowed is found to be 3 annas 8 pies. It is contended that this is not sufficient and that not having given his figures or his methods of calculation the appellants are not in a position to criticise the manner in which he arrived at his figure of 3 annas 8 pies. The appellants, however, had at their disposal full information as to the rates which were taken into consideration in arriving at that figure and if they were prepared to shew that the result of the learned Judge's calculation was wrong in any particular we certainly should have heard their argument about it. The learned Vakil for the appellants, however, is unable to shew us in what particular he could satisfy the Court, if we remanded this case, that the learned Judge had arrived at a wrong result. In the circumstances it seems to me that we should not be justified in sending back this case for further hearing merely because the learned Judge has not set out in detail the figures by which he arrived at his result. In second appeal we will never send back a case for further consideration merely because it is suggested that if the matter went back some different result might possibly be arrived at. It has not been pointed out to us at all in what particulars these figures are wrong. In my opinion these appeals must be dismissed with costs.

Foster, J.—I agree.

K. S. D. *Appeal dismissed.*

(3) 79 Ind. Cas. 199 ; '2 Pat. 92 ; (1928) A. I. R. (Pat.) 324.

(4) 68 Ind. Cas. 433; 2 P. L. T. 642.

DEVARAJULU NAIDU *v.* KONDAMMAL

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 651 OF 1921.

February 14, 1924.

Present :—Mr. Justice Krishnan.

T. DEVARAJULU NAIDU—
DEFENDANT—APPELLANT

versus

KONDAMMAL AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Receiver in possession of properties under s. 146, Criminal Procedure Code—Suit to establish title—Consequential relief for possession, whether necessary—Hindu Law—Partition among minors—Legality.

Where a magistrate by his order under section 146, Criminal Procedure Code placed the properties, the subject of dispute, in the possession of a Receiver, that Receiver must be taken to be in possession on behalf of the persons properly entitled to the properties [p. 929, col. 2.]

Therefore, a plaintiff suing to establish a title in such a case, need not seek any consequential relief by way of recovery of possession. It is sufficient for him to sue for mere declaration of title. [p. 930, col. 1.]

The Administrator-General of Bengal v. *Bhagaban Chandra Roy Chowdhuri*, 10 Ind. Cas 581; 15 C.W.N. 758; *Rajah of Venkatagiri* v. *Isakpalli Subbiah*, 26 M. 410; *Vedanayaga Mudaliar* v. *Vedammal*, 27 M. 591, relied on.

There is no rule of Hindu Law which prohibits a division of properties by minors amongst themselves, where they are properly represented by guardians in the transaction. [p. 930, col. 1.]

Balakrishen Das v. *Ram Narain Sahu*, 30 C. 788 at p. 752; 30 I. A. 139; 7 C W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489 (P. C.), relied on.

Appeal against the decree of the District Court, North Arcot at Vellore in A. S. No. 130 of 1920 preferred against the decree of the Court of the Temporary Subordinate Judge, Vellore, in O. S. No. 5 of 1917 (O. S. No. 41 of 1915 on the file of the Sub-Court, North Arcot.)

Mr. *V. C. Seshachariar*, for the Appellant.

Mr. *A. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.—The plaintiffs sue for a declaration that they are entitled to the properties in the plaint A and B Schedules and the value of C schedule properties. There was a dispute likely to lead to a breach of the peace with reference to these properties between the plaintiffs and the defendants and the matter was taken up by the Magistrate under section 145 of the Code of Criminal Procedure. The Magistrate's order, which was read to me shows that, finding himself unable to say which party was in possession of the properties, he directed the properties to be attached under section 146, Criminal Procedure Code and placed them in the possession of a Receiver pending a decision of the Civil Court in favour of one or other of the parties. It is as a result of that order that this suit has been brought by the plaintiffs for an adjudication as stated above that they are the persons entitled to the properties.

It is objected in Second Appeal *in limine* that the suit as brought is not maintainable, the plaintiffs ought to have sued for possession of the properties as well and that they are not entitled to ask for a mere declaration under section 42 of the Specific Relief Act. On the authorities I do not think that this contention can be supported.

The Magistrate, by his order, has placed the properties in the possession of the Receiver and that Receiver must be taken to be in possession on behalf of the persons properly entitled to the properties. If the plaintiffs can establish their title, then the possession of the Receiver would be on their behalf and they need not seek any further relief for recovering possession from the Receiver. This has been laid down in the authority cited by the learned Subordinate Judge, *The Administrator-General of Bengal* v. *Bhagban Chandra Ray Choudhuri*, (1). This position is also supported by the ruling in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2) where the possession of a Receiver was held to be the possession of the rightful party. Again in *Vedanayaga Mudaliar* v. *Vedammal* (3), it was ruled, in circumstances similar to this, that, where a Receiver

(1) 10 Ind. Cas. 581; 15 C. W. N. 758.
(2) 26 M. 410.
(3) 27 M. 591.

is in possession it is not necessary to sue for consequential relief by way of recovery of possession, but that it was sufficient to sue for a mere declaration.

The learned Vakil for the appellant has tried to raise a special point in this case on the ground that at the time when the Magistrate ordered the attachment of the properties, the properties were not in the possession of the plaintiffs but were apparently lying fallow and uncultivated, the possession of the properties being in dispute. That can make no difference at all, on the point of law. As the Receiver was appointed by the Magistrate to take possession of the properties, he must thereafter be taken to be in possession, and, if his possession is that of a rightful owner, then the plaintiffs have only to establish that they are the rightful owners, and no further reliefs need be claimed by them. The first objection, therefore, fails and must be rejected.

One point taken on the merits is that, in this case, the alleged partition between the deceased brother of the plaintiffs and defendants Nos. 1 to 3 was not a valid partition at all, because at the time of partition all the coparceners were minors. The alleged partition was a partition where the mothers of these various minors were acting as their guardians. As the learned District Judge says, there is no rule that minors cannot divide their properties among themselves when they are properly represented by guardians in the transaction. No case has been brought to my notice where all the coparceners were minors, but it has been laid down that the fact that some of the coparceners are minors will not prevent a partition from being valid, if no advantage is taken of their minority to their loss see the Privy Council decision in *Balkishen Das* v. *Ram Narain Sahu* (4).

At page 752 their Lordships observe :—

"The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding on the coparceners, who were minors at the date of it. But they think that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition and if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority by proper proceedings set it aside, so far as regards himself."

Now, in this case the minors all became majors long previously, about 8 or 10 years ago. No steps have been taken by any of them to set aside the partition at all, and, as pointed out by the learned District Judge, they have acted upon the partition and treated it as good by dealing with their respective shares as each liked by executing sale deeds in respect of them—See Exs. E and E (1). Ex. E, is a sale-deed executed by the 1st defendant himself, who is the sole appellant before me. The learned Judge has also considered whether there was anything to show that the division was unusual or unfair, and has held that there is nothing to show it. In fact it is not alleged that the partition has been either unusual or unfair, and the fact that the parties are standing by it and acquiescing in it is a strong circumstance against the partition being in any way unfair.

In these circumstances, I am not prepared to differ from the learned District Judge who held that this partition was a good partition. It is true that the partition is not evidenced by any document, but the evidence in the case is sufficient to support the finding that there was a partition between Varadarajulu Naidu and defendants Nos. 1 to 3, before the former's death.

That being so, his will, Ex. F, under which his mother Kanniammal got the property is a valid will, and if she was entitled to the properties, plaintiffs must now be held to be entitled to those properties after her death. It was no doubt stated in the written statement that the will was not true in fact when the defendants took objection to its validity as well, but, in the issues, I find no question raised as to the factum of the will. There is nothing before me to show that the defendants insisted upon their plea in their written

(4) 30 C. 738 at p. 752 ; 30 I. A. 139 ; 7 C. W. N. 578 ; 5 Bom. L. R. 461 ; 8 Sar. P. C. J. 489 (P. C.).

statement that the will was not genuine being tried. Issues are framed not only with reference to written statements but also with reference to statements made at the time when they are framed. The fact that the will is a registered will may very likely, as stated by the learned Vakil for the respondent, have led to the defendants giving up their plea as to the factum of the will. There is no substance in the plea now urged that I should raise an issue for the first time as to the factum of the will and call for a finding thereon. If there was anything wrong with the issues framed, it was for defendants then and there to have applied to the Trial Court to amend the issues and put them right ; nothing of that sort was done.

On the evidence I must hold that the decision of the District Judge is correct. The Second Appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

S. D.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 442 OF 1924.

May 28, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

CHARN CHANDRA GHOSH—JUDGMENT-DEBTOR—PETITIONER

versus

RAI BEHARI LAL MITRA BAHADUR—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) O. XXI, rr. 90, 92—Application to set aside sale—Notice to opposite party, object of—Formal notice, whether necessary—Rules of procedure, object of.

The object of r. 92 of O XXI Civil Procedure Code is to give due notice of the application for setting aside a sale to all parties concerned and give them an opportunity of contesting it so that no order may be passed to the prejudice of any party behind his back. This object will be equally achieved if the party has otherwise notice of the application. [p. 932, col. 1.]

Santosh Bala Debi v. *Ramchandra Ghati*, 67 Ind Cas 286, referred to.

Rules of procedure are not made for the purpose of hindering justice. [p. 932, col. 1.]

Indrajit Pratap Bahadur Sahi v. *Amar Singh*, 74 Ind Cas. 741 ; 39 C. L. J. 318 ; 21 A. L. J. 554 ; 4 P. L. T. 447 ; (1923) A. I R. (P. C.) 128 ; 1 P. L R. 345; 2 Pat. 676 ; 33 M. L. T. 233 ; 45 M. L. J. 578 ; 18 L W. 728 ; 25 Bom. L. R. 1259 ; 28 C. W. N. 277 ; 50 I. A. 183 (P. C.), followed.

Rule in the matter of Mis. Appeal No. 266 of 1923, of the Court of the District Judge, Backergunge at Barisal, (Mis. Case No. 23 of 1923, arising out of the Rent Execution Case No. 25 of 1922, of the Sub-Judge, 2nd Court, Backergunge at Barisal).

Babu *Atul Chandra Gupta* (with him Babu *Jyotish Chandra Guha*), for the Petitioner.

Babu *Jogesh Chandra Roy* (with him Babu *Birbhusan Dutt*), for the Opposite Party.

JUDGMENT.—This Rule is issued against an order of the District Judge of Barisal reversing an order of the Subordinate Judge of that place setting aside a sale under O. XXI, r. 90, Civil Procedure Code. The learned Subordinate Judge had held that there were suppression of sale processes and other material irregularities and set aside the sale accordingly. The learned District Judge on appeal proceeded upon one single point, namely, the absence of proof of service of notice on the decree-holder. It may be remarked that in this case the decree-holder was the auction-purchaser. The learned District Judge has found that there was no proof of service of notice of the application on the decree-holder which is necessary to entitle a Court to pass an order under r. 90 and in this view of the matter dismissed the petitioner's application for setting aside the sale. This rule was obtained on the ground that the view taken by the Court below was wrong and that he had no jurisdiction to dismiss the petitioner's application for setting aside the sale only on the ground that no notice was

served on the decree-holder auction-purchaser. In our judgment there is a great deal of force in this contention. Order XXI, r. 92 no doubt lays down that no order should be made unless notice of the application has been given to all persons affected thereby. The object of this enactment is to give notice of the application to all parties concerned and give them an opportunity of contesting it so that no order may be passed to the prejudice of any party behind his back. This object will equally be achieved if the party has otherwise notice of the application. Rules of Procedure are not made for the purpose of hindering justice, *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1). If a party to a sale had notice of the application, it would not ordinarily seem necessary that a mere formality should be observed in order to comply with the requirements of the law. This provision is intended more to safeguard the interest of strangers like a stranger auction-purchaser. A view similar to this was taken in the case of *Santosh Bala Debi* v. *Ram Chandra Ghate* (2). We, therefore, think that the order passed by the learned Judge cannot be supported and must be set aside. The case will, therefore, go back to him for an enquiry as to whether the decree-holder had really any notice of this application or not. It appears from the record of the first Court that the sale took place on the 10th February in which the decree-holder became the purchaser. The 12th March was fixed for confirmation of sale. On the 10th March this application was made and it was ordered to be put up on the 7th April for hearing and both parties were directed to appear on that date. On the 12th March it was ordered that the execution case be put along with the miscellaneous case. This order may lead one to presume that the decree-holder had notice of the application. Whether he had or not should be determined on proper enquiry and in the present case the petitioner had no opportunity of proving that the decree-holder had notice of the application. The case will, therefore, go back to the learned Judge for enquiry as to whether the decree-holder had any notice of this application; and, if he holds he had he will hear the appeal on the merits.

Costs will abide the result. We assess the hearing-fee at one gold mohur.

K. S. D. *Appeal allowed.*

(1) 74 Ind. Cas. 747; 39 C. L. J. 318; 21 A. L. J. 554; 4 P. L.T. 447; (1923) A. I.R. (P.C.) 128; 1 P.L. R. 345; 2 Pat. 676; 33 M. L.J. 233; 45 M.L. J. 578; 18 L. W. 728; 26 Bom. L. R. 1259; 28 C. W. N. 277; 50 I. A. 188 (P. C.).

(2) 67 Ind. Cas. 286.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 160 OF 1923.

April 25, 1924.

Present :—Mr. Justice Ramesam.

JAGANNATHA REDDIAR—DEFENDANT—PETITIONER

versus

LAKSHMANA REDDIAR—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 35, 93, 105, 106,—Pro-note payable on demand—Endorsement—Payment by maker—Cause of action against endorser—Delay in presentation—Notice of dishonour—Endorser's liability—Limitation.

The liability of an endorser of a negotiable promissory-note arises out of the endorsement and not on the note. Therefore, the cause of action against him cannot arise earlier than the endorsement. [p. 933, col. 1.]

A payment by the maker of a note saves limitation against persons liable on the note but not against those liable on the endorsement. [p. 933, col. 1.]

The extent and nature of the liability of the endorser of a note payable on demand is not governed by section 35 of the Negotiable Instruments Act. Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. If it is not so presented, the endorser is discharged. [p. 933, col. 1.]

Sivaramakrishna Pattar v. *Moideen Musaliar*, 8 Ind. Cas. 428; 33 M. 34; 6 M. L. T. 237; 19 M. L. J. 509, relied on.

Where an endorsee presented a note to the maker for payment nearly nine months after endorsement and a part-payment of one Rupee was endorsed on the note by the maker and notice of dishonour was given to the endorsee only just before suit, in a suit against the maker and endorsee more than three years after endorsement;

Held, that the suit was barred by limitation as against the endorser even if he was at all liable. [p. 933, col. 2.]

RADHA LAL v. MULCHAND

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge, Chingleput, in Small Cause Suit No. 724 of 1921.

Mr. *A. Rama Krishna Aiyer*, for the Petitioner.

Mr. *S. Muthiah Mudaliar*, for the Respondent.

JUDGMENT.— This Revision petition arises out of a suit on a negotiable promissory-note (dated 24th December 1915) payable on demand by the endoreer of the note against the maker (first defendant) and the endorser (2nd defendant). The Subordinate Judge gave a decree against both the defendants.

The second defendant filed this petition. In his written statement, he raised the question of limitation. The second point for determination stated by the Subordinate Judge is whether the second defendant is liable. I presume that it was intended to include the question of limitation also, though the Subordinate Judge has not discussed it.

The liability of the second defendant arises out of the endorsement and not on the note. The cause of action against him cannot arise earlier than the endorsement (dated 19th March 1918). A payment of one Rupee by the first defendant was endorsed on it and signed by the first defendant on 20th December 1918. This saves limitation as against persons liable on the note and has nothing to do with persons liable on the endorsement. The suit is filed on 20th December 1921. If the cause of action arises before 20th December 1918, the suit is barred by limitation.

The extent and nature of the liability of the endorser of a note payable on demand is not governed by section 35 of the Negotiable Instruments Act. We have to deal with the case of a note payable on demand which has been negotiated by indorsement before it is overdue and has been dishonoured. *Sivaramakrishna Pattar* v. *Moideen Musaliar* (1). According to section 86 of the Bills of Exchange Act "Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. If it is not presented, the endorser is discharged." The law in India must be, by analogy, (1) to the same effect or (2) subject to a contract to the contrary or (3) the indorser is not liable at all. Taking the most lenient view in favour of the plaintiff, in this case, the note can be regarded as presented for payment only on 20th December 1918 when one Rupee was paid by the first defendant and not earlier. It cannot be said that it was presented within a reasonable time after the endorsement. I do not think it should be in the option of the indorsee by waiting for an unreasonable length of time to postpone the cause of action as he likes. Notice of dishonour is also necessary as a condition precedent to the liability of the second defendant, (section 93) and it also ought to be sent within a reasonable time (see section 94 and sections 105 and 106 of the Negotiable Instruments Act). It is admitted that the notice of the dishonour was given to the second defendant only just before suit. The plaintiff cannot be in a better position than if he presented the note for payment within a reasonable time after indorsement and gave notice of dishonour within a reasonable time after dishonour.

I find the suit is barred by limitation as against the second defendant and I doubt if he is liable at all. The Revision Petition is allowed and the suit is dismissed with costs throughout against the second defendant. The decree against the first defendant will stand.

V. N. V. *Revision allowed.*

(1) 8 Ind. Cas. 428 ; 33 M. 34 ; 6 M. L. T. 237 ; 19 M. L. J. 509.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 463 OF 1921.

May 20, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

RADHA LAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MULCHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 11—Suit for partition compromised—Subsequent suit, whether barred—Res judicata.

RADHA LAL *v.* MULCHAND

A suit for partition compromised by the parties agreeing not to press their claim for partition, does not bar a subsequent suit for partition, because the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists any of the joint tenants may apply to the Court for partition of joint property. [p. 934, col. 2.]

Gulkandi Lal v. *Mannu Lal*, 23 A. 219 ; A. W. N. (1901) 66, dissented from.

T. C Mukerji v. *Afzal Beg*, 27 Ind. Cas. 694 : 37 A. 155 ; 13 A. L. J. 98 ; *Madan Mohan Mandal* v. *Baikunta Nath Mondal*, 10 C. W. N. 839 followed.

Nasratullah v. *Mujibullah*, 13 A. 309 ; A. W. N. (1891) 117 ; 7 Ind. Dec. (N. S.) 195 ; *Bisheshar Das* v. *Ram Prasad*, 28 A. 627 ; A. W. N (1906) 142 ; 3 A. L. J. 379, referred to.

Appeal against the decree of the Subordinate Judge, Mainpuri, dated the 28th July 1921.

Messrs. *Gulzari Lal* and *S. S. Sastry*, for the Appellants.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—The plaintiffs' suit for partition was dismissed by the first Civil Court on the ground that it was barred by the principle of *res judicata*. It appears that the plaintiffs, excepting one Lallu, subsequently born, had sued on 8th September 1919, for partition. This suit was compromised and both the parties filed a joint petition on 31st August 1920. It was to the effect : "In the above case the parties entered into a compromise at the remonstrance of a few respectable persons. The parties shall bear their own costs. The plaintiffs withdrew their claim. Hence, the claim should be struck off." (page 43). This petition of compromise was verified by all the parties (page 47). A decree was passed in accordance with this compromise (page 49). This order was: "It is ordered and decreed that according to the compromise this case be struck off. The parties to bear their own costs." The terms of the compromise are not given and the conclusion we draw is that at that particular time the plaintiffs did not desire to press their claim for partition. There was no decision arrived at, that the plaintiffs had no interest in the properties in suit, or that they were not joint holders of the properties with the defendants.

The learned Judge of the lower Court has relied on a Division Bench ruling of this Court. *Gulkandi Lal* v. *Mannu Lal* (1). That ruling, however, was not followed in a subsequent case of this Court, *T. C. Mukerji* v. *Afzal Beg* (2), which ruling was based on a ruling of this Court *Nasrat Ullah* v. *Mujib Ullah* (3), prior in date to the case reported in *Gulkandi Lal* v. *Mannu Lal* (1). Subsequent to and prior to the 1914 ruling in the case of *T. C. Bannerji* a Bench of this Court held in *Bishesar Das* v. *Ram Prasad* (4), that where a suit for partition was dismissed for default and a fresh suit instituted, there would be no bar under section 13 of the Civil Procedure Code because the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists any of the joint tenants may apply to the Court for partition of a joint property. One of the Judges who delivered the judgment in 1906 was one of the two, who delivered judgment in 1901 in the case reported in *Gulkandi Lal* v. *Munnu Lal* (1). In 1906 the Calcutta High Court held in *Madan Mohan Mondal* v. *Baikanta Nath Mondal* (5) that a fresh suit for partition is not barred by section 13 of the Civil Procedure Code, when a previous suit for partition by the plaintiffs has been compromised. The suit was subsequently dismissed on parties failing to appear during execution proceedings of the preliminary decree passed on compromise. The learned Judge observed at page 840, col. 2 of the Report, following the ruling in *Naslrat Ullah* v. *Mujib Ullah* (3) that a suit for declaration of right for partition differs from most other suits in this respect that so long as the property is jointly held a right to partition continues. For these reasons we do not think that the lower Court was corect in following the ruling in the case of Gulkandi Lal.

We set aside the decree of the lower Court and remit the suit to it for trial on the merits. Costs here and here-to-fore shall abide the result, including costs here on the higher scale.

K. S. D. *Appeal allowed.*
S. D.

(1) 23 A. 319 ; A. W. N. (1901) 66.
(2) 27 Ind Cas. 694 ; 37 A. 155 ; 13 A. L. J. 98.
(3) 13 A. 309 ; A. W. N. (1891) 117 ; 7 Ind. Dec. (N S.) 195.
(4) 28 A. 627 ; A. W. N. (1906) 142 ; 3 A. L. J. 379.
(5) 10 C. W. N. 839.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 178 OF 1923.

April 3, 1924.

Present :—Mr. Justice Jackson.

THE COLLECTOR OF KRISHNA—
PETITIONER

versus

GAJJALA SREERAMAMOORTHY—
RESPONDENT.

Court-fees—Crown—Crown debts.

The Court-fees form a Crown debt and the Crown is entitled to precedence in payment of this debt over all creditors. [p. 935, col. 1.]

Gayanonda Bala Dassee v. *Butto Kristo Bairagee*, 33 C. 1040 ; 10 C. W. N. 857, followed.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order dated the 6th November 1922 of the Court of the District Munsif, Bhimavaram, in C. M. P. No 160 of 1922 in Original Suit No. 721 of 1915 on the file of the Court of the District Munsif, Masulipatam.

Mr. *C. V. Ananthakrishna Iyer*, for the Petitioner.

JUDGMENT.—Plaintiff in O. S. No. 26 of 1920 on the file of the Court of the Additional Subordinate Judge of Ellore sued defendant in *forma pauperis*. The decree directed defendant to pay Rs. 250 to Government being pauper stamp duty. Defendant's properties were sold in execution and Government applied for payment of Rs. 229-11-0 out of the sale proceeds and obtained a cheque for that amount. Plaintiff applied for redeposit in as much as he had brought the property to sale, and the District Munsif has allowed his application. Hence this revision petition. The Court-fees form a Crown debt and the Crown is entitled to precedence in payment of this debt over all creditors. *Gayanonda Bala Dassee* v. *Butto Kristo Bairagee* (1). The fact that plaintiff brought the property to sale is immaterial. The petition is allowed and the order of the District Judge is reversed. Costs will be paid to the petitioner throughout.

V. N. V. *Petition allowed.*

(1) 33 C. 1040 ; 10 C. W. N. 857.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1609 OF 1922.

June 19, 1924.

Present :—Mr. Justice Sulaiman and
Mr. Justice Kanhaiya Lal.

BAKHA SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

RAM NARAIN SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee—Redemption—Adverse possession.

A mortgagee cannot deny the right of the mortgagor or his successor in interest to redeem the mortgage so long as the equity of redemption subsists nor can he set up or acquire title by adverse possession so long as the right to redeem subsists and is not barred by limitation. [p. 937, col. 2.]

Seshamma Shettati v. *Chickaya Hegade*, 25 M. 507 at p. 511 ; 12 M. L. J. 119, followed.

Kunwar Sen v. *Darbari Lal*, 34 Ind. Cas. 171 ; 38 A. 411; *Khairaj Mal* v. *Daim*, 32 C. 206 ; 9 C. W. N. 201 ; 2 A. L. J 71 ; 7 Bom. L. R. 1 ; 1 C. L. J. 534 ; 32 I. A. 23 ; 8 Sar. P. C. J. 734 (P C.), referred to.

Appeal from a decree of the Subordinate Judge, Jaunpur, dated the 3th July 1922.

Mr. *M. S. Bajpai*, for the Appellants.

Dr. *S. N. Sen* and Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The suit which has given rise to this appeal was brought by the plaintiffs appellants for the redemption of three mortgages of different dates and comprising some common and some separate properties. The first mortgage was effected by Sakaldip Singh and Ghazi Mal in favour of Naurang Singh and Ujagar Singh on the 10th of June 1865 and the period fixed for redemption was

8 years. The second mortgage was effected by way of a *zaripeshgi* lease by Sakaldip Singh, Subh Karan Singh and Prayag Singh on the 19th of February 1869 in favour of the same mortgagees for a period of 10 years. The third mortgage was made by Binda Singh in favour of the same mortgagees on the 31st of March 1870.

On the 26th of July 1869 Sakaldip Singh and Prayag Singh sold their interests in the equity of redemption to Bhawani Din Singh, Thakur Prasad Singh and Dawan Singh and left a portion of the sale consideration for the satisfaction of the first two mortgages. Bhawani Din Singh was the uncle and Takur Prasad Singh was the nephew of the mortgagees. Dawan Singh is said to have been the brother of the wife of Ujagar Singh and it is common ground that his name was fictitiously entered in the sale deed. Whether the vendees paid the money left with them for the satisfaction of the prior mortgages to the prior mortgagees is not clear. On the 17th of June 1872 Binda Singh sold his interest in the equity of redemption to Bhawani Din Singh and Thakur Prasad Singh and left a portion of the sale consideration for the payment of the third mortgage above referred to, but whether the vendees paid the money to the prior mortgagees is not clear.

The plaintiffs claimed to be the legal representatives of Thakur Prasad Singh and as such they sued for the redemption of half the properties sold by the above deeds of sale alleging that the interest of Bhawani Din Singh the owner of the other half of the equity of redemption had passed to Naurang Singh the predecessor-in-title of the defendants Nos. 1 to 5 and that Naurang Singh and the defendants Nos. 1 to 5 had in their capacity as the owners of the other half of the equity of redemption got the mortgaged property redeemed from Ujagar Singh or his heirs to the extent of the interest of Ujagar Singh in the said mortgages. The suit was contested by the defendants Nos. 1 to 5 on various grounds. In order to understand the nature of their defence it will be necessary to refer to the pedigree appended to the judgment of the lower Appellate Court, showing that one Subansa Singh had two sons, Pheran Singh and Dayal Singh. Pheran Singh was the father of Naurang Singh and Ujagar Singh, the mortgagees. Dayal Singh was the father of Bhawani Din Singh, one of the purchasers of the equity of redemption. Thakur Prasad Singh, the other purchaser was the son of Sarabjit Singh, a brother of Naurang Singh and Ujagar Singh. The defendants Nos. 1 to 5 denied that the plaintiffs had any right to sue and pleaded that the name of Ujagar Singh was fictitiously entered in the mortgage deed, that he had never been in possession of the mortgaged property and that the sale deed in favour of Thakur Prasad Singh, Bhawani Din Singh and Dawan Singh was similarly fictitious. Their contention really was that Naurang Singh had taken the mortgages in question with his own funds and had got the name of his brother Ujagar Singh fictitiously entered in the deeds, that the real purchaser of the equity of redemption from the original owners was Naurang Singh himself and that neither Thakur Prasad Singh nor Dawan Singh nor Bhawani Din Singh had paid any portion of the consideration or obtained possession of any portion of the property in dispute. In other words they set up Naurang Singh's exclusive title as a mortgagee and then as a vendee and thereafter by reason of his adverse possession for a period of more than 12 years.

It is admitted in the written statement that there had been a separation in the family of the parties in the time of Pheran Singh and Dayal Singh and that the sons of Pheran Singh had also separated after the death of Pheran Singh, but it is nowhere asserted that the mortgages in question had been obtained by Naurang Singh and Ujagar Singh as members of a joint Hindu family or that the sales aforesaid had been obtained by Thakur Prasad Singh and Bhawani Din Singh for the benefit of the said family in satisfaction of the said mortgages.

The Court of first instance found that the defendants had failed to establish that the name of Ujagar Singh was entered fictitiously in the deeds of mortgage and that the names of Thakur Prasad Singh and Bhawani Din Singh were fictitiously entered in the deeds of sale. It also found that every fact and document were consistent with the theory of the co ownership of Thakur Prasad Singh and Naurang Singh after the disputed sales, and as an explanation for

the exclusive possession of Naurang Singh it suggested that the mortgages and sales were taken for the benefit of the joint family comprising the two mortgagees and Thakur Prasad Singh, that the sales had thus the effect of extinguishing the mortgages and that by some arrangement Naurang Singh had became the exclusive possessor of the disputed properties It then proceeded to find that Naurang Singh had been in adverse possession of the properties in question for more than 12 years prior to the suit and that the claim was barred by limitation.

The lower Appellate Court upheld those findings. It pointed out that an attempt was made in 1902 by Naurang Singh to set up his own exclusive title and seek the removal of the name of Thakur Prasad Singh from the revenue papers but without success. It also pointed out that on the death of Thakur Prasad Singh his son Bakha Singh, one of the plaintiffs to the present suit, applied for the entry of his name in place of Thakur Prasad Singh and his application was opposed by Naurang Singh on the same ground and that though the application of Bakha Singh was allowed the name of Naurang Singh continued throughout entered as that of the person in actual possession of the property. From that fact the lower Appellate Court concluded that the exclusive title of Naurang Singh and his heirs by adverse possession for more than 12 years had been established beyond dispute.

In effect the Court below further held that the mortgages in question had ceased to subsist and that no suit for redemption was maintainable.

It is conceded that unless the mortgages were paid or that some other event had happened to put an end to the equity of redemption a suit for redemption would be maintainable; if brought within 60 years from the date when the right to redeem accrues. The contesting defendants did not set up anywhere in the pleadings that the mortgages in question had been redeemed except in so far they alleged that Naurang Singh was really the sole mortgagee and sole purchaser of the equity of redemption. The Courts below, however, found that the entire family owned the mortgages, including the two mortgagees Naurang Singh and Ujagar Singh and that the entire family had purchased the equity of redemption. It is noticeable, however, that one of the mortgagors, namely Ghazi Mal, had not joined in the sales and his interest in the equity of redemption still remains unaffected. It is further noticeable that neither party set up in its pleadings anything suggesting that all the descendants of Pheran Singh, the father of Naurang Singh and Ujagar Singh, were the owners of the mortgagee rights or had purchased the equity of redemption of the persons who had effected the sales. On the other hand one of the purchasers was Bhawani Din Singh, the son of Dayal Singh, who was admitted in the written statement to have been separate from Pheran Singh. The effect of the purchases could not in the circumstances have been to extinguish the mortgages or to vest the rights of the mortgagors in the mortgagees except to a limited extent. The Courts below have dismissed the claim of the plaintiffs on a ground which was not set up in the written statement namely, that the mortgages and the purchases had been made by the joint family and the very basis on which the Courts below have proceeded cannot, therefore, be sustained.

A mortgagee is not in a position to deny the right of the mortgagors or their successors in interest to redeem the mortgage so long as the equity of redemption subsists, and as pointed out in *Seshamma Shettati* v. *Chickaya Hegade* (1) a person who lawfully comes into possession of land as a mortgagee cannot by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real legal relation between them, and that, however, notoriously and to the knowledge of the other party—acquire, by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession. In *Kunwar Sen* v. *Darbari Lal* (2) and *Khairaj Mal* v. *Daim* (3) the same rule was enforced.

It is not, therefore, open to Naurang Singh and his successors-in-interest to set up an adverse title so long as the right of the plaintiffs

(1) 25 M. 507 at p 511 : 12 M. L. J. 119.
(2) 24 Ind. Cas. 171 : 38 A 411.
(3) 32 C. 296 ; 9 C W. N. 201 ; 2 A. L. J. 71 ; 7 Bom. L. R. 1 ; 1 C. L. J. 584 ; 32 I. A. 23 ; 8 Sar. P. C. J. 734 (P.C.).

to redeem the mortgages subsists and is not barred by limitation. The orders passed in the mutation proceedings did not operate to extinguish the title of the plaintiffs. In fact the orders referred to upheld or allowed the entry of the names of Thakur Prasad Singh and his son Bikha Singh in the revenue papers and the possession of Naurang Singh which appears to have continued in spite of the entries of their names can only be attributed to the title which he possessed as a mortgagee, of the whole of the mortgaged properties till redemption was effected in due course of law.

The appeal in these circumstances must be allowed and the case remanded to the lower Apellate Court with a direction to reinstate the appeal to its original number and to dispose of it after deciding the other points involved in the case in the manner provided by the law. The costs here and hitherto will abide the result. The costs in this Court will include fees on the higher scale.

K. S. D. *Appeal allowed.*
S. D. *Case remanded.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 469 OF 1923.

April 3, 1924.

Present :—Mr. Justice Krishnan
and Mr. Justice Odgers.

SINNASWAMI CHETTIAR—PETITIONER—APPELLANT
versus
ALIGI GOUNDAN AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 23, 31—Protection before and after adjudication.

Under section 23 of the Provincial Insolvency Act, protection *before* adjudication can be allowed if the debtor is under arrest or imprisoned in execution of a decree of any Court. Section 31 applies *after* the order of adjudication is made. [p. 938, col. 2.]

Appeal against the order of the District Court, Coimbatore, dated the 16th September 1923, in I. A. No. 268 of 1923 in I. P. No. 80 of 1923.

Mr. *M. S. Vydianada Iyer*, for the Appellant.

Mr. *S S. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the District Judge of Coimbatore refusing protection to the appellant who has filed a petition in insolvency in that Court. The petition has been admitted but no order of adjudication has been made at the time the application for protection was made or even now. The learned Judge has refused protection on the ground that the insolvent had made two fraudulent transfers just before he made the application. We do not, however, propose to go into that question in appeal. Section 31 of the Provincial Insolvency Act deals with applications for protection only after the order of adjudication is made and that stage has not been reached in this case yet. The only other provision which deals expressly with what may be called protection before adjudication is section 23. That section says "At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of a decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.' The condition under which the Provincial Insolvency Act allows the Court to interfere between an insolvent and his judgment creditors before adjudication is where a decree-holder had arrested him. An insolvent is not entitled to make an application under the Act for protection before he is adjudicated, unless he has been arrested, because there is really no necessity till then for any protection. If the insolvent wants to apply for protection, he ought to expedite matters in such a way as to get his order of adjudication first and then ask the Court to grant protection under section 31. Neither the state of affairs contemplated in section 31 nor by section 23 has arisen in this case. We, therefore, think that there is no necessity to grant protection at this stage. If the insolvent is arrested hereafter, it will be open to him to apply under section 23 and we have no doubt that the Court will consider his case on the merits and not allow the order now passed by the District Judge to stand in the way of such

consideration. Similarly, if he gets an order of adjudication, he may apply under section 31. But at this stage we do not think it necessary to interfere. The appeal is, therefore, dismissed with costs.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 58 OF 1923.

July 4, 1924.

Present: —Mr. Walsh, Acting Chief Justice, and Mr. Justice Sulaiman.

MEHI LAL—PLAINTIFF—APPELLANT
versus
RAMJI DASS AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 63 (5)—"Seen it," interpretation of—Interpretation of Statutes.

Under sub-section 5 of section 63. only a witness who has himself seen a document is entitled to give evidence of it. [p. 939, col. 2.]

The words "seen it" in section 63 (5), Evidence Act, allow a person to give an oral account of the contents, when he has merely seen the document; and obviously once he has seen the document, his capacity to give the contents may result, not from what he saw, but from what he was told at the time when he saw it. The fact that the witness has seen it makes his oral account admissible. The important question whether his account is credible is a question of fact for the Trial Court. [p. 940, col. 1.]

One is from time to time compelled to imply or read into the language of an ambiguous section something which is not actually there, but as a general rule, the safest course is to hold fast to the exact language in its ordinary interpretation, if it is capable of bearing it. [p 940, col. 1.]

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Daniels, dated the 25th January 1923.

Dr. *S. N. Sen*, for the Appellant.

Mr. *K. Verma*, for Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal raises a nice point and a very interesting point, namely as to the meaning of the words "seen it" used with reference to a document in section 63 of the Evidence Act. The facts of the case are so far as they are material that an attesting witness to a certain mortgage transaction for Rs. 80, alleged to have taken place in 1865, which is either lost or not forthcoming, so as to entitle the party to give secondary evidence of it, was produced in the Trial Court. His name was Anandi Lal. He was ignorant of Persian character, and, therefore, unable to read the document itself, but he purported to give evidence, or at any rate the first Court of appeal understood him to give evidence, that the contents of the document were either translated, or read out to him, or explained to him, in such a way that he was able to remember them, and he gave on oath his recollection of the material contents of the document, and has been believed by the first Court of appeal. If that finding of fact can be justified in law, the plaintiff's case is established. The question is whether the judge was entitled to hear and believe the witness's oral account of the contents of the document. The matter came before a Judge of this Court, and in a very clear judgment he has held that the District Judge was not so entitled. He rightly says: under sub-section 5 of section 63, only a witness who has himself seen a document is entitled to give evidence of it," and he goes on to say "this clearly implies that it must be a witness who could read "the document," and he follows a decision of Mr. Justice Tudball in the case of *Ghure* v. *Chatrapal Singh* (1). After hearing the matter very fully argued, we have come to the conclusion, with great respect to these two Judges, that we are unable to agree. The critical words in the section are "seen it." The result of the decision would be, for example, that a highly educated person knowing several languages except German, who had seen an original document in German which had been lost, and who was interested in its contents and had had them translated to him by an equally highly educated person who knew German, and explained to him phrase by phrase in such a way that the English translation of the German contents were firmly imprinted on his memory, could not give the contents of that document in evidence under section 63, although he undoubtedly had seen the document. It does not follow, because an interpretation leads to a startling result, that it is necessarily wrong,

But it must be admitted that the interpretation which produces this result is not the literal meaning of the language used but involves the addition of words which are not in the section. Nobody can doubt that one is from time to time compelled to imply or read into the language of an ambiguous section something which is not actually there, but as a general rule the safest course is to hold fast to the exact language in its ordinary interpretation, if it is capable of bearing it. It is difficult to draw the line once you begin to introduce ideas of your own, and a loose method of interpretation undoubtedly leads to a great deal of difference of opinion and uncertainty. We are of opinion that the section means what it says. The question is, has the witness seen the document? The further question whether he is able to give evidence of its contents, is a question of his credibility. Mr. Justice Tudball in his judgmeut is of opinion that the words "seen it" mean having seen and examined the document, so as to be in a position to give direct evidence of its contents. The section does not say that. It might have said "read it." It says neither. If, as might be expected, the legislature intended the right of the witness to give the contenes, to depend upon what he saw, the language should have been not "seen it", but seen them." As the matter stands, he is allowed to give an oral account of the contents, when he has merely seen the document, and obviously ouce he has seen the document, his capacity to give the contents may result, not from what he saw, but from what he was told at the time when he saw it. In other words the admissibility of the evidence is one thing, the weight to be attached to it by a Judge of fact is another. If one were to indulge in speculation upon what is undoubtedly a rather interesting literary problem, it is not impossible that the original intention was to say "read it." But a great proportion of the population in India cannot read at all, and that provision would have excluded a large body of valuable evidence. Whether this was so or not, we have to take the language as we find it, according to its natural meaning. The fact that the witness has seen it makes his oral account admissible. The important question whether his account is credible is a question of fact for the Trial Court.

We, therefore, allow the appeal and restore the decree of the District Judge with costs here and below, including in this Court fees on the higher scale.

S. D. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 799 OF 1922.

March 18, 1924.

Present :—Mr. Justice Jackson.

MALLADI KRISHNAYYA—PLAINTIFF —PETITIONER

versus

TONDEPU VENKATAPPAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Liability—Burden of proof.

Where some property or right is claimed against the maker of an acknowledgment under section 19, Limitation Act, it is immaterial whether at the moment of his making the acknowledgment, the claim could have been enforced against him, as against him the acknowledgmentis sufficient. [p. 941, col. 1.]

If a person, who has *prima facie* no business to make an acknowledgment, makes it, the burden of proving why the acknowledgment was made lies upon him. But if the acknowledgment is alleged to bind other persons, the person so alleging should prove some sort of agency and authority on the part of the maker of the acknowledgment. [p. 941, col. 1.]

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge, Bezwada, in Small Cause Suit No. 491 of 1921.

Mr. *P. Satyanarayana*, for the Petitioner.

Mr. *G. Lakhmanna*, for the Respondents.

JUDGMENT.—The suit is for Rs. 252-9-3 (Rupees two hundred and fifty two, annas nine and pies three only) due on dealings. The lower Court has found that the amount is due but has dismissed the suit as barred by limitation. Plaintiff accordingly prefers this Civil Revision Petition. The point for decision is whether 4th defendant has made such acknowledgment of liability as falls within

the mischief of section 19 Indian Limitation Act. There were two partners, first defendant and one Seshayya father of 4th defendant. On 1st December 1918, (Exhibit C,) 4th defendant wrote to plaintiff: "In respect of the amount due to you under the joint account opened with you in the names of my father and Rajasree Kottumasu Narasimham Garu (1st defendant) I agree to pay you the whole amount with interest after taking accounts." The date of this letter will admittedly save the bar of limitation and it seems to be a clear acknowledgment of liability. It is strenuously contended that 4th defendant had no business to make this acknowledgment at this date that he was neither partner nor agent and acted gratuitously. I do not think that the onus rests upon plaintiff to prove why the acknowledgment was made; that was a fact peculiarly within the knowledge of the 4th defendant. No doubt if the plaintiff wished to establish that 4th defendant by his acknowledgment committed other defendants also he would have to prove some sort of agency and authority and that is the only point which the lower Court has considered. As regards himself 4th defendant's bare acknowledgment is sufficient for plaintiffs purpose and the statute requires nothing more. So long as the 4th defendant is the person against whom the property or right is claimed it does not matter whether at the moment of his making the acknowledgment the claim could have been enforced. *Jugal Kishore* v. *Fakruddin.* (1)

I find, therefore, that there is no bar of limitation as against 4th defendant, and plaintiff is entitled to a decree against such assets of ancestral property of Seshayya as can be traced to 4th defendant. Once the bar of limitation is removed there is no doubt that 4th defendant is bound by his pious obligation. Costs against 4th defendant throughout.

Revision allowed.

S. D.

(1) 29 A. 90; 3 A. L. J. 680; A. W. N. (1906) 286.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 159 OF 1923.

June 26, 1924.

Present :—Mr. Justice Dalal.

GHASI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mt. BHARTO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 32 (2)—Joint occupancy holding—Suit for possession of specific plots, whether maintainable—Joint tenants—Separation.

There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts of the joint holding, provided that their so doing in no respect prejudices the rights of the landholder. [p. 942, col. 1.]

When once co-tenants are in separate possession of separate plots out of the holding and one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed, so long as the suit is instituted against the co-tenants and not the landlord. Such possession does not in any way interfere with the rights of the landlord. [p. 942, col. 2.]

Raghunath Kalwar v *Bala Din Kalwar*, 7 Ind. Cas. 398; 33 A. 143; 7 A. L. J. 518, followed.

Appeal against the decree of the Additional District Judge, Meerut, dated the 15th November 1922.

Dr. *K. N. Katju*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The plaintiffs, occupancy tenants to the extent of 1/3rd in an occupancy holding sued for possession of specific plots on the ground that the holding had been divided between them and the defendants and they had been in possession of these specific plots from which they had been unlawfully ejected. The learned Munsif was of opinion that such a suit for specific possession was barred under the provisions of section 32 (2) of the Tenancy Act and granted to the plaintiffs joint possession with the defendants to the extent of 1/3rd of the entire holding. On appeal by the plaintiffs the learned District Judge was of opinion that a suit for possession in pursuance of existing facts and previous separate possession of co-tenants was not a suit or other proceeding for the division of a holding

or distribution of rent thereof and was not barred by any provision of the Tenancy Act. The matter is concluded by a decision in Letters Patent of a Bench of this Court in *Raghunath Kalwar* v. *Bala Din Kolwar* (1). The case was first heard by one learned Judge and afterwards by another learned Judge as the first Judge omitted to sign the judgment. The Letters Patent Appeal was heard by two other Judges. So in reality the opinion to that effect was confirmed by four learned Judges of this Court. In that case a former decree was pleaded as *res judicata* and the defence was that the decree was inoperative as having been passed contrary to the provisions of section 32 (2). The judgment pleaded as a bar was delivered in a case similar to the one here. The learned Chief Justice observed:—

"There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts of the joint holding, provided that their so doing in no respect prejudices the rights of the landholder."

The other learned Judge (Banerji J) said:—

"The former suit was not one for partition of a holding or the distribution of the rent thereof but was a suit for exclusive possession of certain plots of land which the then plaintiff claimed to be separate property. The Court which tried that suit had jurisdiction to entertain it."

The learned Counsel for the defendant-appellant referred to three former rulings of this Court :—

Achhey Lal v. *Janki Prasad* (2), *Ashiq Husain* v. *Asgari Begam* (3), *Najib Ullah* v. *Gulsher Khan* (4).

In the Full Bench case the case reported in *Achhecy Lal* v. *Janki Prasad* (2), was distinguished because the parties in that case had only the shadowy right of the mortgagees of an occupancy holding. The case reported in *Ashiq Husain* v. *Asgari Begam* (3), did not depend upon any previous division but desired the Court actually to divide the holding. Such a suit would naturally offend against the provisions of section 32 (2). I do not think that the ruling in *Ghunath Kalwar* v. *Rag Bala Din Kalwar* is in any way in conflict with former rulings of this Court. When once co-tenants are in separate possession of separate plots out of the holding and one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed, so long as the suit is instituted against the co-tenants and not the land-lord. Such possession does not in any way interfere with the rights of the land-lord.

I dismiss this appeal with costs which shall include here Counsel's fees on the higher scale.

S. D. *Appeal dismissed.*

(1) 7 Ind Cas. 396 ; 33 A 143 ; 7 A. L J. 918.
(2) 3 A. L. J. 735 29 A. 66 ; A. W. N. (1906) 274.
(3) 4 A. L. J. 509 ; A. W. N. (1908) 21 ; 30 A. 90.
(4) 1 Ind. Cas. 594 ; 6 A. L. J. 348 ; 31 A. 348.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 400 TO 403 OF 1923.

March 24, 1924.

Present :—Mr. Justice Jackson.

RUKMANI AMMAL—PETITIONER

versus

VEERASAMI IYENGAR AND ANOTHER —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII rr. 3, 5 —Applicant found to be minor—Application rejected—Merits—Remedy — Appeal—Suit—Revision— Proper course where applicant found to be minor.

A Court cannot be said to act irregularly, if on finding, that the person, applying in his own name to be brought on record as the legal representative of a deceased plaintiff, is a minor, it rejects his application. But the mere discovery of his minority is no reason,

(i) for not considering his plea that he is the rightful representative, and,

(ii) for adding, without determining the question on its merits, after giving him notice, another person as the legal representative. [p. 943, col 1.]

There is no statutory right of appeal against an order under O. XXII, r. 3, Civil Procedure Code. [p. 943, col. 2.]

The remedy of the person, whose application to be brought on record as the legal representative of a deceased plaintiff, is dismissed is not by way of appeal or suit but by revision. [p. 943, col. 2.]

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Where the applicant is found to be a minor the proper course is not to reject his application but to appoint a guardian *ad litem* [p. 944, col. 1.]

***Obiter*:—If the Court decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed. [p. 944, col. 1.]**

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order dated 26th October 1922 of the Court of the District Munsif, Srirangam, in I. A. Nos. 544 of 1922 and 568 of 1922 in O. S. No. 420 of 1919 and I. A. Nos. 569 of 1922 and 545 of 1922 in O.S. No. 396 of 1920 respectively.

Mr. *T. V. Muthukrishna Iyer*, for the Petitioner.

Messrs. *L. A. Govinda Raghava Iyer* and *W. S. Subrahmania Iyer*, for the Respondents.

JUDGMENT.—In O. S. No. 420 of 1919 on the file of the Court of the District Munsiff of Srirangam, the plaintiff Pichu-Aiyar died. Both his widow Rukmani Ammal, the present petitioner and his daughter Seethai Ammal, the present 2nd respondent applied to be brought on record as legal representative. The District Munsif found that Rukmani Ammal was a minor who had no right to apply in her own right and dismissed her application. Having done so, he disposed of Seethai Ammal's application by merely recording "defendant (present 1st respondent) has no objection." And Rukmani Ammal now applies to have both orders revised.

I cannot hold that the District Munsif acted irregularly in rejecting Rukmani Ammal's application. On the analogy of O. XXXII, r. 2, he exercised a discretion allowed him by law, though I think he exercised that discretion very hastily Cf. *Rattonbai* v. *Chabbildas Lalloobhoy* (1). But I cannot find that the District Munsif was justified in adding Seethai Ammal as legal representative without determining the question on its merits after notice had gone to Rukmani and she had raised the question. The mere fact that Rukmani was discovered to be a minor was no reason for not considering her plea that she was the rightful representative. Here the analogy to be applied is that under O. XXXII, r. 3. The respondents do not attempt to justify the action of the Court which indeed is quite opposed to the oridinary duties of a Court in regard to minors, so much as to show that the petitioner has no right to move this Court for Revision. They contend that her remedy was by way of appeal against the order, or at any rate by way of suit after reaching her majority, and in any case her application has been unduly delayed.

There is no statutory right of appeal against an order under O. XXII, r. 3. The Legislature has chosen not to give a right of appeal against orders under that rule. *Lakshmi Achi* v. *Subrama Aiyar* (2). But respondents rely upon *Ayya Mudali Velan* v. *Veerayee* (3), where it is held that an order rejecting the claim of a person to the legal representative of a deceased plaintiff is appealable in cases where such orders have also the character of decrees. If it is to have this character, the order must conclusively determine the rights of the parties in the suit, and it so happens that all the parties in *Ayya Mudali Velan* v. *Veerayee* (3), were parties in the suit, the 2nd defendant was the person applying to be plaintiff's legal representative. In *Lakshmi Achi* v. *Subrama Aiyar* (2), and in the present case the persons applying to be legal representatives were never parties to the suit and this application having been rejected, they could never have been regarded as such and it is clear from *Ayya Mudali Velan* v. *Veerayee* (3), itself that the learned Judges still regarded *Lakshmi Achi* v. *Subrama Aiyar*, (2) as good law in regard to the facts of that case (cf. p. 815). I, therefore, find that the petitioner had no remedy by way of appeal and is entitled to move for revision.

I do not think it necessary to drive petitioner to a fresh suit, nor do I think that her remedy lies that way. The lower Court having appointed a legal representative that appointment, unless it is set aside, is final, and binds the estate. "If the Court decides wrong the

(1) 13 B. 7; 7 Ind. Dec. (N.S.) 5.

(2) 29 Ind Cas. 142; 39 M. 488 at p. 493; 2 L. W. 403; 28 M. L. J. 491; (1915) M. W. N. 827; 17 M. L. T. 385.

(3) 58 Ind. Cas. 498; 43 M. 812; (1920) M. W. N. 467; 12 L. W. 188; 39 M. L. J. 218.

wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed. *Malkarjan* v. *Narhari* (4).

I do not find that there has been inordinate delay. Petitioner first sought her remedy by way of review on grounds which were certainly not frivolous. Nor I do see any reason for holding that petitioner is still a minor, and even if she were, I should not reject her petition. On that account, there would only be a formal question of appointing a *guardian-ad litem*. Accordingly I allow C.R.Ps. 401 and 402 with costs, one set. I reverse the order of the lower Court and direct the District Munsiff to determine the question whether Rukmani Ammal or Seethaiammal is or is not the legal representative of the deceased plaintiff, Pichu Ayer and then proceed with the suit. C. R. Ps. Nos. 403 and 400 are dismissed with costs, one set.

S. D. *Order reversed.*

(4) 25 B 237 at p 347 : 5 C. W. N. 10 ; 2 Bom. L. R. 927 ; 27 I. A. 216 ; 10 M. L. J. 368 ; 7 Sar. P. C. J. 739 (P.C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1226 OF 1922.

May 22, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

RAM GANESH RAI—DEFENDANT—APPELLANT

versus

Babu RUP NARAIN RAI AND OTHERS —PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872) s. 93—Patent ambiguity in mortgage-deed—Secondary evidence, whether admissible—Mortgage for 82 years—Only one particular day fixed for redemption—Mortgagor debarred from redeeming with borrowed money—Clog on equity of redemption.

Where a deed is ungrammatical and cannot be read literally so as to give any clear meaning without adding to or removing some words from it, there is a patent ambiguity in the deed and under section 93 of the Evidence Act no evidence can be given to supply the defect. [p. 945, col. 2.]

Where the term of a mortgage was 82 years and even at the end of that term only one day was allowed for redemption and unless the money was paid on that particular day the mortgage was to become a sale and it was further covenanted that the mortgagor could not redeem the mortgage with borrowed money :—

Held, that the conditions amounted to a clog on the equity of redemption and were, therefore, unenforceable [p. 945, col. 2.]

Appeal from a decree of the District Judge, Ghazipur, dated the 11th July 1922.

Dr. *M. L. Agarwala* and Mr. *K.N. Laghate*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is an appeal in a suit for redemption of a mortgage. The suit has been decreed by both the Courts below. The defendant appeals on the following grounds:—

1. That the Court below should have come to a finding on the title of the plaintiffs.

2. That the suit is premature and that the mortgage was not redeemable until the full moon of *Jeth* in Sambat year 2039 corresponding to 1982 A. D.

3. That the suit is barred by section 233 (*k*) of the Land Revenue Act.

4. That the suit is barred by adverse possession.

5. Because the mortgage-money should include revenue with interest thereon paid by the appellant.

No argument was addressed to us on the last point and we have, therefore, to consider the first four grounds only.

Plea 1. The learned Judge refused to go into the question of plaintiff's title because he said it had not been seriously contested in the Trial Court or raised in the grounds of appeal to him. The plaintiffs set out their title in para. 3 of their plaint. The defendant entered a formal denial of this paragraph and in his further pleas set out in considerable detail an alleged oral sale by the original owner Parmeshwar Upadhia in his favour. There was nothing further in his written statement to indicate that the plaintiffs' title was challenged on any other ground. The learned Munsif framed an issue. "Are the plaintiffs entitled to redeem? If so on payment of what amount?" In the earlier part of his judgment he gave reasons for rejecting the alleged oral sale. In

dealing with this issue he merely set out the facts constituting the plaintiffs' title without any indication of any arguments which had been put forward challenging it, and then went on to discuss the amount on which redemption should be granted. In the grounds of appeal to the Court below the first ground, and the only one relied on as containing this objection, runs as follows:

> "It is fully proved from the entire evidence on the record that Parmeshwar Upadhia sold his interest in the mortgaged property in favour of the appellant and got the mutation of names effected accordingly and that the appellant has been since then in the proprietary possession of the property. The plaintiffs are by no means entitled to sue for redemption."

Reading this ground as a whole it is clear that while it challenges the plaintiffs' title it does so on the ground that this title is done away with by the alleged previous sale to the defendant and on no other ground. We are of opinion, therefore, that the learned Judge was right in the conclusion at which he arrived on this issue. We may note that before us the appellant does not rely on the alleged oral sale.

Plea 2. The learned Judge finds that the deed is ambiguous on the face of it. It is admittedly ungrammatical and cannot be read literally so as to give any clear meaning. In order to arrive at the construction they desire to place on it the appellant and the respondents alike have to supply or remove some words from the document as it stands. The appellant suggests that the words "Jeth Sudi Puránmasi Sambat 2039" have been written once where they should have been written twice and by repeating these words it is possible to read the document as meaning.

> "The mortgagee shall remain in possession and take the produce of both shares and spend it year by year in lieu of his interest from to-day up to the full moon of Jeth Sambet 2039. On that date if I, the executant, or my heirs pay the money from my own pocket I shall get back the land and the document."

On the other hand by simply omitting the particle "ko" it is capable of being read as meaning,

> "The aforesaid mortgagee shall take possession and expend the produce year by year in lieu of his interest. If from to-day up to the full moon of Sambat 2039 I, the executant, or my heirs pay the money, etc., I shall get back the land and the document."

There is, therefore, a patent ambiguity in the deed and under section 93 of the Evidence Act no evidence is admissible to supply the defect. The learned Judge was right in holding that under these circumstances the mortgage-money must be taken to be repayable at any time. We may add that even if we were prepared to place on the deed the construction for which the appellant contends we should hold that the conditions of the deed amounted to a clog on the equity of redemption and were unenforceable. Not only is the mortgage, on this view, for a period of 82 years but even at the end of that time only one day was allowed for redemption and unless the money was paid on that particular day the mortgage was to become a sale and the mortgagor was to lose his title altogether. There is a further covenant that the mortgagor is to pay the money from his own pocket and that he is not at liberty to redeem the mortgage with borrowed money. The case is very similar to *Sarbdawan Singh* v. *Bijai Singh* (1), in which similar conditions were treated as a clog on the equity of redemption and as not being enforceable.

Plea 3. The plea based on section 233 (*k*) of the Land Revenue Act is fully dealt with by the learned Munsif whose views are adopted by the learned Judge and are sufficient to dispose of this plea. The plea is based on the fact that in the partition record the mortgagee is shown as proprietor of a share equal to the share in dispute. As the learned Munsif has shown this share was interpolated in the *khewat* in addition to the original shares which made up the total area. The mortgagor retained his original share unimpaired and his name continued to be recorded in respect of it. Section 233 (*k*) cannot possibly apply to circumstances like these.

Plea 4. The plea of adverse possession loses all force in face of the appellant's admission that he cannot rely on the oral sale

(1) 24 Ind. Cas. 705 ; 36 A. 551 ; 12 A. L. J. 927.

in his favour. He has nothing in support of it except the mutation entry. A mere mutation entry of the mortgagee as a proprietor clearly cannot convert his possession as mortgagee into adverse possession.

For these reasons the appeal fails and we dismiss it with costs including in this Court fees on the higher scale.

S D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 262 OF 1923.

July 31, 1924.

Present:—R. B. Kinkhede, A. J. C.

HIRALAL—PLAINTIFF—APPLICANT
versus
TULSIRAM AND ANOTHER—
DEFENDANTS—NON-APPLICANTS.

Estoppel, plea of—Provincial Insolvency Act (V of 1920), s. 28—Adjudication order passed—Debt incurred subsequently—Suit to recover, whether barred—Civil Procedure Code (Act V of 1908), s. 91.

A plea of estoppel is a plea of mixed fact and law and has to be urged in the Trial Court. It cannot, therefore, be entertained for the first time in revision. [p 946, col. 2.]

A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act But the jurisdiction of a Civil Court to entertain a suit in respect of such a debt or liability is not barred by the Provincial Insolvency Act, so as to oust the jurisdiction which vests in a Civil Court, to try all suits of a civil nature under section 9 of the Civil Procedure Code. [p. 947, col. 2.]

Revision against the order of the Small Cause Court Judge, Khandwa, in Civil Suit No. 451 of 1923, dated the 6th September 1923.

Mr. *Fida Hussain*, for the Applicant.

ORDER.—This application for revision arises out of a suit instituted on 18th January 1923 by the applicant Hiralal against the non-applicant Tulsiram and his son Nima on the basis of a bond dated 31st May 1920 for a cash consideration of Rs. 50 advanced as a loan to them.

The defence was that defendant No. 1 having been declared insolvent on 15th April 1916, was incompetent to borrow the debt and to contract or incur any pecuniary obligation, after the date of the adjudication, and secondly that non-applicant No. 2 being a minor was also incompetent to contract. The Small Cause Court Judge gave effect to both these contentions and dismissed the suit. The plaintiff has come up in revision.

The applicant's contentions before me are that the adjudication dated 15th April 1916 did not affect the insolvent's liability for the debt incurred thereafter *i. e.*, on 31st May 1920, and that the defendant No. 2 was estopped from raising the plea of minority.

I may dispose of the second contention first. A plea of estoppel is a plea of mixed fact and law and has to be urged in the Trial Court. It cannot, therefore, be entertained at this late stage. I, therefore, overrule this contention. The suit has been rightly dismissed as against defendant No. 2 and I decline to interfere with its dismissal.

I now proceed to deal with the first contention. In connection with this contention it is urged that the debt sued for is not provable under the Insolvency Act and that under old section 16 which corresponds to new section 28 of the Provincial Insolvency Act, a creditor to whom an insolvent is indebted in respect of any *debt provable under the Insolvency Act*, is precluded from having any recourse to a suit or other legal proceeding except with the leave of the Court, and he is also deprived of his remedy against the *property* of the insolvent in respect of such debt and not in respect of debts not so provable. Old section 28 corresponding to new section 34 of the said Act defines what debts are provable under the Act. "All debts and liabilities to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication" are to be deemed to be "debts provable under the act." The necessary consequence

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holder," — *Payment to attaching creditor of decree-holder, whether payment to decree-holder.*

The term " decree holder " as defined in section 2 (3) of the Civil Procedure Code does not include an attaching creditor of the decree-holder.[p. 950, col. 1.]

Therefore, payment out of Court of the decretal amount by the judgment-debtor to the attaching creditor of the decree holder is not a payment to the decree-holder within the meaning of r 1(b) of O. XXI, Civil Procedure Code. [p. 950, col. 1.]

Appeal against the decree of the District Judge, Benares, dated the 5th October 1923.

Mr. *Harendra Krishna Mukerji*, for the Appellant.

JUDGMENT.—This appeal raises a question of law, and it is unfortunate that the respondent is not represented.

Briefly the facts are these. The appellant holds a decree for money against one Ram Pargash Singh. The final decree in the case was made on 16th March 1922. The decree-holder Ram Badan Singh was the judgment-debtor in a decree held by two persons Ram Harakh and Musammat Rup Kali. The decree in favour of these two persons was passed sometime in 1907. In 1922 Ram Harakh and Rup Kali sought the execution of that decree by the attachment of the decree held by Ram Badan against Ram Pargash. On an application being made by Ram Harakh and Rup Kali an order was passed for the attachment of the decree held by Ram Badan Singh. The application was, however, struck off for default of prosecution on the 23rd of December 1922. The attachment was consequently automatically removed. On 16th March 1923 Ram Badan Singh sought the execution of his decree by the arrest of Ram Paragash. Ram Pargash was arrested and brought into Court. On that date a certificate of satisfaction of the decree held by Ram Harakh and Rup Kali was granted by the decree-holders. The Court of first instance held that the certificate of satisfaction was a collusive transaction and did not exonerate Ram Pargash from paying the money due by him to Ram Badan under the decree held by the latter. The lower Appellate Court, however, held the contrary view with the result that Ram Badan's decree was found to be inexecutable.

In this Court it has been urged that assuming that Ram Pargash did really pay the decretal amount due to Ram Badan to Ram Harakh and Rup Kali, this payment made out of Court was not valid at law and did not result in the satisfaction of the decree held by Ram Badan Singh.

I think this contention is right. The methods of payment of money under a decree are laid down in r. 1, O. XXI of the Civil Procedure Code. It may be mentioned here that the decree in favour of Ram Badan was passed by a Subordinate Judge and that in favour of Ram Harakh was passed by a Munsif. The methods of payment are:—

(1) into the Court whose duty it is to execute the decree; or

(2) out of Court to the decree-holder ; or

(3) otherwise as the Court which made the decree directs.

It will be observed that none of these methods was adopted by Ram Pargash. It was the duty of the Subordinate Judge to execute the decree under which Ram Pargash had to make payment. If a payment into Court had to be made that payment should have been made into the Court of the Subordinate Judge. It is, however, nobody's case that any payment into Court was made. For the payment to the decree-holder out of Court, the payment must be made to the holder of the decree in respect of which the payment has to be made. The definition of the term "decree-holder" is given in section 2 (3) of the Code of Civil Procedure and does not include an attaching creditor of the decree-holder. The payment, therefore, to the attaching creditor of the decree-holder is not a payment to the decree-holder within the meaning of r. 1 (*b*) of O. XXI. The last clause does not apply. The payment, therefore, to the attaching creditor Ram Harakh and Rup Kali was no such payment as could discharge Ram Pargash from the decree passed in favour of Ram Badan Singh.

That this conclusion is correct can be seen by examining the facts of the case. When a person purporting to be a decree-holder seeks the attachment of another decree, it is open to the decree-holder, whose decree is sought to be attached, to impugn the attachment. If without giving the decree-holder, whose decree

has been attached, an opportunity to impugn the attachment, his judgment-debtor should make a payment to the person who professes to be the attaching creditor, room for fraud would be opened. In this particular case the final decree in favour of Ram Harakh and Rup Kali was passed as long ago as in 1907. Their application of 1922 was on the face of it barred by twelve years' rule of limitation (section 48, Civil Procedure Code. Obviously it was never the intention of the legislature that a debtor liable under a decree which has been attached should obtain a discharge by payment to the person who professes to possess a right to attach the decree.

The appeal succeeds. I set aside the decree of the lower Appellate Court and dismiss the objection of Ram Pargash as to payment. Ram Pargash will pay the costs of the decree holder Ram Badan Singh in this Court and the Court below. The execution proceedings will proceed.

K. S. D. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 368 OF 1923.

August 6, 1924.

Present :—Mr. Baker, J. C.

NARSING AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

NARAYAN AND ANOTHER—DEFENDANTS —RESPONDENTS.

Contract Act (IX of 1872), ss. 56, 65—Transfer prohibited by law—Suit for refund of consideration—Performance of contract rendered impossible.

If the object of an agreement is to evade the statutory prohibition of the transfer of occupancy land, the contract is void *ab initio* and no suit lies to recover money paid under the unlawful agreement

If a party by his conduct renders the performance of the contract impossible, he is not entitled to recover anything by way of damages from the other party.

Appeal against the decree of the District Judge, Nimar, dated the 10th July 1923, in Civil Appeal No. 94 of 1923.

Mr. *W. R. Puranik*, for the Appellants.

Mr. *S. B. Gokhale*, for the Respondents

JUDGMENT.—The facts are set out in the judgments of the Courts below. The document on which the plaintiffs sue is not a mortgage of the land but of the crops for a period of 16 years. The first Court held the suit maintainable for the recovery of the consideration and awarded the plaintiffs Rs. 900, without damages.

On appeal this decree was set aside by the District Judge, Nimar, who held that by their own act the plaintiffs had rendered it impossible for the defendants to perform the part of the contract, by taking possession of the land and thus laying themselves open to eviction by the *lambardar*.

Plaintiffs make this second appeal.

It is contended that under section 56 of the Indian Contract Act the performance of the contract having become impossible, owing to the *lambardar* having taken possession, the defendants who have received the advantage under the agreement are bound under section 65 to restore it to the plaintiffs.

The appellants rely on *Mathura Mohan Saha* v. *Ramkumar Saha* and *Haribhai Hansji* v. *Nathubai Ratnaji* (2). The first of these cases relates to a Company receiving certain advantage under an illegal agreement, and the second is the case of a mortgage which was found to be void under the provisions of the Bombay Bhagdari Act. The principle laid down in section 65 of the Contract Act will not of course be disputed, but the peculiar feature of the present case is that the plaintiffs made the performance of the contract impossible by taking possession of the land of which the crops were mortgaged to them by defendants. Therefore, the landlord interfered and got a decree for the ejectment of plaintiffs, the result being that the land is now lost to defendants who are therefore incapable of performing the terms of the agreement.

(1) 35 Ind. Cas. 205 ; 43 C. 790; 23 C. L. J. 26 ; 20 C. W. N. 870.
(2) 28 Ind. Cas. 601; 38 B. 249 ; 16 Bom. L. R, 62.

The Judge of the lower Appellate Court has found as a fact that this happened and he further finds that the transaction was intended to be a sale in contravention of the law which prohibits the transfer of occupanay land, and he has held on the evidence that in spite of the agreement that defendant should cultivate the land, it was plaintiffs who cultivated, sold and reaped.

It is now contended that under the terms of the agreement plaintiffs were to reap the crops. But I cannot go behind the finding of fact. Plaintiffs admit they they were ejected, but do not produce the judgment in the suit in which they were ejected, and in the absence of evidence to the contrary it must be assumed that at any rate at the date of the suit they were in actual possession of the land. If the purpose of the agreement was to evade the statutory prohibition of the transfer of occupancy land, the contract is void *ab initio* and no suit will lie to recover money paid under the unlawful agreement: Cf. *Bai Diwali* v. *Umedbhai Bhulabhai Patel* (3) and *Narayan* v. *Motisa* (4). In any case the lower Appellate Court having found that the plaintiffs by taking possession had rendered the performance of the contract by the defendants impossible, the plaintiffs are not entitled to recover anything from the defendants, and section 53 of the Contract Act will apply.

I agree with the view of the lower Appellate Court that the suit must fail and the appeal is dismissed with costs.

S. D. *Appeal dismissed.*

(3) 36 Ind. Cas. 564; 40 B. 614; 18 Bom. L. R. 773.
(4) 78 Ind Cas 343 ; 20 N L. R. 87.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 193 OF 1923.

June 19, 1924.

Present:—Mr. Walsh, Acting Chief Justice, and Mr. Justice Ryves.

SAKALRAJ DUBE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat JADURANI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 8—Vakils' absence whether constitutes default.

When a Vakil represents a party, the right of audience is, for the time being, vested in him and if he is absent there is default. [p. 950, col. 2.]

Appeal from an order of the Second Additional District Judge, Gorakhpur, dated the 6th April 1923.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—We think that the learned Judge who has disposed of this application has missed the point. When a Vakil represents his client the right of audience is, for the time being, vested in him. For the purpose of continuing the hearing, or commencing the hearing, he is the appellant. If he is absent, there is default. According to the entry in the order-sheet the appellant was absent as well as his Vakil. Possibly he was running after him to see if he could find him, but even if he had been corporeally present, in the sense in which the Judge whose order is appealed from appears to mean, we think that in the eyes of the law he was not present in such a sense as to prevent the absence of the Vakil from being a default. If a Judge is anxious to assist a party in distress he can give him a little time to obtain the assistance of a new Vakil, or adjourn the case, and make him pay costs or something of that sort, but for a default of this kind we do not think that, subject to the penalty usually inflicted the client should be deprived of the right of having his appeal heard. We, therefore, allow this appeal though not as a matter of right.

DAS [illegible] 80] INDIAN DAS [illegible] 80] INDIAN DAS [illegible] 80] INDIAN

see nothing in section 179 to support this theory. If we assume that the appointment of a Municipal Commissioner is for the benefit of a town and that no such appointment can be made unless the Municipality has supported this action it seems to be within the power and duties of the Municipality to ask for such an appointment. On the other hand if a Municipal Commissioner is appointed as a sort of penal measure for the City the power of the Municipality to empower the Governor-in-Council to make such an appointment is a power. So far as this goes, I canot see, how the Committee of Management under section 179 can be precluded from exercising the power of the Municipality under section 186 (*a*).

Of course the difficulty does arise in view of the clause in section 186 providing that this application must be supported by not less than 2|3rds of the whole number of the Councillors. It might perhaps be argued that this proviso applies only in the case where the Municipality was functioning and was inapplicable to a condition of things when a Committee of Mangement was in existence. But it is not necessary to discuss or decide that question. Taking the more liberal view adopted by the learned District Judge namely that the Committee of Management must as far as possible be considered bound by the procedure laid down in the Municipal Act, we find in this case ⅔rds of the Committee of Management did suppport this application.

The Legislature has not laid down with very great precision how the Committee of Management under section 179 is to function. All that is said is that the powers and duties of the suspended body should be exercised by such person or persons as may be appointed. Procedure is not "power and duty," the exercise of power and duty is the goal, procedure is the road by which we reach it. It is obviously unreasonable to suppose that the whole of the procedure laid down in the Act should be followed in its entirety and that it is verbally incumbent upon any persons or person appointed by Government to carry on the functions of the Municipality. It is of course very often the cumbrous procedure or the abuse of the procedure which leads to the suspension of the Municipality and to the creation of the Committee of Management *e. g.*, section 179 contemplates appointment of one person to carry on the duties of the Municipality and I believe cases have occurred in which one person has been so appointed. It is obvious that in the case of one person, he could not delegate functions to Committees and Sub-Committees as contemplated by the Municipal Act and it cannot, therefore, be ruled that the whole of the procedure laid down in the Act must apply to the Committee of Management. It is enough, we think, that the persons who are delegated to do the duties of the Municipality carry out their functions in a reasonable and equitable manner, keeping an eye, as far as possible, on the provisions of the Municipal Act, but not being bound by them with the same strictness as the elected Municipality would be. For instance in the case of section 60, the Committee of Management would no doubt be bound before imposing a tax to adopt a good deal of the procedure adopted in that section inasmuch as it is in accordance with justice. But they would not be bound by every one of the formalities laid down in that section, *e. g.*, it would obviously be unnecessary to refer the consideration of objections to a Sub-Committee or to a "general meeting" according to the meaning of that expression in the Act.

In the present case, the exact number of the Committee is not certain because there is doubt as to whether one member of the Committee was, as a matter of fact at the time a member or not. It appears that the maximum number including the Chairman was 6. It would be necessary to sanction a proposal for the appointment of Municipal Commissioner under section 186 (*a*) that it should be supported by votes of ⅔rds of the whole number of Councillors that is to say in all 4. It appears 3 members voted for it and the Chairman who had circulated this report sanctioned it. The motion was, therefore, supported by 4 members if the Chairman's vote is to be counted. I cannot myself see why the Chairman's vote should not be counted. He was not an official president, that he should be barred under section 24 (2) of the Act. There is nothing in natural justice to prevent the Chairman whether an official or not, from voting on the motion before him. It seems to me, therefore, clear that this application for the appointment of a Municipal Commissioner

was properly supported by the body which filled the place of the Municipality which was entitled by law to exercise powers which the Municipality would have had, had they continued to function.

It was objected that there was an irregularity in the manner in which the opinion of the majority was elicited, and it might be that the sending out of the circular without having been absolutely sure it was circulated to all the members of the Board was an irregularity. But clearly in dealing with such an irregularity as that, one must consider that this suit is not brought by any of the Committee to enforce his or its rights, but by a member of the general public. It does not appear that any of the members of the Committee of Management have ever raised any protest against the procedure though many years have elapsed since the circular was circulated and it does not, therefore, seem to me that even if the irregularity had been more serious than it was, the Court would on an application of a private rate-payer set aside the action of the Committee *in toto*. If there had been a serious irregularity, the more correct course would be for the Court to order the Committee of Management to take a fresh vote. But to proceed by way of an injunction and to grant a declaration that the appointment is illegal and *ultra vires* on account of a technical irregularity is a very extreme measure, and the Court would not adopt it unless it was impossible to do justice in any other way.

I am of the opinion, therefore, that the District Judge is right on all grounds in refusing the declaration and injunction prayed for. I would dismiss the appeal with costs.

Aston, A. J. C.—I concur.

I only wish to add that in my opinion section 24 (2) of the Bombay District Municipal Act has no application to the Chairman of a Committee of Management appointed under section 179.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL APPEAL NO. 2399 OF 1922.

October 11, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

FAKIR CHAND—DEFENDANT—APPELLANT

versus

RAM DATT—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870) s. 7 (iv) (a), (X) (a)—Agreement to sell immoveable property—Suit for execution and registration of sale-deed, nature of, Specific performance—Court-fee payable.

There may be a suit for specific performance of a contract without any prayer for possession. [p. 954, col. 2.]

Dinandan Prasad Singh v *Janki Singh*, 56 Ind. Cas. 322; 5 P. L. J. 314; 1 P. L. T. 325; 2 U. P. L. R. (Pat.) 103; (1920) Pat. 266, relied on.

Plaintiff agreed to purchase a shop from the defendant for a certain price. A sale-deed was executed but it was not registered and the defendant subsequently sold the shop to a third person. Plaintiff sued the defendant for the return of the sale-deed, or, in the alternative, for execution of a fresh sale deed and, for registration of the deed. He did not ask for possession of the shop as he alleged that he was in possession of it;

Held, that the plaintiff's cause of action was the defendant's refusal to carry out the agreement of sale, and the suit was, therefore, one for specific performance of a contract and fell within section 7 (X) (*a*) of the Court Fees Act, Court fees being payable on the amount of the consideration. [p. 954, cols. 1 & 2.]

Muhi-ud-Din Ahmad Khan v. *Majhis Rai*, 6 A. 281; A. W. N. (1884) 12; 3 Ind. Dec. (N. S.) 897; *Nihal Singh* v. *Siwa Ram*, 37 Ind. Cas. 275; 38 A. 292; 14 A. L. J. 434, relied on.

Appeal from the order of the District Judge, Gurdaspur, at Dalhousie, dated the 7th June 1922, reversing the decree of the Subordinate Judge, 2nd Class, Gurdaspur, dated the 10th January 1922.

Mr. *Mehr Chand Mahajan*, for the Appellant.

Lala *Balri Das*, for the Respondent.

JUDGMENT.—On the 30th of June 1921 an agreement was executed under which the defendant-appellant agreed to sell a certain shop to the plaintiff-respondent. On the 1st of July 1921 a sale-deed was executed and handed over

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to the Sub-Registrar. Subsequently in the absence of the plaintiff the deed was returned to the defendant and was not registered. The defendant subsequently sold the shop to a third person who is not a party to the present proceedings.

Plaintiff in his plaint sought three reliefs :—

(1) return of the original deed ; or in the alternative,

(2) execution of a fresh deed ; and

(3) registration of the deeds mentioned in (1) and (2).

He valued relief (1) at Rs. 5 and paid a Court-fee of Re. 0 6-0 thereon. The alternative relief he claimed to be included in relief (1) and on relief (3) he paid a Court-fee of Rs. 10. The Trial Court held that the suit was in reality one for specific performance of a contract and that the Court-fee should be paid *ad valorem* on the amount of consideration for sale, namely, Rs. 1,200. It therefore ordered the plaintiff to make up the deficiency in the Court-fee and on his not doing so rejected the plaint. On appeal the learned District Judge held that the suit so far as relief (1) is concerned was governed by section 7 (*iv*) (*a*) of the Court Fees Act ; that the alternative relief was covered by the larger relief of restoration of the original sale-deed ; and that the relief for registration was properly valued. He therefore accepted the appeal and set aside the order of rejection of the plaint.

The defendant has filed an appeal to this Court ; and it is argued that the suit was in reality one for specific performance of a contract. The plaintiff in the plaint alleges that he is in possession of the property sold and therefore he did not sue for possession. At the same time he appended a note to the plaint stating that if he is found to be not in possession then he might be allowed to amend the plaint.

In order to see what the plaintiff's suit really is it is necessary to understand what his cause of action is. His cause of action is obviously the defendant's refusal to carry out the agreement for sale. In the case of *Muhi-ud-Din Ahmad Khan* v. *Majlis Rai* (1) it was held that a suit to have a sale-deed executed and completed and for possession of the property was a suit for specific performance of a contract. The case of *Nihal Singh* v. *Sewa Ram* (2) is similar. These cases are sought to be distinguished on the ground that in them there was a prayer for possession of property, but in our opinion the mere absence of such a prayer makes no difference to the real nature of the suit. According to the agreement the plaintiff considers himself entitled not only to execution and registration of the sale deed of the property agreed to be sold, but also to possession. He does not make the latter claim because he says he is in possession. The case of *Deonandan Prasad Singh* v. *Janki Singh* (3) shows that there may be a suit for specific performance of a contract without any prayer for possession. Plaintiff in the present case asks that the sale to him should be completed and his suit is therefore undoubtedly one for specific performance of a contract. The alternative relief sought by him is the larger one, and the lower Appellate Court was not right in its view that the alternative relief was less than that for restoration of the original deed of sale, if still in existence. Counsel for the respondent is unable to cite any authority in support of his argument that the lower Appelate Court's decision is correct.

We accept the appeal and reversing the order of the District Judge restore that of the Trial Court rejecting the plaint with costs to defendant-appellant in all the Courts.

Z. K. *Appeal allowed.*

(1) 6 A. 231; A.W. N. (1884) 42; 3 Ind. Dec. (N.S.) 837.

(2) 35 Ind. Cas. 275; 38 A. 292; 14 A. L. J. 434.

(3) 56 Ind. Cas. 322; 5 P L J. 314; 1 P. L. T. 325; 2 U. P. L. R. (Pat.) 108; (1920) Pat. 266.

HOTKHAN SHERKHAN *v.* PAHLUMAL UKERMAL

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 9 OF 1920.

August 9, 1922.

Present :—Mr. Kennedy. J. C., and Raymond, A. J. C.

HOTKHAN SHERKHAN—APPELLANT
versus
PAHLUMAL UKERMAL AND ANOTHER—RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), ss. 86, 87, order under—Suit to set aside order, maintainability of—Civil Courts, jurisdiction of.

The object of sections 86 and 87 of the Bombay Land Revenue Code is to enable superior holders to recover rent or land revenue expeditiously when their title is clear, by a written application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. They are purely executive orders and the Civil Courts have no right to sit in judgment upon them. [p. 955, col. 2.]

A party dissatisfied with such an order may file a suit in the Civil Court, not to set aside the order, but the superior holder to recover such amount as he may deem still due to him and the inferior holder to recover the amount levied from him in excess of what was due. [p. 956, col 1.]

Appeal from the decree of the Joint Judge, Hyderabad.

Mr. *Tahilram Maniram*, for the Appellant.

Mr. *Tolasing Khushalsing*, for the Respondents.

JUDGMENT.—Mir Budho Khan was the Jagirdar of certain land in Deh Vagoori which he had leased to the respondent (defendant) Pahlumal Ukermal. Two survey numbers of the Jagir land had been let for cultivation for 1916-17 to Hot Khan appellant plaintiff by Usman deceased who was the *maurusi hari* thereof. In his plaint Hot Khan stated that he paid Rs. 12 as *lapo* for the two survey numbers and the other dues were payable according to the usage prevailing in the jagir but that the lessee Pahlumal insisted on enhanced rates and made a written application to the *Mukhtiarkar* under section 86, Bombay Land Revenue Code, asking for assistance in recovering dues at certain rates from him and an order was passed thereon in Pahlumal's favour. Plaintiff's prayer in his plaint was for a declaration that the decree (*sic*) obtained by Pahlumal at the hands of the *Mukhtiarkar* under section 86, Land Revenue Code, was null and void and for an injunction to Pahlumal restraining him from executing the decree. The Sub-Judge after hearing lengthy evidence as to the usage prevalent in the jagir in respect of rates of payment of the various land dues, came to the conclusion that the decision of the *Mukhtiarkar* in acceding to the application of Pahlumal was erroneous and directed it to be set aside. On appeal the District Court of Hydrabad was of opinion that the trial Court was not competent to set aside an order passed under section 86 of the Land Revenue Code and that the suit could not be entertained in the form in which it was brought and allowing the appeal, dismissed the plaintiff's suit. He now comes before us on second appeal.

The object of sections 86 and 87 of the Land Revenue Code is to enable superior holders to recover rent or land revenue expeditiously when their title is clear, by a written application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. There can be no doubt in the present case as to Pahlumal being the superior holder as the lessee of the *Jagir* land and entitled in that capacity to recover the land revenue, whereas Hotkhan was the inferior holder. It was, therefore, quite open to Pahlumal to seek assistance of the Revenue Officer in the form prescribed by section 86. But the order of the *Mamlatdar* on Pahlumal's application was in no way conclusive. Clause 4 of section 87 states in clear terms. "Nothing in this section shall prevent either party from having recourse to the Civil Courts to recover from the other, such amount as he may deem to be still due to him, or to have been levied from him in excess of what was due, as the case may be." There was no necessity, therefore, for Hotkhan, though the *Mamlatdar's* order was adverse to him, to sue to set it aside, nor was he estopped by the order from having recourse to a Civil Court. The suit, therefore, to have the *Mamlatdar's* order set aside was misconceived, the *Mamlatdar's* order may be right or wrong, but it is purely an executive order and the Civil Courts have no right to

sit in judgment upon it. In terms of section 87 the Collector or any Revenue Officer to whom powers under section 87 are delegated, on an application under section 86, does one of two things, if he finds that the question at issue between the parties complicated or difficult, he refuses the assistance sought but if the question is simple he grants it. The party dissatisfied with his order may then file a suit in the Civil Court, not to set aside his order, but the superior holder to recover such amounts as he may deem still due to him, and the inferior holder to recover the amount "*levied*" from him in excess of what was due." The latter's suit, therefore, becomes one "for the recovery of moneys had and received." But the plaintiff Hotkhan has come to Court to have the order of the *Mamlatdar* cancelled and the Subordinate Court has given him a declaration setting aside the *Mamlatdar's* order which he had no jurisdiction to do. No doubt Hotkhan apprehended that after the *Mamlatdar's* order, the next step would be to recover from him land revenue in excess of what he contended was due, and in resorting to a Civil Court he was prompted by the natural desire to stay execution of the order. But in terms of section 87 his cause of action arises when a sum in excess of what he contends is due is levied from him. It is at this stage permissible to him to have recourse to the Civil Courts, not for cancelling or amending the order of the Revenue Officer, but for the refund of the amount levied from him in excess of what was actually due.

We, therefore, dismiss this appeal but in the circumstances of the case we direct each party to bear his own costs on this appeal.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 67 OF 1921.

March 6, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

Syed HASAN IMAM AND OTHERS
PLAINTIFFS—APPELLANTS
versus
DEBI PRASAD SINGH—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, r. 2—Limitation, plea of—Omission to state facts—General plea, effect of—Limitation Act (IX of 1908), Sch. I, Art. 89—Failure to render accounts—Refusal to render accounts

The plea of limitation is a plea in bar of the suit and unless the necessary facts are stated by the defendant in the written statement to raise a substantive defence of limitation, a general statement that the suit is barred by limitation means that on the face of the plaint the suit is so barred. [p. 957, col. 1.]

The question whether the failure of an agent to render accounts amounts to a refusal within the meaning of Art. 89 of Schedule I to the Limitation Act depends upon the circumstances of each case [p. 957, col. 2.]

The "putting off" of the rendering of accounts by an agent is equivalent to postponement and postponement implies an admission that the account is due and will be rendered. [p. 957, col. 2.]

Appeal against a decision of the Officiating Subordinate Judge, Patna, dated the 21st December 1920.

Messrs. *S.M. Mullick* and *Shiveshwar Dayal*, for the Appellants.

Messrs. *L. N. Singh* and *Syed Nurul Hassan*, for the Respondent.

JUDGMENT.

Ross, J.—The learned Subordinate Judge has dismissed the major part of the plaintiffs' claim for accounts against the defendant on ground of limitation. The defendant was the *Tahsildar* of Karanpura, a village in the estate represented by the plaintiffs from 1900 until the 14th December 1917. The suit was brought on the 5th December 1919. The learned Subordinate Judge has limited the account to the year 1917, and the plaintiffs file the present appeal.

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The suit is governed by Article 89 of Schedule I to the Limitation Act. The period of 3 years limited by that Article begins to run when the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates. Time would, therefore, begin to run in the present case from the 14th December 1917, unless during the continuance of the agency an account was demanded and refused. The material parts of the pleadings on his question are as follows. In paragraph 5 of the plaint it is said that.

"Some days before he was dismissed the Rai Saheb asked him to render account; but he went on putting off the matter from day to day and did always promise that he would render account."

Paragraph 1 of the written statement is that the suit has not been properly framed and is barred by limitation, and in paragraph 10 it is said that on the expiry of the year this defendant used to render accounts. Now the plea of limitation is a plea in bar and there are no facts stated to raise a substantive defence of limitation. Therefore, paragraph 1 of the written statement must be read as meaning that on the face of the plaint the plaintiffs' suit is barred. This plea manifestly fails because the allegation in the plaint is that the defendant promised to render accounts. Moreover, the substantive defence, which has been disbelieved by the learned Subordinate Judge, is that in fact accounts were rendered. In the words of the Judicial Committee in *Nobin Chandra* v. *Chandra Maldab* (1).

"The statement of objections on the part of respondent does not allege that there has been any demand and refusal of accounts."

The learned Subordinate Judge, however, has based his decision on certain statements of the plaintiffs' witnesses. Plaintiffs' witness No. 3 said in cross-examination.

"Before the trust, defendant was asked several times to render accounts but I cannot give any exact idea of the demand, it may be 5 or 6 years before. I think some *Parwana* was sent to him to render accounts. In my presence defendant was asked to render accounts some time."

In re-examination he said,

"Defendant was asked to render account repeatedly and he put it off but never refused to render account."

Plaintiff's witness No. 5 also says that

"Defendant was asked to render account but he went on putting off the matter."

If it is open to the defence to raise this substantive plea of limitation on these statements of the plaintiffs' witnesses, the effect of these statements must be taken to be merely this; that demands were made and the defendant put the matter off. The learned Subordinate Judge has relied upon *Madusudan Sen* v. *Rukhal Chandra Das* (2). In that case the defendant was called upon to explain his papers and did not respond to the call. Apparently he did nothing and kept silent and this was construed as a refusal. In *Bhabatarini Debi* v. *Sheikh Bahadur Sarkar* (3), it was pointed out that the question whether the failure of an agent to render accounts amounts to a refusal within the meaning of Article 89, depends upon the circumstances of each case. In my opinion there was in this case no refusal by the defendant. The expression 'putting off' has been interpreted by this Court in *Nawab Choudhury* v. *Lok Nath Singh* (4), as equivalent to postponement, and postponement is by no means tantamount to refusal, on the contrary it implies an admission that an account is due and will be rendered.

In my opinion, therefore, limitation in this case runs from the date of the termination of the agency and the suit is within time.

On the merits of the case it was argued on behalf of the respondent that the defendant had actually submitted accounts, and referene was made to the evidence. This matter has been fully discussed by the learned Subordinate Judge and his reasoning is so convincing that it is unnecessary to go into the evidence. All the proofs that might have been expected to be forthcoming if accounts had in fact been rendered are absent in this case; and the learned Vakil for the respondent did not meet any

(1) 36 Ind. Cas. 1; 44 C. 1; 24 C. L. J 509; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 836; (1916) 2 M. W. N. 565; 5 L. W. 452 (P.C.).

(2) 30 Ind. Cas. 697; 43 C. 248; 22 C. L. J. 552; 19 C. W. N. 1070.

(3) 53 Ind. Cas 675; 80 C L. J. 90.

(4) 43 Ind. Cas. 570.

of the arguments of the learned lower Court.

I would, therefore, decree this appeal and decree the plaintiff's suit in full. There will be a preliminary decree for accounts from 1307 to *Ajhun* 1324, instead of for the limited period allowed by the Subordinate Judge, and the Commissioner will take the accounts for the entire period claimed.

The plaintiffs are entitled to the costs of this appeal.

Das, J.—I agree.

N. H. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 1255 OF 1920.

April 7, 1921.

Present:—Mr. Madgavkar, A. J. C.

L. COLLINS—PLAINTIFF
versus
CHARLES BOOTH & CO., LTD—DEFENDANTS.

Civil Procedure Code (Act V of 1908) O. VI, rr. 4, 5; O. VII, r. 11 (a)—Suit for damages for wrongful dismissal—Particulars of defence · Rejection of plaint—Cause of action, absence of - Duty of Court.

The power conferred by O. VII r. 11 (*b*) of the Civil Procedure Code should be exercised with great circumspection and only if the Court is satisfied that even if the plaintiff proves all the allegations of fact he sets forth in the plaint, he would still not be entitled to any relief whatever. [p. 959, col. 2.]

Moore v. *Lawson*, (1915) 31 T. L. R. 418; *Fraser* v. *Pape*, (1904) 91 L. T. 340; 20 T. L. R. 798, referred to.

The rule does not justify the rejection of a plaint in part. Where the *onus* of establishing a positive or negative allegation lies upon the plaintiff the Court will order the defendant to give particulars of his traverse of that allegation. [p. 960, col. 1.]

Weinberger v. *Inglis*, (1918) 1 Ch. 133; 87 L.J. Ch. 148; 118 L. T. 205; 62 S. J. 160; 34 T. L. R. 104; *Weinberger* v *Inglis*, (1919) A. C.606; 88 L.J. Ch. 287; 121 L. T. 65; 63 S. J. 461; 35 T. L. R. 399, relied on.

Alwan v. *Oppert*, (1901) 70 L. J. K. B. 745; 2 K. B. 576; 84 L. T. 828; 8 Monson 816, referred to.

In a suit to recover damages for wrongful dismissal of the plaintiff by the directors of the defendant Company in the alleged exercise by them of the powers conferred on them by the agreement of service entered into by the plaintiff, the plaintiff cannot call upon the defendant for a statement of particulars of the reasons why the directors considered the plaintiff unsuitable, or adduce evidence to show that these reasons were wrong or in sufficient and cannot ask the Court to substitute itself for the directors to decide how far these reasons were good, bad or indifferent. All that he can ask the Court in cases of this character is whether the action of the directors was an honest and *bona fide* exercise of their powers under the agreement. [p. 960, col. 1.]

Cassel v. *Inglis*, (1916) 2 Ch. 211; 85 L. J. Ch. 569; 114 L. T. 935; 32 T. L. R 555; *Diggle* v. *Ogston Motor Co.*, (1915) T. W N. 37; 84 L. J. K. B 2165; 112 L. T. 1029, relied on.

Mr. *T. G. Elphinston*, for the Plaintiff.

Mr. *W. Gregory*, for the Defendants.

JUDGMENT.—Suit for damages. By an agreement, dated the 8th September 1919, the defendants Messrs. Charles Booth & Co., engaged the plaintiff L. Collins for a period ending on 31st May 1924 to assist them in their business in India and in particular to create and manage branch establishments in Karachi and Amritsar, on a salary of Rs. 2,500 per mensem plus 15 per cent of the net profits earned by the Amritsar and Karachi branches. Under clause 11 of the agreement the defendants were entitled to put an end to this agreement at any time by giving the plaintiff three months' notice in writing if the directors of the Company considered the plaintiff unsuitable for his duties. On the 2nd November 1920, the defendants gave the plaintiff a notice, Ex. A, filed with the written statement determining his services....On 19th November 1920, the plaintiff filed his present suit claiming Rs. 70,000 from the defendants for breach of the agreement. The defendants demand particulars as to how this amount is made up on the ground that they are not specific. But apparently the plaintiff's salary alone at the rate in the agreement from 1st February 1920 to 31st May 1924 amounts to more than seventy thousand rupees.

The defendants contend *inter alia* that their action was within their powers under Cl. II and the plaint discloses no cause of action and the suit must, therefore, fail.

COLLINS *v.* CHARLES BOOTH & CO., LTD

The following issues were framed :—

1. Whether the suit is not maintainable by reason of the defendants being sued as Charles Booth & Co., Ltd, incorporated in India having its registered office at Calcutta by their manager of Karachi branch whoever he may be residing in Karachi ?

2. Whether the plaint discloses no cause of action and the suit is not maintainable ?

3. Whether the plaintiff is entitled to particulars as to why the directors of the defendants considered the plaintiff unsuitable for his duties within the meaning of Cl. II of the agreement between the parties ?

4. Whether the defendants were guilty of breach of contract by their action on 2nd November, 1920 ?

5. To what damages, if any, is the plaintiff entitled ?

6. General.

Issues Nos. 1, 2 and 3 were set down for preliminary hearing at the request of the defendants and have been argued and I proceed to record my findings on them particularly on issue No. 2.

As regards the first issue the plaintiff has amended the description of the defendants in the plaint and the defendants have consented to this course. The first issue, therefore, does not remain and is struck off.

Issue No. 2.—The question in this issue is whether the plaint discloses no cause of action and whether the suit should, therefore, be dismissed under O. VII, r. 11. The Court has had the benefit of exhaustive arguments on the question of law as between master and servant and dismissal and damages. These arguments are, however, really directed towards issue No. 4 rather than towards the second issue. It is admitted that the defendants gave the plaintiff the notice Ex. A on the 2nd November 1920 and terminated his service. The plaintiff contends that their action in these two respects was not legally justified and did not fall within their powers under Cl. II of the agreement. The defendants contend that it did. It appears to me clear that whatever the facts and the law in favour of each party and whatever the ultimate conclusion, in cases such as the present one, the plaintiff must be allowed to lead evidence and prove his case. The present case is hardly one in which it can be said that the plaint discloses no cause of action, and the defendants are not justified in asking the Court to reject the plaint. In fact even upon the arguments of the defendants, the plaintiff would be entitled to two months' salary and fifteen per cent. commission for three months from the date of notice. The salary for November was paid to the plaintiff on the 30th November. As regards the salary for December and January, the defendants allege that they were willing to pay and have deposited it in Court and the plaintiff has withdrawn the amount. As regards commission the defendants contend that the Karachi and Amritrar branches show no profit, but a loss, therefore, the plaintiff is not entitled to any sum in respect of commission. Accepting for a moment the truth of this allegation for the defendants, the fact remains that on the date of the plaint, the plaintiff by the defendants' own admission remained entitled to three months' salary and account in respect of commission, if any, if he chose. It follows, therefore, that there was 'a cause' of action admittedly in respect of a portion at least of the period for which the plaintiff claims. In view of this finding it appears to me advisable not to go at length into the arguments on both sides, which as I have said above, are more appropriate in my opinion to issue No. 4 than to issue No. 2. The rule in England as far as I am aware has been as in India, *viz*, to exercise the powers under O. VII, r. 11 with great circumspection and only if the Court is satisfied that even if the plaintiff proves all the allegations of fact he sets forth in the plaint, he would still not be entitled to any relief whatever. Thus r. 4 of O. XXV of the Judicature Act gives the English Courts larger powers, as it provides firstly that a pleading may be struck off and secondly that it may be struck off on the ground that it discloses no reasonable cause of action. The rule was nevertheless not acted upon in *Moore* v. *Lawson* (1); and it has only been acted upon in plain and express cases. That was also the view adopted by Collins, M. R. in *Fraser* v. *Pape* (2). It was held by the Allahabad High Court in *Raghubans Puri* v. *Jyotis Swarupa* (3), that the rule in India does not justify the rejection of a plaint in part. It is further to be observed that the defendants did not ask for the trial

(1) (1915) 31 T. L. R. 418.
(2) (1904) 91 L. T. 340 ;20 T. L. R. 798.
(3) 29 A. 325 ; A. W. N. (1907) 68.

of the fourth issue as a preliminary issue, and the Court cannot therefore be asked at this stage to express an opinion without evidence which the plaintiff desires to lead on the main point in issue between the parties, *viz.*, whether the defendants' acts did or did not fall within their powers under Cl. II. I must, therefore, find on issue No 2 that the plaint discloses a cause of action and the suit is maintainable.

On the third issue.—There has been a keen contest between the parties as to whether the defendants can be compelled by the plaintiff to furnish particulars of the grounds why the defendants professed to consider the plaintiff unsuitable for his duties. Whatever the case may be, in suits such as *Alman* v. *Oppert* (4) as regards the grounds which led the directors to make a false statement in the prospectus of a company the general rule is laid down by Astbury, J. in *Weinberger* v. *Inglis* (5) that "where the onus of establishing a positive or negative allegation lies upon the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation." This view was confirmed by the Court of Appeal and was upheld in the House of Lords *Weinberger* v. *Inglis* (6) which held that the question in these cases was whether the defendants had *bona fide* exercised the discretion conferred upon them and were not shown to have acted arbitrarily or capriciously. Following the rule, I am of opinion that the plaintiff cannot call upon the defendants for a statement of particulars of the reasons why the directors considered the plaintiff unsuitable, or adduce evidence to show that these reasons were wrong or insufficient and cannot ask the Court to substitute itself for the directors to decide how far these reasons were good, bad or indifferent. All that he can ask the Court in cases of this character is whether the action of the defendant was an honest and *bona fide* exercise of their powers under Cl. 11 of the agreement : *Cassel* v. *Inglis* (7), *Diggle* v. *Ogston Motor Co.*, (8). In the present case while the plaint does not admit that these reasons come within the powers of Cl. 11 there is no clear denial of *bona fides* in the plaint itself. In the course of arguments reference was made to a letter to the defendants from the plaintiff's counsel the day after the notice hinting apparently that the real motive of the defendants was to save their pockets by engaging a manager on smaller pay. That circumstance, however, does not alter the legal position nor does it entitle the plaintiff to call upon the directors of the Company to give particulars.

The only question which remains for me to consider after my finding in the negative on the third issue is whether the plaintiff should be granted an issue about the defendants' action other than issue No. 4.

The plaintiff's counsel desires to ask for an amendment of the plaint questioning the defendants' *bona fides* in the sense of his letter of the 3rd November. It appears preferable therefore to reserve the question of further issues until the plaintiff has put in the prayer for the amendment of the plaint and both sides have been heard on the point.

Z. K. *Order accordingly.*

(4) (1901) 70 L. J. K. B. 745 ; 2 K. B. 576 ; 84 L. T. 828 ; 8 Manson 316.

(5) (1918) 1 Ch. 133 ; 87 L. J. Ch. 148 ; 118 L. T. 208 ; 62 S. J. 160 ; 34 T. L R. 104.

(6) (1919) A C. 606 ; 88 L J. Ch. 237 ; 121 L. T. 65 ; 63 S J. 461 ; 35 T L. R. 399.

(7) (1916) 2 Ch 211 ; 85 L. J. Ch 569 ; 114 L. T. 935 ; 32 T. L. R. 555.

(8) (1915) T. W. N. 37 ; 84 L. J. K. B. 2165 ; 112 L. T. 1029.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 801 OF 1920.

November 13, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

UDE RAM AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

ATMA RAM AND OTHERS—DEFENDANTS —RESPONDENTS.

Pre-emption—Portion of property sold transferred by vendee—Suit for balance, whether maintainable.

Defendant purchased certain property and sold a portion of it to M. who asserted a right of pre-emp-

tion. Plaintiff then sued to pre-empt the portion retained by the defendant, and the latter objected that a suit for pre-emption of a portion of the property purchased by him was not maintainable;

Held, that the defendant himself having parted with a portion of the property to M, could not object that a suit for pre-emption of the balance retained by him did not lie [p. 962, col 1.]

Sheobharos Rai v. *Jiach Rai*, 8 A. 462; A. W. N. (1886) 214: 5 Ind. Dec (N. S.) 176; *Ram Nath* v. *Badri Narain*, 19 A. 148; A. W. N. (1897) 20; 9 Ind. Dec. (N. S.) 98, relied on.

Fatteh Chand v. *Nihal Singh*, 106 P. R 1880; *Ralla* v. *Dayal*, 34 P. R. 1903; 64 P. L. R. 1903, referred to.

Appeal from the decree of the District Judge, Ambala, dated the 2nd February 1920, reversing that of the Subordinate Judge, 1st Class, Ambala, dated the 26th June 1919.

Mr. *Jagan Nath*, for the Appellants.

Mr. *G. C. Narang*, for the Respondents.

JUDGMENT.—The material facts of the case out of which the present second appeal arises are as follows:—

On the 18th March 1918 Ram Singh sold certain house property to Atma Ram and Janki Das. On the 16th July 1918 Janki Das sold his half share to Atma Ram and on the same day Atma Ram sold a portion of the property to Mukand Singh, defendant respondent, on the latter asserting his right of pre-emption. Ude Ram and another then brought the present suit for pre-emption of the part which Atma Ram had not sold to Mukand Singh. The first Court decreed the claim, and both the parties appealed to the District Judge who held that Mukand Singh, who had a right of pre-emption not having pressed his claim to the whole of the property sold, had lost his right as a pre-emptor and that the plaintiffs, therefore, could and should have sued for the whole of the property sold and that they were not entitled to pre-empt a part only. He accordingly dismissed the plaintiff's claim, and they have come up on second appeal to this Court.

It is common ground that the general rule is that the pre-emptor must take over the bargain as a whole, and that he is not entitled to sue for a part only, when he is entitled to sue for the whole. Ellis in his law of pre-emption, 4th Edition, points out at pages 147 *et seq.* that this general rule is limited to certain cases which he details. The present case does not appear to be covered by authority. Counsel for the respondents cites *Fatteh Chand* v. *Nihal Singh* (1) and *Ralla* v. *Dayal* (2), as authorities for the proposition that a pre-emptor cannot relinquish his claim to a part of the property sold, and that if in buying property to which he has a right of pre-emption he associates himself with a stranger who has not such a right, he loses his right of pre-emption. In accordance with these authorities it appears that Mukand Singh, who had a right to pre-empt the whole property, by taking only a portion from Atma Ram, lost his right of pre-emption and, therefore, the plaintiffs could have brought the present suit for the whole of the property sold. The question, however, is whether they were bound to sue for the whole of the property. Counsel for the appellants has cited the case of *Sheobharos Rai* v. *Jiach Rai* (3), in which Mahmood, J. said that the principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. He said that the rule applied only to those transactions which while contained in one deed, could not be broken up or separated, and that it should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers. In that case the sale was to persons having a right of pre-emption and to a stranger who had no such right, but the shares sold to each were distinctly specified and it was held that in such a case the suit could not be brought in regard to the portion of the property sold to the persons who had right of pre-emption. This case was followed in *Ram Nath* v. *Badri Narain* (4). Dr. Narang who appeared for the respondents admitted the force of these authorities, but said that they did not

(1) 106 P. R. 1880.
(2) 34 P. R. 1903; 64 P. L. R. 1903.
(3) 8 A. 462; A. W. N. (1886) 214; 5 Ind. Dec. (N. S.) 176
(4) 19 A. 148; A. W. N. (1897) 20; 9 Ind. Dec. (N.S.) 98.

apply to the present case, because the original sale was not one of specified portions to Atma Ram and Mukand Singh. They are not on all fours with the present case, but in our opinion the principle of them should be made applicable to it. Atma Ram having himself broken up the property sold by parting with a portion of it to Mukand Singh who had a right of pre-emption has no grievance when the plaintiffs sue him for the remainder of the property. He would not gain anything by plaintiffs suing not only for the portion of the property left with him but also for that sold by him to Mukand Singh. This is not a case where the plaintiff is seeking to pick and choose part of the property in the possession of the vendee. The vendee himself having parted with a portion of the property does not suffer in any way whatsoever by plaintiffs not suing for the whole of it. The reason for the rule that the pre-emptor must take over the whole of the property sold no longer exists. The giving of a decree to the plaintiffs will not involve any breaking up of the bargain as understood in the law of pre-emption because it has already been broken up by Atma Ram himself in selling a portion of the property to Mukand Singh.

We, therefore, accept the appeal and setting aside the decree of the District Judge remand the case to him for redecision of the parties' appeals lodged in his Court. Stamp in this Court will be refunded and other costs will be costs in the cause.

Z. K. *Appeal allowed.*
Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 18 OF 1917.

July 5, 1920.

Present :—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

Seth KHEMCHAND RAMDAS—PLAINTIFF—APPELLANT
versus
MOHSON SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) ss. 10, 14—Limitation Act (IX of 1908 Sch. I, Arts. 10, 113—Construction of document—Covenant by vendee to give right of first refusal to vendor and his heirs, validity of—Remoteness—Restraint on alienation—Suit to enforce covenant—Limitation.

The vendee of a house covenanted to live in the house himself and when he wanted to sell the house to give the right of first refusal to the vendor and his heirs at a certain price, and to sell the house as a whole and not piecemeal In a suit by the vendor to enforce the covenant against the vendee himself:

Held, (1) that the convenant was not void for remoteness nor did it offend against the provisions of section 10 of the Transfer of Property Act. [p 964, col 2, and p 965, col. 1.]

South Eastern Railway v. *Associated Portland Cement Manufacturers*, (1910) 1 Ch. D 12; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61, relied on.

Karim Bakhsh Khan v. *Phula Bibi*, 8 A. 102; A. W. N. (1886) 24; 4 Ind. Dec. (N. S) 1115; *Ramasami Pattar* v. *Chinnan Asari*, 24 M. 449; *Nabin Chandra Soot* v. *Nabah Ali Sarkar*, 5 C. W. N. 343, distinguished.

That the suit was not one to enforce a mere right of pre-emption but was a suit for specific performance and was governed by Article 113 of Schedule I to the Limitation Act. [p. 965, col. 1.]

Appeal from the decree of the Assistant Judge, Sukkur.

Mr. *Dipchand Chandumal*, for the Appellant.

Mr. *Rupchand Billaram*, for the Respondents.

JUDGMENT.—The facts of the appeal are shortly as follows:—

The plaintiff Khemchand Ramdas is a bania of Shikarpur. Near him lived one Hajanshah

KHEMCHAND RAMDAS *v.* MOHSON SHAH

Hajanshah's family tree so far as is necessary to the purposes of this case is as follows :—

Hajanshah,
Defendant No. 3—Bibi Kezbanu. Defendant No. 1 Mian Mohsonshah Chulalshah.
Jahanshah,
Defendant No. 2.

On Hajanshah's death his house passed to his son Jahanshah who sold it to his mother the defendant No. 3 by a sale-deed dated 9th March 1907. Defendant No. 3 re-sold the house to plaintiff and his uncle Khiomal by a deed dated 29th February 1908. Afterwards the defendants Nos. 1 to 3 refused to vacate, so Khiomal and the plaintiff filed suit 297 of 1908 to eject them In the course of the suit Khiomal died. Since he and his nephew had been joint the suit came to be continued in the name of the plaintiff alone. But before it terminated plaintiff came to an agreement with the defendants. By this agreement the plaintiff reconveyed to the defendants Nos. 1 and 2 the house. They on the other hand agreed,

(1) To sell the house to Khemchand and his heirs only ; if the sale occurred within five years the price would be Rs. 1,736 the price paid by the defendants. If the sale occurred after five years then the sale price would be fixed by certain persons named in the deed.

(2) The defendants Nos. 1 and 2 were not to alienate the property to any one but Khemchand or his heirs unless they refused to buy.

(3) The defendants Nos. 1 and 2 were to live in the house themselves.

They were to sell the house as a whole and not piecemeal.

In February 1912, the defendants Nos. 1 and 2 sold half the house to defendant No. 3, by Ex. 65. On the 4th May 1912, she resold the said half to one Gopumal, defendant No. 4. The plaintiff hearing of the re-sale warned Gopumal of his rights with the result that the latter filed a suit to set aside the sale. The suit dragged on for some time until the defendant No. 3 accepted a reconveyance of the half house from the defendant No. 4. Thereafter the defendant No. 3 mortgaged the same half to defendants Nos. 5 and 9. On 6th October 1914, the plaintiff filed the present suit in the Court of the Sub-Judge of Shikarpur for specific performance of his agreement. On the 30th April 1915, the Sub-Judge, Mr. Akhund, found that the plaintiff had slept over his rights so as to disentitle him to equitable relief and dismissed the suit. The plaintiff appealed to the District Court. On the 5th January 1917, Mr. Tirithadas, the Assistant Judge, dismissed the appeal. He disagreed from the trial Judge's finding that the plaintiff had been guilty of laches but he held that the covenant was (1) void for remoteness and (2) that it was opposed to the provisions of section 10 of the Transfer of Property Act.

The plaintiff has come in second appeal here.

Mr. Dipchand has appeared for the appellant.

Mr. Rupchand for the respondents.

Now it must be admitted that on its face there is nothing in the agreement inequitable. The plaintiff had bought the house from the defendant No. 3, but could not get it from her. Sooner than carry on protracted legal proceedings, he agreed to reconvey it to the defendants Nos. 1 and 2, provided they promised him first refusal of it. In these circumstances we are disposed to scrutinize strictly the plea that the agreement was contrary to law. The two objections taken by the lower Appellate Court were (1) the covenant was void for remoteness, in that it operated not only in the lifetime of the plaintiff but for ever and (2) the covenant was not one merely to secure a right of pre-emption but imposed an absolute bar to sell a portion of the property.

Now section 10 of the Transfer of Property Act runs as follows :—

"Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him, provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Mahomadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

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The question, therefore, before us is whether the resale by the plaintiff to the defendants Nos. 1 and 2 was subject to any condition or limitation absolutely restraining them or any persons claiming under them from parting with or disposing of their interest in the property. It is clear that it was not. On the contrary the sale-deed contemplated the transfer by the defendants of the property. The only condition imposed on them was that they should offer it to the plaintiff first for Rs. 1,736 the price at which he had himself sold it to the defendants. Now it has been held in *Karim Baksh Khan* v. *Phula Bibi* (1), that such a condition is not illegal. The learned Judge of the lower Court has relied on two cases in support of his view that the covenant was bad for remoteness: namely *Rama Sami Pattar* v. *Chinnan Asari* (2) and *Nabin Chandra Soot* v. *Nabab Ali Sarkar* (3). In our opinion neither of these cases supports his view. In *Rama Sami Patter* v. *Chinnan Asari* (2), the facts were widely different from those in the present case. In 1872, A. mortgaged some land to S. for Rs. 100. The mortgage-deed gave S. the right of pre-emption of the mortgagor's equity of redemption 1873, A. sold his equity to V. and from V. it passed to the plaintiff. When the plaintiff sued S. to redeem the mortgage, S. pleaded his covenant of pre-emption and contended that because of it the assignment to V. and and to the plaintiff were void. The learned Judges held that plaintiff was not a transferee with notice and that even if he had notice, as defendants could no longer bring a suit to enforce the contract, he could not use it as an answer to the plaintiff s claim.

Ayyangar, J. also held that the covenant of pre-emptionwas a clog on the equity of redemption and, therefore, inequitable. It is true that towards the end of their judgment both judges did refer to the question of perpetuity. But it is clear that their observations were *obiter dicta* and Ayyangar J., emphasised this by saying "I am glad to refrain from expressing any opinion on this difficult and important question of the application of the doctrine of perpetuities to covenants, as it has not been really argued in this case." In the case of *Nobin Chandra Soot and Nabab AliSarkar* (3), a certain Ramkissan sold some land to plaintiff. Subsequently the plaintiff reconveyed to Ramkissan the land in suit for Rs. 25 on condition that if he had to part with it he should retransfer it to them for the same price. If they refused the land, he could then be at liberty to sell it to others. After Ramkissan's death his son the defendant No. I sold the suit land to certain strangers in spite of the plaintiff's demand that he should sell it to them. The judges held that the covenant was void for remoteness because it sought to bind the heirs. It is true that here the covenant also seeks to bind the heirs of the parties. But the heirs are not in Court. It is the original parties who are before us. The finding, therefore, of their Lordships in *Nobin Chandra Soot and Nabab Ali Sarkar* (3) is not on all fours with the present litigation.

On the other hand there is the case of *South Eastern Railway Company* v. *Associated Portland Cement Manufacturers* (4). There a Railway Company bought a strip of land from a landed proprietor on the understanding that the vendor, his heirs or assigns might at any time make a tunnel under the railway line. When the heirs of the landed proprietor wished to make a tunnel the Railway Company invoked the aid of the law against perpetuities. But the learned Judges brushed aside the plea on the ground that the Railway Company was the living covenantor and that in a suit against the covenantor, the question of perpetuities did not arise. That as it seems to us, is exactly the position here.

We now come to the second point namely whether the covenant was void because to use the words of the learnrd Judge it imposed an absolute bar to sell a portion of the property. The wording of the agreement and of the sale-deed is certainly somewhat vague. But all parties admit that the covenant imposes on the defendants the obligation to sell the house as a whole or not at all. Here again let us consider whether this condition was inequitable. Surely not. The plaintiff had no objection to the defendants as neighbours, but when he re-sold the house to them he wished to ensure himself against their selling it to other less desirable persons. So he got them

(1) 8 A. 102; A. W. N. (1886) 24; 4 Ind Dec (N. S.) 1115.
(2) 24 M. 449.
(3) 5 C. W. N. 343.
(4) (1910) 1 Ch. D. 12; 79 L. J. Ch. 150; 101 L T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61.

to agree that they would before selling it to any one else offer it to him for Rs. 1,736 and also to agree, so that their previous covenant should not be defeated, not to sell the house by bits. Mr. Rupchand has urged that the defendants Nos. 1 and 2 were each restrained absolutely from selling their half share of the house. But they had no separate share of the house. It is clear that they were joint owners. They jointly sold half of the house to the defendant No. 3. They were however, restrained from selling the house piecemeal. Was that a violation of section 10? We do not think so. They were in no way restrained from selling the house as a whole. They were only restrained from selling it in a particular way.

Mr. Rupchand has further pressed on the Court the view that the suit was time-barred. The suit came, according to him, under article 10 of the Limitation Act. But in our opinion the suit comes under article 113, being a suit for specific performance of a contract. The contract between the parties does not give a mere right of pre-emption. It includes a number of other terms as well. Article 113 allows three years. The cause of action arose at the earliest when the defendants Nos. 1 and 2 sold half their house to defendant No. 3, in February 1912. The amended plaint was filed in the Shikarpur Sub-Court on 26th October 1914. The learned Sub-Judge has found that the plaintiff was guilty of laches. But this finding has been set aside by the Court of the 1st Appeal. We may add, that to this finding we agree.

Mr. Rupchand has lastly urged that if the present suit be deemed to be a suit for specific performance, then it is open to the Court to grant damages. But we are of opinion that if the plaintiff has done all that was incumbent on him to do, damages would not be a sufficient compensation to the plaintiff. He has all along been anxious to keep the house in suit free from undesirable neighbours. He first bought it. Then when he could not get possession of it through the action of the vendor, he compromised with them and reconveyed the house to defendant on the condition that they lived in it themselves or that if they wanted to sell it they should sell it to him. When defendants Nos. 1 and 2 sold half of the house to defendant No. 3, he took no exception to the transaction because, although it violated the letter of their agreement, the defendant No. 3 was the mother-in-law of defendant, No. 2, and therefore, one of the family. When the defendant No. 3 re-sold the half to defendant No. 4, the plaintiff threatened legal steps and forced the defendant No 4 to reconvey the half share to defendant No. 3. When the defendant No. 3 mortgaged the property to defendants No. 5 and 9 the plaintiff brought the present suit. It is clear that the plaintiff's only wish is to keep his own house free from undesirable neighbours and that the only way to gratify that wish is to allow him specific performance of his contract.

It has, however, been urged that the defendants called on the plaintiff by means of certain notices to buy the house and that he did not do so.

In these circumstances we remand the case for trial to the first Court, of the issue:—

Was an offer made to the plaintiff by the defendant No. 3 to take the house in mortgage or by way of sale? Did he refuse to do so? If so was he justified in refusing and what was the effect on his claim for specific performance?

Z. K. *Case remanded.*

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

February 26, 1924.

Present:—Lord Shaw, Lord Phillimore, Lord Blanesburgh, Sir John Edge and Lord Salvesen.

DURGA DEVI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHAMBHU NATH AND OTHERS—PLAINTIFES—RESPONDENTS.

Custom—Hindu Law—Adoption—Boy invested with sacred thread, whether can be adopted—Kashmiri Brahmins of Amritsar—Adverse possession—Female members of family allowed to occupy family house.

Among *Kashmiri* Brahmins of Amritsar the adoption of a boy, seventeen years of age, who has been invested with the sacred thread is valid by custom. [p 968, col. 2.]

Maharaj Narain v. *Banoji*, 84 P. R. 1907; 112 P. W. R. 1907, referred to.

DURGA DEVI *v.* SHAMBHU NATH

Where female members of the family of a deceased Hindu are permitted to occupy the family house by the heir of the deceased their possession cannot be regarded as adverse to the heir. [p. 969, col. 1.]

Appeal from a decree of the Chief Court of the Punjab, dated the 10th March 1916.

Messrs. *L. De Gruyther*, *K. C.*, and *J. M. Parikh*, for the Appellants.

Sir *G. Lowndes*, *K. C.*, and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.—This is an appeal by *Musammat* Durga Devi and her minor son Kali Sahai, two of the defendants to the suit, from a decree, dated the 10th March, 1916, of the Chief Court of the Punjab, which reversed a decree, dated the 31st July 1914, of the District Judge of Amritsar, which had dismissed the suit. The respondents are Shambhu Nath, who is the plaintiff in the suit, and Arjan Singh and Nathu Mal, who are two of the defendants to the suit and have taken no part in this appeal or in the litigation.

The pedigree of the family to which Shambhu Nath belonged is as follows :—

DEVI DAS=. . . .

Kashmiri Brahmin

Hari Ram=. . . .

Two sons.

Shambhu Nath, third son, alleged to have been adopted by Ram Chand after the death of Amar Nath, Plaintiff, respondent.

Ram Chand=. . . .

Amar Nath =Indrani, adopted son. Died July, 1918. Died in the life-time of Ram Chand, sonless.

Durga Devi=Manohar Nath a defendant, Appellant.

Kali Sahai, a minor, a defendant, appellant.

The suit was brought in the Court of the District Judge of Amritsar on the 21st October, 1913, for a decree for the possession of two houses, a well, a *kothri* and a shop in Amritsar, of which the plaintiff alleged that he, as the adopted son of Ram Chand, was the owner. His case is that he was adopted by Pandit Ram Chand in September 1896, who was the owner of the property in question, and died on the 13th July, 1897. The case of the defendants Durga Devi and Kali Sahai, her minor son, is that plaintiff was not adopted by Ram Chand and that the suit is barred by the law of limitation. The other two defendants, who have no title if the plaintiff is the adopted son of Ram Chand and is not debarred from maintaining the suit by the law of limitation, did not defend the suit and were, by an amendment of the decree of the Chief Court, made not liable for costs.

It will be convenient to consider whether Shambhu Nath was validly adopted by Ram Chand before considering whether Shambhu Nath's suit is barred by the law of limitation.

Shambhu Nath was the third son of Hari Ram, a brother of Ram Chand. They belonged to a family of Brahmins which came from Kashmir and settled in Amritsar in the Punjab, and section 5 of Act IV of 1872, the Punjab Laws Act, 1872, as amended, applied to that family of Kashmiri Brahmins. By that section it is, so far as is material to this suit and appeal, enacted as follows :—

"5. In questions regarding succession, . . . adoption...or any religious usage, . . . the rule of decision shall be—

(*a*) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority ;

(*b*) the Muhammadan law, in cases where the parties are Muhammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by such custom as is above referred to."

The adoption alleged in this suit to have been made was an adoption applicable by

custom to the family of Kashmiri Brahmins to which Ram Chand Shambhu Nath belonged, and had not been altered or abolished or declared to be void.

At the date of the alleged adoption Shambhu Nath was 17 years old and he had been invested with the sacred thread, that is the ceremony of Upanayna had already been performed upon him. There was no evidence as to what school of Hindu law Kashmiri Brahmins living in Kashmir are subject to, and it has not been suggestd that this family of Kashmiri Brahmins was living in the Punjab subject to any school of Hindu law peculiar to Kashmir. They were, however, Brahmins by caste, and consequently were Hindus of a twice born class.

In considering whether a family custom as to adoption was proved in this suit, it is advisable to bear in mind what Lord Buckmaster said in delivering the judgment of the Board in *Abdul Hussein Khan* v. *Bibi Sona Dero*, (1) as to the proof of family customs in India. Afther pointing out that it is incumbent upon a plaintiff to allege and prove the custom upon which he relies, Lord Buckmaster said :—

> "Their Lordships have carefully considered the difficuty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognized in India (see *Soorendronath Roy* v. *Heeramonee Burmoneah* (2), although such a custom is unknown to the law of this country, and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or not by another family, would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed."

There are concurrent findings of the Trial Judge and the Chief Court that Shambu Nath was in fact adopted by Ram Chand, and there was evidence upon which those Courts could so find, and those findings as to the factum of the adoption must be accepted as conclusive. Each Court also found that the adoption was valid but apparently for different reasons. The Trial Judge apparently relied for his finding that the adoption was valid, not upon the evidence as to custom, but upon a judgment of the Bombay High Court in *Lakshmappa* v. *Ramava* (3), to which this family of Kashmiri Brahmins were not parties. He also referred to Trevelyan's *Hindu Family Law*, edition of 1908, page 148. He did not, however, express any opinion that on the evidence before him in this suit the adoption was invalid. He, however, dismissed the suit on the ground set up by *Musammat* Durga Devi and her son in their written statement that the suit was barred by the law of limitation. He dismissed the suit without costs. From that decree Shambhu Nath and *Musammat* Durga Devi and her son appealed. The Chief Court found on the evidence that by the custom of this family the adoption was valid, and that the suit was not barred by limitation, and decreed the suit with costs. The Chief Court dismissed the appeal of *Musammat* Durga Devi and her son with costs.

Shambhu Nath, the plaintiff, did not in his plaint state in what particular form he had been adopted by Ram Chand, but he alleged in his plaint that he was the adopted son of Ram Chand, and that Ram Chand, son of

(1) 43 Ind. Cas. 306 ; 45 I. A. 10 at 14 ; 16 A. L. J. 17 ; 4 P. L. W. 27 ; 34 M. L. J. 48 ; 22 C. W. N. 353 ; 23 M. L. T. 117 ; 27 C. L. J. 240 ; 1 P. L. R. 1918 ; 20 Bom. L. R. 528 ; 45 C. 450 ; 12 S. L. R. 104 (P. C.)

(2) 12 Moo. I. A. 81 at p. 91 ; 2 Sar. P. C. J. 372 : 2 Suth. P. C. J. 147 ; 10 W. R. 35 P. C.; 1 B. L. R. P. C. 26 ; 20 E. R. 271 (P. C.).

(3) 12 B. H. C. R. 364.

DURGA DEVI *v.* SHAMBHU NATH

Pandit Devi Das, by caste a Kashmiri Pandit, resident of Amritsar, had been the owner of the property, specified in his plaint, in respect of which he, Shambhu Nath, claimed a decree for possession. As Shambu Nath had been adopted in September 1896, openly and in the presence of many members of the brotherhood, the form of his adoption must have been perfectly well known in the family and by *Musammat* Durga Devi. In the written statement which she filed in the suit on behalf of herself and her son, she confined herself so far as the question of Shambhu Nath's adoption was concerned, to a simple denial that Shambhu Nath was the adopted son of Ram Chand. On those pleadings Shambhu Nath was, in order to succeed in his suit, bound to prove that he had been validly adopted.

On behalf of Shambhu Nath several witnesses were called, most of whom were members of the Biradri, and all of whom, so far as appears, were persons of respectability. Some of them who were members of the Biradri lived in Amritsar, others lived in Lahore. Ram Chand was a Guru, that is a religious teacher and spiritual guide amongst these Kashmiri Brahmins of Amritsar, and was obviously much respected, and he must have known what were the essentials to a valid adoption in the family to which he belonged. As has already been mentioned Shambhu Nath was 17 years old when the adoption took place, and he had been then already invested with the sacred thread; those are facts which must have been known by the members of the Biradri and by other friends of the family who attended the adoption, several of whom gave evidence in support of his case.

It is not suggested that any one who attended the adoption had questioned in any way the right to validly adopt in this family a boy or young man who had previously been invested with the sacred thread. Not one question was put in cross-examination of any witness for the plaintiff to suggest that Shambhu Nath could have not been validly adopted because he had been previously invested with the sacred thread, and the cross-examination of the plaintiff's witnesses was directed to make out a case that the adoption was invalid by reason of Shambhu Nath having been 17 years old when the adoption took place. There was abundant evidence that there was no limit of age for a valid adoption in this family, and the contention that there was a limit of age within which a valid adoption could be made in this family was subsequently abandoned. After the plaintiff's evidence had been closed, some witnesses were called on behalf of *Musammat* Durga Devi and her son, who, if their evidence was believed, proved that a boy of 17 years of age could not be adopted.

One of the witnesses for the defendants—appellants was Kishori Lal, a Kashmiri Pandit of Delhi. He stated that "a boy who has gone through his janaoo ceremonies (ceremonies of investiture with the sacred thread) can never be adopted," and "we follow *Mitakshara*." It may be mentioned with regard to his evidence that the Chief Court of the Punjab had held in *Maharaj Narain* v. *Banoji* (4), that Kashmiri Brahmins of the Delhi District were proved to be governed in matters of adoption by custom and not by the principles of the *Mitakshara* form of Hindu Law.

Another witness for the defendants appellants was Mohan Lal, a Kashmiri Brahmin of Lahore He stated that "a boy who has gone through the janaoo ceremony cannot be adopted," and "we follow Dharam Shastar in matter of janaoo and adoption"; he further stated "according to Hindu Law janaoo ceremonies cannot be performed after the age of 11 or 12 years. I do not know whether there is any age restriction as regards adoption. I have not read the Hindu Law." It is not necessary for their Lordships to consider what is the law of *Mitakshara* or of the Dharma-Sutras, as the question on which this suit depended is one as to a custom of adoption in this family of Kashmiri Brahmins. The plaintiff was not entitled to call rebutting evidence on the question of adoption as his case as to the alleged adoption had been closed.

After a careful consideration of the evidence their Lordships have come to the conclusion that Shambhu Nath was validly adopted by Ram Chand. His adoption was recognised as valid by Biradri and by the friends of the family, and so far as appears its validity was not questioned by any one from 1896 until the present dispute arose in 1913. When

(4) 84 P. R. 1907; 112 P. W. R. 1907.

Ram Chand died, his brother Hari Nath and two elder sons of Hari Nath were living, but it was Shambhu Nath who performed the funeral obsequies of Ram Chand and of Ram Chand's widow, and on Ram Chand's death Shambhu Nath succeeded him as the Guru. It was Shambu Nath who gave *Musammat* Durga Devi away in marriage, and it was Shambhu Nath who paid the not inconsiderable expenses of the marriage.

The contention of the appellants that this suit is barred by the law of limitation on the ground that *Mussammat* Umraoti, the widow of Ram Chand, and *Mussammat* Indrani, and after her *Mussammat* Durga Devi held adverse possession of the property in suit for more than 12 years was, in the circumstances of the case, in their Lordships' opinion, an impudent and unfounded contention of the appellants. The family house at Amritsar was naturally the proper place in which Umraoti, Indrani and Durga Devi until her marriage should live. Shambhu Nath permitted them as female members of the family to live in that house. He had obtained employment at Lahore in the service of the railway company. The rents of the property at Amritsar were trifling and he allowed Umraoti, Indrani and Durga Devi to enjoy these rents for their maintenance as female members of this family. There was no 12 years' adverse possession of any of the property in suit.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants—Messrs. *Downer & Johnson.*

Solicitors for the Respondents—Messrs. *Ranken Ford, & Chester.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUITS NOS. 25 AND 262 OF 1922 AND MISCELLANEOUS NOS. 36 AND 92 OF 1922.

February 6, 1923.

Present :—Mr. Raymond, A. J. C.

TAYABALLY ABDUL HUSSAIN—
PLAINTIFF

versus

MESSRS. JAMES FINLAY & CO.—
DEFENDANTS.

Court-Fees Act (VII of 1870) s. 7 (IV) (e)—Suit for declaration and injunction, valuation of—Arbitration and award—Suit to set aside award, maintainability of—Agreement to refer submission not signed, effect of—Suit for declaration, effect of, on arbitration—Awards, several, whether can be made on one submission—Construction of contract—Dispute arising out of contract.

Though a party dissatisfied with a private award may wait till his adversary seeks to enforce it by the summary process prescribed by the Indian Arbitration Act, and then contest it by finding such objections as are allowed by the law, that remedy is not his sole remedy and does not take away the remedy open to him under the provisions of section 9, Civil Procedure Code of bringing an action to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation." [p. 978, col. 1.]

Firm of Jai Narain Babulal v. *Firm of Naraindas Janimal*, 69 Ind. Cas. 585 ; 3 L 296; (1922) A. I. R. (L.) 369, relied on.

Ramkishen Joydoyal v *Pooran Mull*, 56 Ind. Cas. 571 ; 47 C. 783 ; 31 C. L. J. 259 ; *Vulley Mahomed* v. *Dattubhoy Hassam*, 25 B 10 ; 2 Bom. L. R. 907, referred to

In a suit for a declaration and for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purposes of Court-fees, and the value for the purposes of jurisdiction is the same. [p. 978, col. 2.]

Balkrishna Narayan Sawant v. *Jankibai Sitaram Sansgiri*, 56 Ind. Cas. 340 ; 44 B. 331 ; 22 Bom. L. R. 289, relied on.

Arunachalam Chetty v. *Rangaswami Pillai*, 28 Ind. Cas. 79 ; 38 M. 922 ; 28 M. L. J. 118 ; (1915) M. W. N. 118 ; 17 M. L T. 151 ; *Shriram* v. *Firm of Dataram*, 70 Ind. Cas. 852 ; 16 S. L. R. 109 ; (1922) A. I. R. (S) 20 ; *Deo Kali Koer* v. *Kedar Nath*, 15

TAYABALLY ABDUL HUSSAIN *v.* JAMES FINLAY AND CO.

Ind. Cas. 427 ; 39 C. 701 ; 16 C. W. N. 833, referred to.

Plaintiff brought a suit for a declaration that there was no valid and binding contract between him and the defendant for the purchase of certain goods, and, in the alternative, that the contract, if any, was void as having been induced by fraud, and that the parties had not agreed to refer their disputes to arbitration, and for an injunction restraining the defendant from enforcing the contract or submitting disputes arising out of the alleged contract to arbitration ;

Held, (1) that the suit was maintainable, (2) that the suit fell within the purview of section 7 IV (*e*) of the Court-Fees Act, and the plaintiff was entitled to value his claim for the purposes of court-fees and pay court-fees accordingly. [p. 973, col. 2 and p. 974, col. 1.]

The general rule of construction of a written contract is that the language of the instrument is to be understood in its ordinary and natural meaning, but at the same time, the whole of the contract must be considered in order to ascertain the meaning of any particular part thereof [p. 978, col. 1.]

If parties have agreed in writing to submit their differences to arbitration, the submission need not be signed. [p. 978, col. 1.]

Utoamal v. *Haridas*, 7 Ind. Cas. 595 ; 4 S. L. R. 26; *Lyon Lord & Co.* v. *Firm of Chapee Minersi*, 49 Ind. Cas. 135 ; 12 S. L. R. 55, followed.

The failure of a party to a contract to pay a sum of money claimed by the other party under the contract, constitutes a matter in difference between the parties arising out of the contract. [p. 979, col. 2.]

Finlay Co. v. *Jashanmal Kirpalain*, 12 Ind. Cas. 188 ; 55 S. L. R. 4, followed.

The filing of a suit for a declaration that the plaintiff is not bound by a submission to arbitration does not *ipso facto* render the arbitrators *functi officio* and their award void. [p. 979, col. 2.]

A submission to arbitration is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. There may be as many awards on one submission as there are disputes arising out of the contract. [p. 979, col. 2.]

Original suits.

Mr. *Rupchand Bilaram*, for the Plaintiff.

Mr. *Kimatrai Bajraj*, for the Defendants.

JUDGMENT.—Tyabali Abdul Hussain carries on business in Karachi in the name of Alibhai Mamuji and deals extensively in sugar. One Hassonand is a sugar Broker of James Finlay & Co. Tayabali alleges that in the early part of August 1921, Hassanand on behalf of Finlay asked him whether he would purchase 400 tons of white Java sugar and 100 tons of Brown Java sugar at Rs. 23-12-0 per cwt., for the former and Rs. 20-14-0 for the latter. Tayabali requested that the rate for the white Sugar should be reduced to Rs. 23-8-0 that being the rate at which he had purchased white sugar that day and the rate for the Brown sugar to Rs. 20-8-0. Hassanand said in reply that he should agree to the rate named by him for the white sugar and that he would have the price for the Brown sugar reduced by about six to eight annas. Tayabali consented and within an hour, Hassanand brought him a form for his signature which is headed " Memorandum " and is addressed by Alibhai Mamuji to James Finlay & Co. and is Ex. 6 in the case. Considering its importance it is desirable to reproduce its contents which are as follows : –

" We shall thank you to telegraph to your friends in England to purchase the following on our account, for reply by 10 o'clock tomorrow night, subject to the conditions of your indent forms:

400 tons of White Java sugar at Rs. 23-12-0 November, December equally.

100 tons of Brown Java sugar at Rs. 20-8-0 November, December equally."

This memo was signed by Tayabali and is dated the 10th August 1911. Tayabali's case is that he contracted for the purchase of both the White and Brown Java sugar on the inducement held out to him by Hassanand that the higher rate for the White Java was compensated for by the lower rate for the Brown Java. On the 11th August 1921, that is the day following Ex. 6, Finlay addressed to Tayabali a " Sugar Acceptance Notice " wherein they informed him of the acceptance of his offer for 400 tons of the White Java only " subject to the confirmation of our telegram and to the terms of the agreement which we shall call upon you to sign in due course as usual." On the 12th August, the pleaders of Tayabali wrote to Finlay, Ex. 8, with reference to their acceptance notice, pointing out that the offer of their client was for both the White and Brown Java sugar, and it was not open to Finlay to accept the one without accepting the other, and further, it was alleged that as the acceptance was conditional, it amounted to a counter

offer which their client could not accept. It is significant to observe that there is no reference in Ex. 8 to any fraudulent representation on the part of the broker Hassanand or to any inducement held out by him prior to Tayabali appending his signature to Ex. 6. Finlay replied to Ex. 8 through their pleader stating that there were two separate offers for white and brown and that their clients were justified in accepting the one and not the other, and that their acceptance was by no means conditional. They urged that Tayabali was bound by the contract for the purchase of white Java sugar and that the usual indent would be sent to him for his signature, and arrival notice would be given to him on the arrival of the shipments. They add that the reason for Tayabali attempting to back out of the contract was the fall in the market rate, Ex. 9. On the 15th August, Ex. 10, plaintiffs' pleaders reiterate their reasons already advanced repudiating the contract and mention that the broker held out an inducement to their client to purchase both the qualities of the sugar and that the contract for both was but one "written on the same paper and over one signature." Finlays denied the inducement and contended that as the offers related to different kinds of goods they were distinct offers. Ex. 11. There was no further correspondence between the parties till a month later when Finlay's pleaders wrote to the pleaders of Tayabali, Ex. 12, informing them that they were prepared owing to the decline of prices in the market to have the dispute between them referred immediately to arbitration before the arrival of the goods and invited their concurrence, but Tayabali's pleaders replied, Ex. 13, that as there was no contract between the parties they challenged the right of Finlay to proceed to arbitration. On the 26th November 1921, Ex. 15, notice of arrival of 200 tons of white Java was given to Tayabali who replied that they had nothing to do with the goods in question. Finlay then advised that they would resell the goods on their account and informed them of the resale on the 6th December 1921 at Rs. 18 per cwt. On the 13th December 1921. Finlay wrote to Taybali Ex. 19, enclosing a copy of an account showing the loss sustained by them on 200 tons of white Java which amounted to Rs. 24,723-6-3 which they called upon them to pay within 24 hours and in the event of their failure to nominate their arbitrator within eight days, giving them at the same time the name of their arbitrator. Tayabali's pleaders failed to nominate their arbitrator contesting the right of Finlay to proceed to arbitration, the latter accordingly nominated an arbitrator on behalf of Tayabali. A reference in favour of the arbitrators was executed by Finlays alone on the 27th December 1921, and the arbitrators duly fixed a date for the hearing, giving notice thereof to Tayabali who did not attend before them nor was represented, and on the 10th January 1922, passed their award for the aforesaid sum in favour of Finlay. A day previous to the award, that is, on the 9th January 192-, Tayabali filed a suit in this Court against Finlay praying for a declaration that there was no valid and binding contract between the parties in respect of the 400 tons white Java sugar, and in the alternative that the contract, if any, be declared void as having been induced by fraud; for a declaration that the parties have not agreed to refer their disputes to arbitration and for an injunction restraining Finlay from enforcing the contract or submitting disputes arising out of the alleged contract to arbitration.

On the 23rd December 1921, Finlay gave Tayabali notice of the arrival of the balance of 200 tons of white Java, Ex. 22, and as Tayabali adopted the identical attitude as in respect of the previous 200 tons these were also resold by public auction at Rs. 16/14 per cwt. A bill was submitted to Tayabali and the same procedure adopted with reference to arbitration, the reference being executed on the 31st January 1922. Again Tayabali failed to appear before the arbitrators who passed their award on the 7th February 1922 awarding Finlay the sum of Rs. 25,537-13-8 against Tayabali. On the 18th March 1922, Tayabali filed another suit in this Court wherein he asked for similar relief as in his previous suit with the additional prayer that both the awards be declared not binding upon him and set aside and cancelled and for an injunction restraining Finlay from enforcing them.

Meanwhile on the 16th January and 9th February 1923, the arbitrators presented two petitions in Court under the Indian Arbitration Act of 1899 for the two awards being made a

rule of the Court and to these awards various objections were taken in more or less similar terms.

Subsequently an application under section 151, Civil Procedure Code was presented to the Court by the pleaders of Tayabali praying that in the interests of justice, and for the convenience of the parties, both the suits and the petitions to file the awards should be consolidated and heard together and after hearing the objections of the other side to this application I acceded to the prayer of the applicants, provided they gave security for the amounts awarded against them, with which order they complied.

The issues framed in the latter suit No. 262 of 1922 which virtually covered the whole ground in the previous suit No. 25 of 1922 and the objections raised to the petitions to file the two awards and which the pleaders for the respective parties have argued before me at considerable lenghth, are the following :—

(1) Is the suit as brought competent in view of the reasons given in para 1 of the written statement ?

(2) Is the suit for declaration and injunction not maintainable ?

(3) Is the plaint sufficiently stamped ?

(4) Was there an express agreement between the parties that both the white and brown sugar were to be sold by one and the same contract or was the offer for White Java sugar separate from that of brown Java sugar ?

(5) Was there no complete and binding contract between the parties for reasons given in paras. 1 to 4 A. of the written statement ?

(6) If there was a complete and binding contract, is the same voidable at plaintiff's instance for reasons given in paras. 1 to 5 of the plaint ?

(7) Did the plaintiff agree to submit to arbitration their disputes including the disputes whether there was a complete contract or not ?

(8) Had the defendants no right to refer the disputes to arbitration for reasons given in para. 6 of the plaint ?

(9) Are the two awards in Judl. Misc. Nos. 36 and 92 of 1912 or any of them null and void for reasons given in para. 13 of the plaint ?

(10) Is the plaintiff entitled to urge the contentions raised in clauses (d), (e), (f) and (g) of para. 13 of the plaint ?

(11) Is the plaintiff entitled to any, and if so, what relief ?

(12) General.

The first issue has not been pressed by Mr. Kimatrai who represented the defendants James Finlay & Co. and my finding on it on the evidence recorded is in the affirmative.

ISSUE 2—On the facts as set out above, plaintiff's allegation is that as the acceptance by the defendants was only of a part of the goods and was also conditional, the so-called acceptance was in the nature of a counter-offer which the plaintiff declined to accept, hence there was no contract between the parties ; and, further, even if there was a complete and binding contract with respect to the 400 tons white Java sugar the same was voidable by reason of fraud on the part of the defendants' broker. Whether the allegations have been substantiated or not is a point that I shall discuss later but plaintiff prays for a declaration that there is no valid and binding contract and consequently the awards are not binding upon him and for an injunction restraining the defendants from enforcing them. Mr. Kimatrai has argued that the suit for declaration and injunction as prayed for, is not maintainable. He relies principally on the case of *Ram Kissen Joydoyal* v. *Pooran Mull* (1) where " in a suit for a declaration that a certain contract entered into between plaintiffs and defendants was not binding on the plaintiffs inasmuch as they did not enter into such contract and that they were accordingly entitled to an injunction to restrain arbitration, it was held that no injunction could be claimed under section 54 of the Specific Relief Act, and further that the injunction claimed should not be granted under the provisions of section 56, cl. (1) which laid down that an injunction could not be granted when equally efficacious relief could be obtained by any other usual mode of proceeding." Mr. Kimatrai's contention was that the suit did not lie as there was a remedy open to the plaintiffs to have the award set aside under

(1) 56 Ind. Cas. 571 ; 47 C. 738 ; 31 C. L. J. 259

section 14, Indian Arbitration Act. The latest pronouncement on a suit of the nature which I am considering is the Privy Council case of *Sassoon & Co.* v. *Ramdutt Ramkissen Das* (2) where a suit was filed for a declaration that the award was void and for an injunction. It was held that the suit was maintainable as the award was objected on the grond of want of jurisdiction, not of misconduct or irregularity by the arbitrator, and accordingly an application under section 14 of the Act to set aside the award was not the only remedy open to the plaintiff, and further having regard to the relief sought, sections 42 and 56 of the Specific Relief Act constituted no bar to the suit. This is precisely the case here. Plaintiffs contend that there was no valid and binding contract and consequently the arbitrators had no jurisdiction to sit on judgment on the disputes between the parties which were said to arise out of the alleged contract. In *Ram Kissen Joydoyal* v. *Pooran Mull* (1) referred to above, plaintiffs asked for an injunction to restrain the defendants from proceeding with the arbitration, and this was the relief the plaintiff in this case sought in the first suitNo. 25 of 1922 which was a suit filed before either of the awards was made but in the second suit plaintiff seeks to have the awards set aside and for an injunction to restrain defendants from enforcing them. In *Firm of Jai Narain Babulal* v. *Firm of Naraindas Janimal* (3) "it was held that though a party dissatisfied with a private award may wait till his adversary seeks to enforce it by the summary process prescribed by the Indian Arbitration Act, and then contest it by filing such objections as are allowed by the law, that remedy is not his sole remedy and does not take away the remedy open to him under the provisons of section 9, Civil Procedure Code of bringing an action to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation." Section 39 of the Specific Relief Act empowers a person against whom a written instrument is void or voidable to sue to have it adjudged void or voidable if he reasonably apprehends serious injury accruing from it if left outstanding; and in *Vulley Mohomed* v. *Dattubhoy Hassam* (4), an award was considered an instrument to which the provisions of section 39 could be applied. There can be little doubt that the plaintiff must entertain a reasonable apprehension that the award if left outstanding will cause him serious injury and as he contends that the award is either void or voidable, I fail to see any bar to his suit to have it declared ineffectual and to restrain defendants from enforcing it. I am of opinion that the suit is maintainable in the form in which it is brought and issue 2 must be answered in the affirmative.

With regard to issue 3 whether the plaint is sufficiently stamped, plaintiff has valued the suit as for cancellation of the two awards at Rs. 10 each and for the injunction and declaration at Rs. 1,000 and has paid a Court-fee of Rs. 95. The amount comprised in the two awards in Rs. 50,311-3-5. Plaintiff contends that under section 7, Cl. 4, sub-Cl. (*e*), the Court-fees have been correctly assessed. In *Balkrishna Narayan Sawant* v. *Jankibai Sitaram Sauzgiri* (5), it was held that in a suit for a declaration and for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purposes of Court-fees, and the value for the purposes of jurisdiction is the same. In *Arunachalam Chetty* v. *Rangaswamy Pillai* (6), it was held by a Full Bench that a suit for a declaration that a mortgage-decree is not binding on the plaintiff and for an injunction restraining defendants from executing the same is a suit for a declaratory decree with consequential relief within the meaning of section 7, clause 4 (*e*), of the Court Fees Act and an *ad valorem* fee is payable on the valuation fixed in the plaint. Mr. Kimatrai relied on *Sriram* v. *Dataram* (7), where it was held, in a suit to set aside a decree on the ground of fraud and where no consequential relief had been prayed for, that plaintiff was bound to ask for the consequential relief for which he really applies and pays

(2) 70 Ind. Cas. 777; 49 I. A. 366; (1922) A. I. R. (P. C.) 374; 37 C. L. J. 336; 44 M. L. J. 758; 27 C. W. N. 660; (1923) M. W. N. 372; 50 C. 1; 18 L. W. 537 (P. C.).

(3) 69 Ind. Cas. 585; 3 L. 296; (1922) A. I. R. (L.) 369.

(4) 25 B. 10; 2 Bom. L. R. 907.

(5) 56 Ind. Cas. 340; 44 B. 331; 22 Bom. L. R. 289.

(6) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 151.

(7) 70 Ind. Cas. 852; 16 S. L. R. 109; (1922) A. I. R. (S) 20.

Court-fees on the decretal amount which the plaintiff claims to avoid. Mr. Kimatrai, therefore, urged that in the present suit the Court-fees must be determined on the amounts involved in the two awards. The case in *Sriram* v. *Dattaram* (7), followed. *Deokali Koer* v. *Kedar Nath* (8), where it was held that "a Court-fee of Rs. 10 is not sufficient for suits that are not declaratory suits. in the proper sense of the term." In the latter case it was observed that the suit for a declaration could not be deemed such under section 42 of the Specific Relief Act and it was not a suit as sanctioned by law, whereas in the Sind Law Reporter case where the plaintiff had contented himself with asking for a bare declaration it was said that the real relief which the plaintiff sought was not limited to the declaration that he prayed for, but that it was incumbent on him to apply for consequential relief : but neither of these rulings lays down that if the plaintiff asks for declaration with consequential relief he is not justified in assessing the Court-fees according to the amount at which the relief sought is valued. My finding on issue 3 is in the affirmative.

Issues 4, 5 and 6 may conveniently be considered together. Plaintiff's case substantially is that he made but one offer for the contract in suit, for the 400 tons of White Java and 100 tons of the Brown Java sugar, they are both contained in but one document, and the broker Hassanand who took the offer invited it for both the qualities of the sugar at the same time, mentioning the rate at which the quantity would be available. Plaintiff states that he pressed for a reduction of the rates mentioned by the broker but the latter induced him to consent to the rate mentioned by him for the White Java and promised to secure a concession in the rate of the Brown Java. As to what actually transpired at this interview between the plaintiff and Hassanand we have only the evidence of the plaintiff on one side and that of Hassanand on the other. Hassanand states that on the night previous to the offer the Manager of James Finlay, Mr. Brachi asked him to sell 200 tons of White Java at Rs. 24-8-0 per cwt., and on Hassanand pointing out to him that the market was weak, he was told to bring firm offers from merchants at such rates as he could secure, the shipment being for November-December. On this, says the broker, he went to the plaintiff who offered to purchase 400 tons of White Java at Rs. 23-12-0 per cwt. After this offer was made Hassanand says that Tayabali stated he also required Brown sugar but did not mention either the quantity or the rate. On this according to Hassanand he told Tayabali he would speak to Finlay's Manager about it and if he agreed to wire for it he would take an offer from him. Then according to the broker he returned to the office of Finlay and informed the salesman in the sugar department, Patrick DeSouza of the firm offer for White Java and that the dealer was inclined to purchase Brown Java. The salesman took the broker to Brachi & Gilkes both of whom looked after the sugar business of the firm. The broker was told to bring the offer for the Brown Java and that Finlays would wire and try to get it. Hassanand then went to the plaintiff's Kothi and received an offer from him for 100 tons of Brown Java at Rs. 20-8-0 per cwt. On Hassanad returning with this offer Mr. DeSouza told him to bring the offers in writing and gave him one of the office forms on which the necessary entries were made in respect of both the qualities of sugar and the plaintiff's signature was taken. The broker repudiates the plaintiff's assertion that there was any agreement that the offer for the White and Brown sugar was to be reckoned as but one offer or that the offer for the White sugar was made as the broker offered to sell the Brown at a rate lower than the market rate. Now, though the plaintiff's statement that he was inveigled into the contract rests on his assertion alone, the broker's evidence has a certain amount of corroboration. DeSouza states that the broker told him on the 10th August that plaintiff had made an offer for white Java at Rs. 23-1½-0 per cwt. November-December shipments subject to reply the following day by 10 P. M. when the salesman took him to Mr. Gilkes and after this offer was mentioned to the latter, the broker said that the plaintiff was also inclined to purchase Brown Java and Gilkes asked the broker to bring an offer and he would try. Gilkes states in his evidence that the broker brought an offer for

(8) 15 Ind. Cas. 427 ; 39 C. 704 ; 16 C. W. N. 838.

400 tons of white Java of November December shipments and that he was informed that plaintiff was inclined also to offer for brown Java and the broker was instructed to get both the offers in writing. If the evidence of the defendants is to be accepted it appears clear that the offer for the white Java was distinct from that for the brown Java. Does then the circumstance of both the offers appearing in one memo addressed to Finlay negative the conclusion which *prima facie* this evidence suggests. According to Mr. Brachi, Ex. 6, which contains both the offers, is a printed form of a memo used for sundries and the office has no forms for sugar. When the broker went to the plaintiff to take his signature on the offer for the white Java he was also told to bring an offer for the brown Java in writing and there does not seem any apparent necessity for the two offers to be written on separate memos considering that they were by the same dealer. Mr. Brachi has stated in his evidence. " We have had oral offers made to us for two commodities at the same time by the same dealer. I have had offers for white and brown Java sugar from the same dealer at the same time. I would treat an offer of this description (by which he referred to the offer in suit) as two distinct offers unless the dealer asks that they should be treated jointly". There can be no doubt that defendants treated the two offers as separate. Ex. 48 is a telegram that they received from Java offering 200 tons of the white sugar alone at a particular rate and it was in pursuance of this telegram that Hassanand had been sent to the market to produce offers for the white sugar alone ; but when the broker returned and informed the defendants that the plaintiff had expressed his willingness also to purchase 100 tons of brown sugar, defendants despatched a wire, Ex. 49, to Batavia in reply to the wire received that they could not accept the offer for the white sugar at the rate mentioned, but counter-offered for 400 tons white Java at Rs. 23-12-0 per cwt. November-December shipment and in the same telegram but as distinct from the previous offer for the White made a firm offer for 100 tons Brown Java at Rs. 20-8-0 per cwt. of the same shipment. It could be scarcely arguable that the Java dealers could interpret this telegram, Ex. 49, as implying that they should either accept or reject both and defendants themselves disown any such intention. Ex. 50 the reply to Ex. 49 accepted the offer for the 400 tons white Java and followed it up with a letter Ex. 51 confirming the acceptance. Defendants could not for a moment contend that the acceptance was invalid and not binding on them as it did not relate to the white and the brown sugar. Now the whole of the plaintiff's case as to his offer for the white and brown sugar being interconnected is based entirely on his uncorroborated allegation that he bought the white at a higher rate as the broker offered him the inducement to let him have the brown at a lower rate than the market rate. Apart from the isolated character of plaintiff's statement it appears to me not to accord with the facts of the case as disclosed by the evidence. Plaintiff's trump-card is that the very day that he made an offer for the white Java he purchased that morning similar sugar at Rs. 23-8-0. It is common ground that the price of sugar fluctuates rapidly sometimes even on the same day. Let me for a moment touch on the evidence as to the rates and in doing so it is necessary to observe that only those rates should be primarily considered that refer to transactions of November-December shipment. Lauper, the Assistant Manager of Volkart Bros., states in his evidence on reference to what he describes as his quotation book, that the market rate of sugar on the 10th August, *i. e.*, the same day plaintiff made his offer to defendants, for November-December shipment was Rs. 24-3-0 per cwt. on the 9th August that is the day previous he states that the rate was Rs. 24-8-0 for white Java and on the 12th August Rs. 23-8-0 for the same sugar, both being for November-December shipment. Ex. 81 shows that the plaintiff himself had purchased on the 10th August 1921, 50 tons of white Java of November-December shipment from Volkart Brothers at Rs. 23-12-0 per cwt. The witness further states that on the 10th, Volkart Brothers sold 250 tons at Rs. 23-12-0 and on the same day 150 tons at Rs. 23-12-0 of November-December shipment The evidence of this witness has not been impugned and I believe him implicitly. Tikamdas, Ex. 49, a salesman in Louis Dreyfus & Co. who was ex-

amined as a witness by the plaintiff deposes to the sale of 25 tons of white Java on the 10th August of November-December shipment at Rs. 24-0-0 per cwt., also on the same date 100 tons of white Java and 50 of the same at Rs. 24-0-0 per cwt. but of December shipment alone. On the 9th August they sold 200 tons of White Java at Rs. 24-0-0 per cwt. but of December shipment alone and on the 11th August sold 100 tons of White Java at Rs. 23-6-0 and purchased an equal quality of the same sugar at Rs. 23-4-0 both of November shipment alone. I have no doubt that plaintiff did purchase on the 10th August, 90 tons of White Java from Meherbux Alibux at Rs. 23-8-0 per cwt. however of October-November-December shipment, but as I have remarked the market rate varied even on the same day, and the same vendor sold on the 10th August, 12 tons of September shipment at Rs. 23-14-0. I am not at all convinced on the evidence that the rate of Rs. 23-12-0 per cwt. for the 400 tons in suit was a rate higher than the market rate prevailing on the 10th August, and I am equally unconvinced that the rate of Rs. 20-8-0 for the brown Java was lower than the market rate. The salesmen of E. D. Sassoon, Ex. 34, states that on the 8th August his firm sold brown Java of October-November shipment at Rs. 20-12-0 and on the 10th August they sold the same quality at Rs. 20-14-0 for September-October-November-December shipment, it must be remembered that the earlier the shipment the higher the rate. Louis Dreyfus have effected no transactions on the 10th August but on the 11th they purchased 300 tons of Brown Java at Rs. 20-4-0 September to December shipment and on the 12th August sold 100 tons of Brown Java of December shipment at Rs. 20-8-0. Admittedly it is the White Java that is bought and sold in far greater quantities than the Brown and the transactions in the latter commodity are limited. As therefore, I am not prepared on the evidence to accept the plaintiff's assertion that the broker induced him to pay a higher rate for the White and that he would allow him a concession on the Brown, the foundation for the contention that the two offers were inseparable, fails. Further, it seems idle to argue that the plaintiff could have relied on any assurance that the broker may choose to give him, even though he be a broker of the defendants. The vendors were the defendants and it is hardly to be expected that they would sell at a loss or forego their profit merely to please their broker. It was strenuously contended that I should accept the version of the plaintiff as to the circumstances under which the contract was brought about in preference to that of the broker whose moral integrity is sought to be impeached by the following incident: Plaintiff states that this broker Hassanand had unauthorisedly entered into a contract on his behalf in respect of 30 tons of sugar. On the detection of the fraud he tendered an apology, Ex. 32. This apology does contain an admission that on the 17th May 1920 the broker had as he describes himself "through his carelessness" entered into a contract with Topandas on behalf of the plaintiff which the latter had not authorised, and which was therefore cancelled, and in lieu of it a new contract was entered into for 22½ tons with the same Topandas. The broker's explanation in respect of this charge against him is certainly unsatisfactory and his assertion that the plaintiff backed out of the bargain with Topondas and that he was made to append his signature on a piece of paper on which there was something written but which was not read out to him is difficult to accept. But the important fact remains that even after this piece of shady transaction on the part of the broker the plaintiff did not cease to enter into contracts through his agency. It is a matter of common knowledge that brokers sometimes for the purposes of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification, but it is a far cry that because Hassanand has been shown to be guilty of shady practice his evidence as to the circumstances under which the contract in suit was entered into should be entirely discarded. His evidence, as I have remarked, is corroborated, no doubt, by witnesses in defendants' service but which I see no reason to treat as unworthy of credence. Besides the burden of proof undoubtedly lay on the plaintiff to show that he entered into the contract in consequence of the mis-representation of Hassanand and that the offer made by him was one and inseparable. Plaintiff is not a

novice in his business, on his own admission, he deals very largely in sugar, and if by reason of his experience in his dealings with Hassan and he felt that the latter was a man of doubtful virtue he should have stipulated in Ex. 6 that either both offers should be accepted or neither. I am strongly inclined to the view that plaintiff's assertion that it was the inducement held out by the broker that he should offer for the white Java at a slightly higher rate and that the Brown Java would be supplied to him at a rate lower than the market rate and that this understanding led him to make one offer for both is a fiction of his imagination. When the acceptance notice, Ex 7, was sent to him on the 11th August and he replied to it on the 12th August, Ex. 8, there is no reference in his letter to any inducement held out by the broker, all that was said was "that there was but one offer for both the white and brown Java, and it was not open to you to accept the one without accepting the other." The facts leading to the offer must have been quite fresh in the plaintiff's mind when he gave instructions for Ex. 8 and he must have been aware if it were true, that it was the representation made by the broker that operated on his mind in making an offer for the two qualities of the sugar. It is, therefore, very remarkable that there should be an entire absence of any reference to such an important fact. It is only on the 15th August, by Ex. 10 that plaintiff refers to the inducement held out by the broker after defendants had repudiated their assertion that there had been but one offer for the two commodities.

It was further argued that the acceptance note of the defendants, Ex. 7, was conditional and the plaintiff treated it as a counter offer which he declined. I fail to understand how the defendants could be said to have imposed any fresh condition on the plaintiffs which was not contained in the offer of the latter. The written offer, Ex. 6, required the defendant to intimate his acceptance by 10 P. M. of the morrow and the offer was subject to the conditions of the defendants' Indent forms and the acceptance notice was despatched within the time prescribed and intimated that the offer for the 400 tons white Java was accepted "subject to the confirmation of our telegram and the terms of the Agreement which we shall call upon you to sign in due course as usual." It is true that by Ex. 6 plaintiffs asked the defendants to telegraph to their friends in England to purchase, this appears in the printed part of the form, but as Mr. Brachi explains, the form used is one for sundries and they have no sugar forms and that all their sundries are purchased through their London office whereas the "sugar as a rule is purchased from Java, sometimes from London and sometimes locally." Defendants did wire to Java offering Rs. 23-12-0 per cwt. for the Java, this was accepted Ex. 50, and a confirmation letter was sent Ex. 51. Does then the question that the defendants did not wire to England as required by Ex. 6, but wired to Java affect the validity of the contract? Mr. Brachi states in his evidence "when the dealer places an offer with us we need not necessarily wire. We may wire wherever we like. It is open to us to accept the offer without buying locally or without wiring and subsequently buying and supplying on the due date." Now there can be little doubt that the dealings between the plaintiff and defendants were as principal to principal. The Indent establishes it, *vide* Lauper's evidence Ex. 80. *Paul Beier* v. *Chotalal Javerdas* (9). Para. 13 of the Indent. Ex. 30 subject to which the offer was made is as follows: "James Finlay & Co. reserve to themselves the right to fulfil this contract or any part thereof by either importing the goods out from Europe or elsewhere or by purchase out here." Therefore, defendants were entitled notwithstanding the printed words in Ex. 6 "to wire to England" either to do so, or wire to Java or procure the goods locally. In fact I do not believe for a moment that it was the intention of either party that the sugar the subject-matter of the contract, should be ordered out from England, certainly it was not the intention of the defendants for they invited offers only after they had received a telegram from Java offering white sugar at certain rates and when the dealer made an offer to them they wired to Java in response to the telegram, nor as the relations between defendant and plaintiff were those between vendor and purchaser, could it possibly have been the intention of the plaintiff that the

(9) 30 B. 1 ; 6 Bom. L. R. 948.

sugar to be supplied to him could be only such as was imported from England, as long as the sugar tendered to him was of the quality required and at the rates and shipments specified in his offer. And further, as he made, an offer subject to the conditions contained in the defendants' Indent forms he is bound by those conditions. No doubt, the general rule of construction of a written contract is that the language of an instrument is to be understood in its ordinary and natural meaning, but at the same time the whole of the contract must be considered in order to ascertain the meaning of any particular part thereof. The offer Ex. 6 is to be interpreted in the light of the conditions contained in the Indent and as that empowers defendants either to import the goods from Europe or elsewhere, plaintiff can have no legitimate ground for complaint. It is true that the Indent in which the submission clause is incorporated is not signed by the plaintiff, but if parties have agreed in writing to submit their differences to arbitration, the submission need not be signed. *Utoomal* v. *Haridas* (10), *Lyon Lord & Co.* v. *Chapsi* (11).

It is alleged that defendants fraudulently represented to the plaintiffs that their offer had been accepted by their Home friends in England. There is absolutely no ground for this averment. The acceptance Ex. 7 merely states that the offer was accepted "subject to the confirmation of our telegram and to the terms of the agreement." The confirmation of our telegram means according to Mr. Brachi and what it may usually be taken to mean, confirmation by post.

Mr. Rupchand for the plaintiff desired to lead evidence that his client has dealt extensively in sugar and never resiled from his bargains, and Mr. Kimatrai on the other hand was desirous of cross-examining some of the witnesses on the delinquencies of the defendant in the performance of some of his contracts, I disallowed both as in my opinion the conduct of the defendant in other transactions in the sugar market were neither relevant nor material in the present case which I proposed to consider on its own merits ; nor do I feel it necessary to discuss the circumstances under which the offer from the plaintiff was taken in writing.

The evidence clearly establishes that shortly after the 10th August the market was falling. Plaintiff states in his evidence "After the 11th August the sugar market went on declining," and defendants allege that it was due to this decline in the sugar market that the plaintiffs attempted to withdraw from their contract. Mr. Rupchand replies that the market went down not only in respect of white but also brown sugar and the motive urged for the plaintiff by insisting that his contract was also for brown was only adding to his burden, and his second argument was that as the market declined only by about 4 to 6 annas the loss to his client would be somewhere about Rs. 2,000 only which to him was a flea-bite. It appears to me that the plaintiff's contention as to his readiness to accept the contract for the Brown sugar also is thinly veiled attempt to wriggle out of the contract, and his pleader's statement that a loss of Rs. 2,000 only would not be an inducement powerful enough to make him back out of his liability is one that I can view only with considerable suspicion. But above all, one cannot lose sight of the important fact that if plaintiff fulfilled his contract he had in the first instance to pay up a sum of about Rs. 50,000.

My finding, therefore, on the first part of issue 4 is in the negative and on the second part in the affirmative.

I hold on issues 5 and 6 that there was a valid and binding contract between the parties which was not voidable at the instance of the plaintiff.

Issue 7 is a simple issue. The Indent Ex. 30 subject to which the offer Ex. 6 was made contains a submission clause and when the offer was accepted, the terms of the Indent became binding on the parties as those terms are incorporated in the contract and there was nothing as far as I can see to prevent the operation of the arbitration clause. I hold, therefore, on issue 7 that the plaintiff did agree to submit to arbitration the disputes arising between the parties out of the contract and on issue 8 that there was no valid bar to the defendants referring the disputes to arbitration.

Issues 9 *and* 10.—The latter issue has not been pressed by Mr. Kimatrai and only issue

(10) 7 Ind. Cas. 595 ; 4 S. L. R. 26.
(11) 49 Ind. Cas. 135 ; 12 S. L. R. 55.

9 need be considered. It must be remembered at the very outset that what the defendants sought to and did refer to arbitration was not the *factum* of the contract but the dispute arising out of it. The fact that plaintiff denied the existence of the contract did not necessarily operate as a bar to defendants proceeding with arbitration proceedings on the failure of the plaintiff to pay the amount due on his purchase. The goods in question were to be shipped in two equal monthly lots ; on the arrival of the first lot of 200 tons, notice of arrival was given to the plaintiff and on his failing to take delivery he was informed that the defendants would re-sell the goods in terms of the Indent. The sugar was resold and a memo. of the loss sustained by the resale was submitted to the plaintiff and as he did not reimburse the defendants the latter referred the disputes to arbitration. The same procedure was followed with regard to the second lot of 200 tons. Clause 14 of the Indent provides for a reference to arbitration of "disputes of whatsoever nature arising out of this contract including the question of the construction of this contract." The two references to arbitration state that disputes have arisen out of the contract and they are referred to the decision of the arbitrators. Both the awards determine the amount that plaintiff should pay the defendants. It is remarkable that plaintiff who has so vigorously contended that there was no contract between the parties and, therefore, demurred to the jurisdiction of the arbitrators neither appeared before the arbitrators nor was represented and allowed the arbitration to proceed *ex parte*.

It is argued that the points in difference between the parties do not fall within the submission clause even if the submission clause be held binding, and that mere refusal to pay does not justify a reference to arbitration. The contention of the plaintiff that it could not have been within the intention of the parties to refer to arbitration the question as to the refusal to pay would be entirely subversive of the arbitration clause and render it a nullity. In *Finlay Co.* v. *Jashanmal Kirpalani* (12) following the judgment in *Donald Graham & Co.* v. *Asumal Khushaldas* (13) which was upheld on appeal, it was held that a mere failure to pay a claim constitutes a difference between the parties to a submission I am bound by this ruling and hold that the failure by the plaintiff to pay the amount claimed by the defendants did constitute a matter in difference arising out of the contract justifying a reference to arbitration. It was next argued that the arbitrators were *functi officio* as soon as suit No. 25 of 1922 was filed, and that the defendants could not after the filing of this suit appoint arbitrators in respect of the second lot of 200 tons of white Java sugar. As I have observed above Suit No. 25 of 1922 was filed on 9th January 1922 and the first award in respect of the 200 tons of the first shipment was made on the 10th January 1922 and the second award was made on the 7th February 1922. As far as the first award was concerned it is not alleged that the filing of the suit was known to the arbitrators nor were the arbitrators restrained from proceeding with the arbitration. The question is, were the arbitrators debarred from proceeding with arbitration with reference to the second lot of 200 tons? I am bound by the Judgment of this Court in *Totaram* v. *Mitsui Bussan*, Rev. Appln. No. 48 of 1921, that the filing of a suit does not *ipso facto* render the arbitrators *functi officio* and their award void. I must, therefore, hold that this contention cannot prevail.

It was lastly argued that the defendants could not refer the same disputes twice over to the same arbitrators; but the defendants have not done so. The first reference was in respect of the sugar in relation to the first shipment and the second with respect to the December shipment. Clause 11 of the Indent expressly stipulates "that this agreement is to be deemed and construed as a separate contract in respect of each instalment of goods in case the goods are to be shipped and delivered in instalments and the rights and liabilities of James Finlay & Co. and mine respectively shall be the same as if a separate contract had been made out and signed in respect of each instalment." As held in *Balmukand Raiz* v. *Gopiram Bhotica* (14), there may be as many awards as there are disputes arising out of the contract. The submission is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it.

(12) 12 Ind. Cas. 188 ; 5 S. L. R. 4.
(13) 12 Ind. Cas. 187 ; 5 S. L. R.7 Note.
(14) 60 Ind. Cas. 195 ; 24 C. W. N. 775.

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My finding, therefore, on issue 11 is that the plaintiff is not entitled to any relief and this suit is dismissed with costs on the plaintiff.

Suit No. 25 of 1922 is also dismissed but I make no order as to costs, and in Misc. Nos. 36 and 92 of 1922, I direct the award to stand filed.

Suits dismissed.

Awards filed.

Z. K.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 129 OF 1921.

April 24, 1924.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Kalwant Sahai.

DEO SARAN BHARTHI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DEOKI BHARTHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, scope of—Trustee setting up adverse title—Suit, maintainability of—Transfer of Property Act (IV of 1882), ss. 122, 123—Hindu Law—Gift, essentials of—Dedication to deity—Acceptance by donee.

To make s. 92 of the Civil Procedure Code applicable it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant and a suit under that section is maintainable for declaratory relief, where the trustee not only mismanages the trust property but sets up a title adverse to the trust. [p. 982, col. 1.]

Jamal-uddin v. *Mujtaba Husain*, 25 A. 681; A.W.N. (1903) 120; *Budh Singh Dudhuria* v. *Niradbaran Roy*. 2 C. L. J. 431; *Jafarkhan Jatbarkhan Pathan* v. *Daudshah Mohamedshah Fakir*, 9 Ind. Cas 358; 13 Bom. L. R. 49, referred to.

Under section 122 of the Transfer of Property Act to constitute a valid gift, there must be a voluntary giving by the donor and an acceptance by the donee. What constitutes acceptance depends upon the circumstances of each case. [p. 982, col. 2.]

In the case of the donee, being incapable of signifying his acceptance by reason of age or of his being an impersonal being recognized by law as capable of being a donee, such as deity, the acceptance required by the section may be done on his behalf by somebody else competent to act as an agent. The acceptance may again be signified by an overt act such as the actual taking possession of the property, or such act by the donee as would in law amount to taking possession of the property where the property is not capable of physical possession. Thus actual delivery of possession is not essential in all cases, for it is only one of the modes of indicating acceptance. [p. 982, col. 2.]

Case-law referred to.

A registered deed of gift cannot take the place of those essentials among which is the complete divesting of the ownership by the donor. Therefore, it must be proved in each case, apart from the registration of the document, that there was a complete divesting of the ownership. A registered deed of gift, as any other such document, may be merely a nominal transaction, without any intention on the part of the executant to give effect to the terms falsely or fictitiously set forth in the document. [p. 983, col. 1.]

The Transfer of Property Act lays down general provisions governing gifts and dedications and there is no distinction in principle between the essential ingredients requisite for a valid gift or dedication in Hindu Law and those laid down by the Act. [p. 983, col. 2.]

The essential ingredient that constitutes gift of moveable or immoveable property in the Hindu Law whether in favour of a deity or a human being is the *Sankalp* and the *Samarpan* whereby the property is given completely away and the owner completely divests himself of the ownership in it. [p. 983, col. 2.]

Appeal against the decision of the District Judge, Gaya, dated the 11th March 1921.

Messrs. *C. C. Das* and *Naval Kishore Prasad II*, for the Appellants.

Messrs. *S. M. Mullick*, *Siva Nandan Roy* and *Satyadeva Sahai*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This is an appeal by the plaintiffs. The plaintiff No. 1 is the *Chela* of Mahanth Sheosharan Bharthi. The plaintiff No. 2 alleges himself to be a *pujari* of the temple of *Shiva* to whom the properties in suit are said to have been dedicated.

The plaintiffs' case is that Sheosharan Bharthi defendant No. 2 on 31st October, 1912, executed a deed of trust dedicating the properties in suit to the god *Shiva* and appointing defendant No. 1 as manager and trustee of the endowment and that the defendant No. 1 acted as such for some years. In 1915, he and *Musammat* Punia acting in collusion got defendant No. 2 to execute two registered sale-deeds, dated the 23rd and 25th

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November 1917, selling to defendant No. 1 the properties already dedicated to the god *Shiva* except one-fourth share in certain *jagir* lands which was given to *Musammat* Punia under sale-deed, dated the 25th November 1917. It is said that defendant No. 1 is acting adversely to the trust and is setting up a title of his own and consequently he has committed a breach of the trust and is liable to be removed. The suit was instituted under section 92 of the Civil Procedure Code after obtaining sanction of the Legal Remembrancer.

The defendant No. 5 Sheosaran Bharthi did not appear. The suit was resisted by defendant No. 1 Deoki Bharthi alone. He repudiates the allegation that there was any trust or dedication of properties to the god *Shiva* as alleged by the plaintiffs and he set up his own absolute title to the properties based upon the aforesaid sale-deeds executed by Sheosharan Bharthi in his favour and in that of *Musammat* Punia. He also took certain pleas in bar. Upon the pleadings a number of issues were raised in the Court below, but for the purposes of this appeal the following only need be mentioned. The finding on the other issues is not challenged.

"1. Can the suit proceed under section 92 of the Civil Procedure Code?"

"2. Can the plaintiffs maintain this suit?"

"5. Whether the properties in suit were dedicated to the god *Shiva* as alleged in the plaint?"

"6. Whether the defendant No. 1 is a trustee in respect of the properties in suit?"

The Court below decided Issue No. 1 in favour of the plaintiffs and Issues Nos. 5 and 6 against them. In the result it dismissed the suit. The plaintiffs have come to us in appeal.

The learned Vakil for the respondents says that the Court below was wrong in deciding the Issue No. 1 in favour of the plaintiffs and that it ought to have held that the suit is not maintainable under section 92 of the Civil Procedure Code.

The learned Vakil contends that section 92 has no application to the present suit wherein the plaintiffs want a declaration that the properties in suit were dedicated to the god *Shiva*. His contention is that the section is confined only to a case where the prayer is merely to remove a trustee and to give necessary direction for the administration and management of the trust property. He relies upon the wordings in section 92, which are as follows: —

"In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the sanction in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree.

(*a*) removing any trustee;
(*b*) appointing a new trustee;
(*c*) vesting any property in a trustee;
(*d*) directing accounts and inquiries etc.
(*h*) granting such further or other relief as the nature of the case may require."

This section, according to Mr. Mullick, assumes that there is no dispute as to there being a trust express or constructive, and that the only question involved is as to the conduct of the trustee in the administration of the trust property. In support of his contention he relies upon the case of *Jamaluddin* v. *Mujtaba Husain* (1). There the suit was brought as an ordinary suit cognizable by a Subordinate Judge for the purpose of a declaration that the property was endowed property and for removal of the *Mutawalli* on account of mismanagement of the trust. Upon the plea taken by the defendants, the Subordinate Judge dismissed the plaintiff's case upon the ground that section 539 of the old Civil Procedure Code, which corresponds to section 92 of the present Code, was a bar to the suit, no consent of the proper officer to institution of the suit having been obtained. On appeal the High Court of Allahabad held that the Court could only return the plaint to the plaintiff to be presented to a Court having jurisdiction to try the suit and ought not

(1) 25 A. 631; A. W. N. (1903) 120.

to have dismissed the suit. The decision virtually supports the view opposite to that contended for by Mr. Mullick. The case was considered and explained in *Budh Singh Dudhuria* v. *Niradharan Roy* (2), in that case upon facts similar to the present case it was held that in order to make section 539 applicable it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant. If the trust is disputed, the question is decided by the Court upon evidence. To the same effect is the decision in the case of *Jafarkhan Jatbarkhan Pathan* v. *Daudsha Mahomedshah Fakir* (3).

It appears that where a trustee not only mismanages the trust property but sets up a title adverse to the trust, there is no reason why section 92 cannot be invoked. That section is wide enough, and in clause (*h*), which I have quoted above, power is given to the court to grant any relief as the nature of the case may require. The primary object of the provision is the administation of trust property by removing the trustee, appointing a new trustee or making such directions as may be necessary for the protection and management of the trust property. In order to secure that object it may be necessary for the plaintiff as a member of the public interested in the preservation and management of the trust property to seek for reliefs, such as a relief of a declaratory nature like the one in the present case. We, therefore, overrule this contention of Mr. Mullick.

The case really depends upon the decision of issues No. 5 and 6. The Court below has held that there was no real dedication of the properties in suit to the god *Shiva*, nor was defendant No. 1 a trustee in respect of the properties in suit. The plaintiffs-appellants impugn the finding of the Court below and on their behalf it has been urged by Mr. Das, that the trust-deed dated the 31st October 1922, is conclusive as regards the creation of the trust and dedication of properties to the god *Shiva*. The learned Counsel goes so far as to contend that the deed being a registered document purporting to effect complete dedication of the properties to *Shiva*, no subsequent act or conduct of the dedicator, Mahanth Sheosaran Bharthi, defendant No. 2, is admissible to show that there was no real dedication. No authority has been cited in support of this proposition. A faint reliance has, however, been placed upon section 122 of the Transfer of Property Act under which a gift of immoveable property must be effected by a registered instrument and a gift of moveable property may be effected either by registered instrument or by delivery. The provision in this section does not purport to legislate that the registration of a deed of gift in respect of an immoveable property is sufficient transfer of the property. It follows section 122 of the Act, which lays down the requisite essentials of a complete gift, namely (1) the transfer of property, (2) made voluntarily without consideration by one person called the donor to another called the donee, and accepted by or on behalf of the donee. There must be, therefore, a voluntary giving by the donor and an acceptance by the donee. In the case of the donee, being incapable of signifying his acceptance by reason of age or of his being an impersonal being, recognized by law as incapable of being a donee-such as deity, the acceptance required by the section may be done on his behalf by somebody else competent to act as an agent. The acceptance may again be signified by an overt act such as the actual taking possession of the property, or such act by the donee as would in law amount to taking possession of the property where the property is not capable of physical possession. Thus actual delivery of possession is not essential in all cases, for it is only one of the modes of indicating acceptance. This will explain, the seeming contradiction in some of the authorities cited before us. These authorities are as follows: *Kishto Soondery Debea* v. *Ranee Kishtomati* (4) *Dagai Dabee* v. *Mothura Nath Chattopadhya* (5), *Kalidas Mullick* v. *Kanhaya Lal Pundit* (6), *Watson and Company* v. *Ramchand Dutt* (7), *Lakshimoni Dasi*

(2) 2 C. L J. 431
(3) 9 Ind. Cas. 358 ; 13 Bom. L. R. 49.

(4) (1863) Mar. Rep. 367.
(5) 9 C. 854 ; 12 C. L. R. 530 ; 4 Ind. Dec. (N. S.) 1219.
(6) 11 C. 121 ; 11 I. A. 218 ; 8 Ind. Jur. 638 ; 4 Sar. P. C. J 578; 5 Ind. Dec. (N. S.) 839.
(7) 18 C. 10 ; 17 I. A. 110 ; 5 Sar. P. C. J. 535 ; 9 Ind. Dec. (N. S.) 7.

v. *Nittyananda Day* (8), *Abaji Gangadhar* v. *Mukta* (9), *Upendra Lal Boral* v. *Hem Chandra Boral* (10), *Ganpati Ayyan* v. *Savithri Ammal* (11), *Ram Chandra Mukerjee* v. *Ranjit Singh* (12), *Babajirav* v. *Laxmandas* (13), *Jagindra Nath Roy* v. *Hemanta Kumari Debi* (14), *Parthasarathy Pillai* v. *Thiruvengada Pillai* (15), *Gurdit Singh* v. *Sher Singh* (16).

In some cases actual delivery of the properties gifted was insisted upon and in others it was condoned. But there has been no real difference as regards the principle that there must be something shown to indicate an acceptance on the part of the donee, and as to whether there has been an acceptance and what constitutes acceptance depends upon the circumstances of each case. In this light I have read the authorities cited before me and I do not want to refer to them in detail. This disposes of the part the donee is required to play in a completed gift On behalf of the donor the essential ingredient as adverted to above is, that he should voluntarily and without consideration transfer the property to the donee. The giving away of the property as the essential ingredient for a valid gift implies a complete divesting of the ownership in the property by the donor. Section 122 only provides a further safeguard by requiring a gift of immoveable properties to be effected by a registered instrument. It cannot in any way affect the essential ingredients of a completed gift set forth in section 122 and referred to above. A registered deed of gift cannot take the place of those essentials among which is the complete divesting of the ownership by the donor. Therefore it must be proved in each case, apart from the registration of the document, that there was a complete divesting of the ownership. A registered deed of gift, as any other such document, may be merely a nominal transaction, without any intention on the part of the executant to give effect to the terms falsely or fictitiously set forth in the document. In the cases referred to above in spite of the documents in question being registered ones, the question as to whether there was a complete gift was determined upon the proof or otherwise of there being a complete divesting of the ownership by the donor, Reference has been made in some of those cases to the Hindu gifts and more particularly to the dedication of a property to a deity by a Hindu. The Transfer of Property Act lays down general provisions governing gifts and dedications, and I have in vain ransacked the provision in the texts to find out any real distinction in principle between the essential ingredients requisite for a valid gift or dedication in Hindu Law and those laid down in the Transfer of Property Act. The dedication to a deity and the creation of a trust for religious purposes no doubt finds favour in the Hindu Law just in the same way as it does in other communities, and the essential ingredient that constitutes gift whether of moveable or immoveable property in the Hindu Law is the *Sankalp* and the *Samarpan* whereby the property is completely given away and the owner completely divests himself of the ownership in the property. In the Hindu Law as elsewhere there must be a real and true *Sankalp* and *Samarpan*. This view seems to have been entertained by the parties themselves in this case who are Hindus. The plaintiffs and their witnesses, apart from proving the registered deed, try to prove that there was a general meeting where the dedication of the property was effected by Sheosaran Bharthi in favour of the God *Shiva*. The plaintiffs being Hindus could not rest their case, as the learned Counsel on their behalf tried to do in this Court, simply upon the execution of a registered deed of gift as if it was an ordinary transfer of property by way of mortgage or sale. I could understand the contention of Mr. Das based upon the registration of the document if he had urged that the registration thereof shifted the onus upon the opposite party to prove that there was no gift or that it lightened the burden of proof that rested upon the plaintiffs to show that there was a true and real

(8) 20 C. 464 ; 10 Ind. Dec. (N. S.) 314.
(9) 18 B. 688 ; 9 Ind. Dec. (N. S.) 968.
(10) 25 C. 405 ; 2 C. W. N 295 ; 13 Ind. Dec. (N. S) 269.
(11) 21 M. 10 at p. 15 ; 7 Ind. Dec. (N. S.) 364.
(12) 27 C. 242 ; 4 C. W. N. 405 ; 14 Ind. Dec. (N. S.) 160.
(13) 28 B. 215 ; 5 Bom. L. R. 932.
(14) 32 C. 129 ; 31 I. A. 203 ; 8 C. W. N. 809 ; 6 Bom. L. R. 765 ; 1 A. L. J. 585 ; 8 Sar. P. C. J. 698 (P. C.).
(15) 30 M. 340 ; 17 M. L. J. 379 ; 2 M. L. T. 198.
(16) 14 Ind. Cas. 247 ; 68 P. W. R. 1912 ; 106 P. L. R. 1912 ; 78 P. R. 1912.

dedication. For my own part I would say that a registration of the document will only affect the onus so far as the execution thereof is concerned but will in itself be no proof of the real dedication of the property or the divesting of the ownership therein by the donor. The onus, therefore, according to my view, of proving real dedication, namely, the *Sankalp* and the *Samarpan* of the properties in favour of the donee, the God *Shiva*, rests upon the plaintiffs. The question of onus, however, does not arise in this particular case inasmuch as the evidence as summarised by the Court below has been one-sided, *viz.*, that produced on behalf of the defendants. They have proved by overwhelming documentary and oral evidence that ever since the execution of the deed of trust, Sheosaran Bharthi the dedicator has been exercising acts of possession and, in fact, has been in actual possession up to the present moment just as he was before the deed in question was executed. The exhibits in the case consist of leases, mortgages and sales executed by Sheosaran Bharthi from 1912 when the deed was executed up to 1918 : (Exts. A, B, D, E, F, F1, H, H1, and H2). No such document on behalf of the plaintiffs has been produced showing the dealings of the property by the donee on the footing that the properties were the dedicated properties of the God *Shiva* ; not even the account of the income and expenditure has been produced showing that the donee received any income of the property or spent anything towards the purposes for which the dedication of the trust was created. The actual possession of the properties has been similarly proved to have been continued in Sheosaran Bharthi unaffected in any way by the trust deed of the year 1912 in question. The rent receipts Exts. C to C 24 prove that the rents were paid by Sheosaran Bharthi and his name stood recorded in the landlord's *Sarishta* ; there is nothing to show that any rent was paid by the donee to the landlord.

Now, is there anything to show that an attempt even was made by the donee to have his name mutated in the landlord's *Sarishta*? Soon after the alleged deed of dedication of 1912 came the preparation of the Survey Record-of-Rights and the dispute lists (Exts. K and K1 of April 1914, and the finally published Record-of-Rights of January, 1916, (Ext. L) conclusively establishes the actual possession of Sheosaran Bharthi even after the execution of the deed of trust. As against the aforesaid unimpeachable evidence of actual and continuous possession of Sheosaran Bharthi from before and after the execution of the deed of gift, the plaintiffs have only two documents Exhibits 1 and 3, the first being a report of the Sub-Inspector of Police dated the 5th November 1915, and the second an extract from the register of criminal records sent to the Record-Room in the aforesaid case in 1917.

The Court below has commented adversely upon these documents and has held them to be spurious. It has also shown that the identity of the parties mentioned in those documents has not been satisfactorily established. Their relevancy and admissibility are also questionable. In no case the report can be accepted as evidence of the statement of the complainant and we cannot agree with Mr. Das that the statement relied upon by him can in law be used as evidence. The Sub-Inspector who recorded it is dead and no evidence is given that that was the statement actually made by the complainant. Again the aforesaid two documents which constitute simply one transaction, assuming them to be relevant and true, only show an attempt on the part of Deoki Bharthi to take possession of the property and to assert his right under the deed of dedication. But the actual divesting of ownership by Sheo Saran Bharthi cannot be established by these documents which relate to an event in 1915 as against the evidence of the defendants that between 1912 after the execution of the deed, and 1915, the date of the aforesaid event, Sheosaran Bharthi not only asserted his possession but has been in continuous actual possession of the property.

The oral evidence merits the same remark, namely, that the evidence on behalf of the defendants consists of competent witnesses such as the lessees, mortgagees and others having dealings with the property. These witnesses prove the possession of Sheosaran Bharthi uninterrupted in any way by the deed of trust ; they prove that the deed was never given effect to and was merely a nominal and sham transaction. The plaintiff's witnesses cannot claim disinterestedness and

independence which would merit any consideration of their evidence by the Court. Their evidence has been shown by the Court below to be discrepant and inconsistent with the case of the plaintiffs as laid in the plaint which they want to improve by setting up two events: (1) the previous dedication of the property, *Sankalp* and *Simarpan* in the presence of the people and (2) the subsequent execution of the deed of trust.

We have carefully gone through the oral evidence and considered the comments made on behalf of the parties. In fact, Mr. Das did not feel confident of the oral evidence tendered on behalf of the plaintiffs and consequently did not seem to rely upon it. We need not repeat the reasons given in detail by the learned District Judge who appears to us to have carefully and exhaustively gone into the evidence. Suffice it to say that we entirely concur with his estimate of the evidence. We prefer the evidence given on behalf of the defendants to that adduced on behalf of the plaintiffs. Upon the evidence, oral and documentary, therefore, no real dedication of the property has been proved, nor has it been proved that defendant No. 1 was a trustee of the properties in question.

Agreeing, therefore, with the view of the Court below, we dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

N. H. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 36 OF 1920.

June 29, 1921.

Present:—Mr. Kennedy, J. C., and Mr. Madgavker, A. J. C.

Seth VISHINDAS FATEHCHAND—PLAINTIFF—APPELLANT

versus

NARUMAL DHARAMDAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. IX, rr. 8, 9—Dismissal of suit for default—Fresh suit, whether barred—'Cause of action' meaning of—Minor plaintiff—Guardian ad litem, change of, effect of.

I C—124

The term 'cause of action' means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. [p. 986, col. 1.]

Read v. *Brown*, (1888) 22 Q. B. D. 128 at p. 131; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131; *Chand Kour* v. *Partab Singh*, 16 C. 98 at p. 102; 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65 (P. C.), relied on.

Defendant obtained a decree on a mortgage executed by a Hindu. The minor sons of the latter brought a suit for partition of the family properties free from the mortgage on the ground that the mortgage was not for necessity, but was executed for immoral purposes personal to the mortgagor. The suit was dismissed under O. IX r. 8 of the Civil Procedure Code. Defendant then applied for sale of the mortgaged property in execution of his decree. The sons of the mortgagor then brought the present suit for an injunction restraining the defendant from selling the property in execution of his decree. The suit was based on the same allegations on which the previous suit was based.

Held, that the second suit was barred under O. IX r. 9 of the Civil Procedure Code, as the cause of action in both suits was the same. [p. 987, col. 1.]

The provisions of O. IX, r. 9 of the Civil Procedure Code cannot be nullified in the case of minor plaintiffs by the simple process of changing guardians-*ad-litem* from time to time, and alleging their knowledge at various times. [p. 987, col. 1.]

Appeal from the decree of the Assistant Judge, Hyderabad.

Mr. *Harchandrai Vishindas*, for the Appellant.

Mr. *Gopaldas Samtari*, for the Respondents.

JUDGMENT.—In 1911, Dharamdas mortgaged certain property to Vishindas. On the 26th of August 1914, in suit No. 32 of 1914 Vishindas obtained a mortgage-decree for Rs. 15,000 on this deed of mortgage. In suit No. 29 of 1916 the three minor sons of Dharamdas by their guardian and mother Jamnabai brought a suit against Dharamdas and various alienees of his property including Vishindas, for partition free from mortgages and other encumbrances on the ground that

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the alienations were not for the purposes of the joint family, but for immoral purposes personal to Dharamdas. That suit was dismissed under O. IX, r. 8. The minor sons by another guardian now sue Vishindas, Dharamdas andothers for an injunction restraining Vishindas from selling this property in execution, as he had applied to do. Vishindas *inter alia* resisted the suit on the ground that it was barred under O. IX, r. 9 of the Code of Civil Procedure. The Court of First instance, upheld the plea on the ground that the causes of action in the two suits were the same. But the Court of First Appeal held that they were not proved to be the same; and this is a second appeal by Vishindas on the same plea. The question is, therefore, whether the cause of action of the present suit is or is not the same as the cause of action in the former suit. The term 'cause of action has long been judicially defined as being "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the Judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved," per *Read* v. *Brown* (1). And as was observed by their Lordships of the Privy Council in *Chand Kour* v. *Purtab Singh* (2). "The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

An initial difficulty in the decision of the appeal was the absence of the pleadings in the former suit, which caused the Court of first appeal to hold that apart from the former suit being a suit for partition, the appellant had not proved the cause of action therein to be the same. It appears, however, from the Judgment of the trying Court that the record of the former suit which had also been tried by it, was referred to by the parties and by that Court for the decision of the present question. In the absence of the pleadings, it would obviously be impossible to decide the point at issue. The proper course for defendant No. 2, appellant, who had set up the bar, would have been to put in copies of the pleadings or other necessary record in support of his plea. Since the case has, however, taken the course it actually did, we are constrained to allow the pleadings in the former suit to be brought in evidence here under O. XLI, r. (27) (*b*) of the Code of Civil Procedure.

It is argued for the respondents that the application for execution by the appellant is an extraneous act which furnishes them with a fresh cause of action. This plea, we think, is not sustainable. In the first place, there is no evidence as to when the appellant first applied in execution. But that apart, the cause of action in both the suits may be divided into two parts. Firstly the respondent's title which is admittedly identical and secondly the mortgage and its validity, which is impugned in both the suits on the same ground of immorality on the part of the mortgagor's father. This cause of action accrued to the respondent's sons of the mortgagor from the moment of the mortgage; and it remains unaltered whether they chose to sue for its invalidity before the mortgagee sued on it, or for a partition after the mortgage-decree or for an injunction after attachment in execution. The time of suing might alter the form of the reliefs but not the cause of action. The Court of first instance was, therefore, correct in holding that the cause of action comprising both the titles of the minor sons and coparceners in the joint Hindu family as well as the alleged immorality of the father invalidating his mortgage are one and the same in both the suits.

The second ground for the respondents argued before us is that partition is a recurring right, that the former suit failed on account of the negligence of the then guardian the mother, that the present guardians are different and that the knowledge of the latter of this application for execution by the decree-holder, all these circumstances furnish a fresh cause of action. The case cited in support, *Lalla Sheo Churan Lal* v. *Ramnandan Dobey* (3), however, hardly goes to this extent.

(1) (1888) 22 Q. B. D. 128 at p. 131; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

(2) 16 C. 98 at p. 102; 15 I. A. 156; 5 Sar. P.C. J. 248; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65 (P. C).

(3) 22 C. 8; 11 Ind. Dec. (N. S.) 7.

We express no opinion on the point as to the legal rights of the minors on attaining majority if they desire to prove negligence on the part of the guardians. The provisions of O. IX, r. 9, cannot, however, be nullified in the case of minor plaintiffs by the simple process of changing guardians-*ad-litem* from time to time and alleging their knowledge at various times. In the present instance, we may observe that the minors have raised no pleading or issue as to the negligence of the mother in the former suit. The negligence was merely an argument in the trying Court. On the materials before us, it is not necessary, nor are we in a position to find whether the former suit was in the first instance collusive with the father or whether he failed to prosecute it, or whether it failed because of the negligence of the mother. It does not appear, however, that before the filing of the present suit, any steps were taken by or on behalf of the minors to set aside under the latter part of r. 9, the dismissal under O. IX, r. 8.

We agree, therefore, with the Court of the first instance that the present suit is in respect of the same cause of action as the former suit. There is no evidence before us to show whether there was or was not any application for execution prior to the former suit. But, however that may be, we are clearly of opinion that in the present plaint the cause of action is not varied on account of the application for execution; and on this ground alone, this case must be distinguished from the case cited above. *Chand Kour* v. *Partabsing* (2).

The appeal, must, therefore, be allowed and the decree of the lower Appellate Court set aside. We confirm the decree of the trying Court and dismiss the plaintiff's suit with costs throughout against the plaintiffs.

Appeal allowed.

Z. K.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
NOS. 191-195, 206-208, 226-236,
1898-99 OF 1922.

May 1, 1924.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.

RAMIJUDDIN AND OTHERS—APPELLANTS
versus
RAI RADHA KANTA AICH BAHADUR
AND OTHERS—RESPONDENTS.

Regulation VII of 1822, *s.* 10 (8)—**Malguzar,** *appointment and status of*—*Bengal Tenancy Act* (*VIII of* 1885) *ss.* 3 (4), 105, 188—Malguzars—*Proprietary body*—"*Agent*" *in s.* 188, *whether means only one person*—Malguzars, *whether can start proceedings under s* 105—*Rate of rent mentioned about excess land*—Mukarrari *holding*—*Presumption.*

The effect of the appointment of *Sadar Malguzar* is to suspend or take away for the time being the proprietary rights of the proprietors of the estate. [p. 988, col. 1.]

The *Sadar Malguzars* constitute the entire body of landlords within the meaning of section 188, Bengal Tenancy Act For the time being the tenants must be held to be holding under the *Sadar Malguzars.* The right of the other proprietors under the law remains in abeyance so long as the property is managed by the *Malguzars* under the Regulation. [p. 988, col. 2.]

Malguzars may be considered as agents of the proprietors and as such they are entitled to maintain suits under section 105 Bengal Tenancy Act. The word "Agent" in section 188, Bengal Tenancy Act includes "Agents" There is no special provision in the Bengal Tenancy Act or any other law which would restrict the meaning of words 'agent' to a single individual. [p. 988, col. 2.]

The mere fact that a certain rate is mentioned in respect of excess land to be found in possession of the tenants does not raise the presumption as to the *Mukarrari* nature of the holdings. [p. 988, col. 2.]

Appeals against the decrees of the Special Judge, Noakhali, dated the 26th April and 5th May 1921, reversing the decrees in No. 191 of 1922, affirming in Nos. 192 to 195 and 226 to 235 of 1922 and modifying in No. 236 of 1922, the decrees of the Assistant Settlement Officer of that district, dated the 20th June in Nos. 226 to 234 and 236, 26th June in No. 235 and 9th July in Nos. 191 to 195 of 1922 and Appeals against the decrees of the Special Judge, Noakhali, dated the 30th June and 9th July 1921, affirming the decrees in Nos. 206 to 208 and 1898 of 1922, and modifying the decree in No. 1899 of 1921, of Assistant Settlement Officer, Noakhali, dated the 27th June in Nos. 206 to 208 and 31st July in Nos. 1898 and 1899 of 1922,

RAMIJUDDIN *v.* RAI RADHA KANTA AICH BAHADUR

Babu *Brojolal Chakravarty* (with him Babu *Santosh Kumar Bose*), for the Appellants.

Babu *D. L. Kastgir* (with him Babu *Nagendranath Bose*), for the Respondents.

JUDGMENT.—These consolidated appeals raise two points which are common to all of them. The first is that the respondents are only some of the co-sharer landlords and are, therefore, not competent to maintain suits under section 105, Bengal Tenancy Act; and the second point urged is that it should have been held that the rents of the appellants are fixed. The first question is of some importance and is one of first impression.

The facts are that the appellants are tenants of *chars* Kakra an Hazari. For the purpose of determination of the first question it is not necessary to go to the early history of the estate. Suffice it to say that it was taken possession of by the Collector under Regulation 5 of 1812 under the order of the District Judge. It was released in 1858 on condition that the proprietors of the estate, who had quarrelled amongst themselves, should enter into an agreement, that the management of the estate should be carried on through *Malguzars* under Regulation 7 of 1822. On the estate being released the Collector resumed possession under arrangement with the whole body of proprietors and let out the estate from time to time to *Sadar Malguzars* under Regulation 7 of 1822, as extended by Regulation 9 of 1828. The present proceeding was started by the present *Sadar Malguzars* appointed by the Collector under the Regulation. The question, therefore, is whether these *Sadar Malguzars* are persons who may be called the entire body of the appellants. The position of the *Sadar* landlords or who represent the landlords of *Malguzar* is to be found in section 10 (8) of Regulation VII of 1822. That section empowers the *Sadar Malguzar* to manage the property, collect rents and pay the Government Revenue. It further lays down that if any of the co-proprietors is in possession of any land within the estate he will hold it as a subordinate proprietor subject to the payment of rent to the *Sadar Malguzar*, who is vested with exclusive powers over the tenants in the matter of collection of rents &c. &c. The effect of the appointment of *Sadar Malguzar* is, therefore, to suspend or take away for the time being the proprietary right of the proprietors of the estate. Whether a *Sadar Malguzar* is a person who may be called "landlord" within the meaning of section 3 (4), Bengal Tenancy Act is to be determined with reference to the definition of the word "landlord" in that section. 'Landlord' is defined as "a person immediately under whom a tenant holds and includes the Government". 'Proprietor' has also been defined in that section as "a person owning an estate or part of an estate." Reading the two definitions together, it would appear that a distinction was attempted to be made between a 'proprietor' having higher proprietary interest and a 'landlord' under whom the tenant holds, who may have an intermediate interest between the proprietor and the tenant. But a proprietor may be a landlord if he has direct relations with the tenants. In the present case it is argued that the tenants must be taken to be holding under the entire body of proprietors, though rent is to be realised only by the *Sadar Malguzars*. On a reference to the Regulations and the general scheme of the law on this point, it would appear that a *Malguzar* is more than a mere Collector of rent. In him is vested the management of the estate. Any co-parcener who is in possession of the land is to be considered subordinate to the *Malguzar*. He is entrusted with powers over the tenants in respect of the collection of rent. The powers apparently include entering into settlements and all acts necessary for the management of the property. We have given our best consideration to this point and the conclusion which we have come to is that the *Sadar Malguzars* constitute the entire body of landlords within the meaning of section 188, Bengal Tenancy Act For the time being the tenants must be held to be holding under the *Sadar Malguzars*. The right of the other proprietors under the law remains in abeyance so long as the property is managed by the *Malguzars* under the Regulation.

There is another point of view from which this question can be looked at. As we have observed the Collector took over charge of this estate on the proprietor's agreeing that the management should be carried on through the *Malguzars* under Regulation VII of 1822. In pursuance of that agreement *Malguzars* have been appointed from time to time. They may, therefore, be considered as agents

of the proprietors and as such they are entitled to maintain the present suits under section 105, Bengal Tenancy Act. Section 188 requires that the entire body of landlords should join in the proceeding or that they should act through an agent. In this connection reference was made to the case of *Sati Prosad Gurga* v. *Radha Nath Maity* (1), in which there is some expression of opinion that the word 'agent' as used in section 188 means one person and not more than one person. That was a case in which two brothers of a joint *Mitakshara* family had brought a suit for assessment of rent under section 52 B. T. A. Their Lordships held that all the members of the joint family must join under section 188 B. T. A. and that two of them could not be considered to be agents of the entire body of landlords. Probably it was enough for the decision of that case to hold that the plaintiffs were not the entire body of landlords nor were they the agents of their co-parceners. The learned Judge, proceeded further to observe as follows. "It is clear, therefore, that the legislature has expressly provided for the performance of an act, not only by the entire body of the joint landlords but also by their representatives. But the legislature contemplated that where such representative is allowed to act, he must be a single individual; in other words, the act, must be done by a single agent authorised to act on behalf of the entire body of landlords." We must respectfully dissent from the view above expressed. Under section 13 Clause (2) of the General Clauses Act 1897 there is no reason why the word 'agent' should not include agents. We have been unable to discover any special provision in the Bengal Tenancy Act or any other law which would restrict the meaning of the words 'agent' to a single individual. I am, therefore, of opinion that the requirements of section 188, Bengal Tenancy Act, have been satisfied in this case, the plaintiffs being regarded as the entire body of landlords or as agents of the entire body of landlords.

The next point is set at rest by the findings of fact arrived at by the learned Judge. It is argued that the tenants are in occupation of this land at any rate from 1808. The lands had diluviated before the Permanent Settlement and had reappeared sometime about 1808 when they were settled with tenants. It is contended that since it has been found that tenants are in possession since 1808 it ought to be presumed that they were in possession from before the Permanent Settlement when the lands were under water. We do not think that we are entitled to make any such presumption. Further the lower Appellate Court has found as a fact that the entire *char* was unoccupied in 1808. Evidently the tenants did not come into possession of any portion of this *char* until sometime afterwards and, therefore, no tenancy could have been in existence until then. The presumption that the tenancies had been in existence from the time of the Permanent Settlement in 1793 is thus clearly rebutted. The finding comes to this that the tenants come into occupation of the land sometime after 1808 which negatives the supposition that they were in possession from before the Permanent Settlement. The argument that is based upon it that the tenants having proved uniform payment of rent, for more than 20 years shall be presumed to have permanent *Mukarari* interest from the time of the Permanent Settlement consequently fails.

A further question is raised in S. A. Nos. 191 to 195 that the fact that there was a stipulation in the *Kabuliyat* that rent for any additional area to be found in future in possession of the tenants should be paid at a certain rate would make the rate permanent; and in suport of this reliance has been placed on the case of *Ram Dayal Giri* v. *Midnapore Zemindary Coy.* (2). The learned Judge has considered this matter and we think that he has come to a correct conclusion. These have been found to be *Raiyati* holdings and the *Kabuliyats* merely mention the fact that if any increased area is found in possession of the tenants rent would be charged at a certain rate per *kani*. It is not stated for what period the rate should continue. From this fact it cannot be presumed as a matter of law that it is intended to create *Mukarari* holdings. *Surja Prosad Sukul* v. *Midnapore Zemindary Company Ltd.* (3), *Loges Chandra Ray* v. *Makbul Ali* (4) and *Upendralal Gutpa* v. *Joges Chandra Ray* (5). In all those cases it has been held

(1) 18 Ind. Cas. 197 ; 16 C. L. J. 427.

(2) 7 Ind. Cas. 785 ; 15 C. W. N. 263.
(3) 77 Ind. Cas. 954 ; 38 C. L. J. 369.
(4) 54 Ind. Cas. 850 ; 28 C. W. N. 945 ; 30 C. L. J. 140.
(5) 38 Ind. Cas. 56 ; 22 C. W. N. 275.

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that the mere fact that a certain rate is mentioned in respect of excess land to be found in possession of the tenants does not raise the presumption as to the *Mukarari* nature of the holdings. In the case of *Ramdayal Giri* v. *Midnapore Zemindary Coy.* (2), which was decided by one of the learned Judges who was a party to the decision in the case of *Makbul Ali* v. *Jogesh Chandra Ray* (4), there were several factors which led the learned Judges to draw the inference of permanency as to the rate of rent. They observe "it is true there are in the leases no words which by themselves would bar an enhancement such as are used in formal leases in other parts of the country. But there is "the conduct of the parties for more than 60 years showing that notwithstanding one transfer and several successions the same rate of 5 as 4 pies has been maintained ; there is the admitted object of the lease in respect of a large fraction at least of the lands to extend cultivation over jungle lands: there is the progressive nature of the rental in respect of the excess lands." In these circumstances the learned Judges held that the presumption of permanancy of rent may be deduced. These circumstances do not exist in the present cases.

The result is that all these appeals are dismissed with costs. We assess the hearing fee at seven gold mohurs for all these appeals.

S. D. *Appeals dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 32 OF 1919.

November 24, 1921.

Present :—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

THE KARACHI MUNICIPALITY—APPLICANT

versus

M. R. D'SA AND ANOTHER—OPPONENTS.

Rules and Bye-Laws of Karachi Municipality, Appendix D, r. 6 (*e*), *whether* ultra vires—*Terminal tax, refund of—Procedure of Municipality, power of, to prescribe rules.*

Clause C of rule 6 of Appendix D. of the rules and bye-laws of the Karachi Municipality, which lays down the procedure for the refund of terminal tax in respect of goods supplied to Government is not *ultra vires*. [p. 991, col. 2.]

No bye-law of a Municipality can cut down an exemption allowed by the Legislature, and any such bye-law is invalid. [p. 991, col. 2.]

Where, however, an exemption is allowed by the bye-laws themselves, it is competent to the municipality to prescribe and lay down the conditions under which it will grant that exemption. [p. 991, col 2.]

Revision, against the decree of the Small Cause Court Judge, Karachi.

Mr. *Rupchand Billaram*, for the Applicant.

Mr. *Suganlal Hassanand*, for the Opponents.

JUDGMENT.

Kennedy, J.C. —The defendants imported some fire-wood into the limits of the Karachi Municipality, the firewood was unloaded on the Railway at Kiamari and paid no terminal tax to which under the rules of the Municipality it is liable. It has been found as a fact that this fire-wood was imported by the defendants for the purposes of fulfilling a contract by which they had agreed to supply fire-wood to the Military Department and that the fire-wood was, as a matter of fact, so delivered to the Supply and Transport in terms of the contract.

The Municipality are now bringing a suit against the defendants in order to recover the amount which should have been paid as terminal tax. They filed that suit in the Court of Small Causes, Karachi. The defence set up was that this fire-wood was imported for the use of Government under a contract and it was, therefore, not liable to terminal tax or rather that the importers were entitled to receive refund of the terminal tax, to which the Municipality replied that before the importer could have the benefit of the bye-law prescribing the refund of terminal tax, it was incumbent on the importer to comply with certain conditions laid down in this bye-law, namely, that the importer should produce a certificate signed by the Military Officer at the time of the import and that within 30 days of such importation, he should produce a subsidiary certificate of the same officer or his successor as to what part of the said goods

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if any have vested in Government. The Municipality, therefore says, that as the defendants have not performed the duty imposed upon them in this respect, the duty incumbent upon the Municipality under clause (*c*) namely to remit the terminal tax also does not come into force.

The view which commended itself to the learned Judge of the Small Cause Court was that this condition laid down by the Municipality is *ultra vire.* He found that though the Act gives the Municipality a right to exempt the importer from paying terminal tax, it does not allow the Municipality to go further and to say that the exemption must be accompanied by these certificats and thus prescribe a mode of proof for such exemption. He says that there is no doubt that it is perfectly open to the Municipality to require importers to do certain things and if importers do not comply with such bye-laws they would clearly be liable to prosecution, but that the Municipality by their bye-laws cannot cut down any exemption from terminal tax which has been once granted in general terms.

It is to be assumed for the purposes of the suit, that the Municipality has the right to sue for the recovery of the terminal tax, if it is not paid. And we decide this matter on that basis. This case, we must suppose, is of a very rare occurrence because the rules presuppose payment of the dues in respect of the terminal tax before the goods are removed from the Station, therefore, it would not generally be necessary for the Municipality and importers to resort to Courts about it. The present revision application is filed by the Karachi Municipality on the ground that the learned Judge of the Small Cause Court was in error in finding the bye-law *ultra vires.*

As regards this question, we think, the learned Judge has failed to distinguish between the case of an Octroi tax and a terminal tax. The authorities quoted in favour of the proposition which commended itself to him refer to the cases of Octroi and as regards Octroi, it is admitted by the Legislature there is a right to obtain a refund unless the goods so imported are consumed within the limits of the Municipality or in certain other cases. It is obvious that no bye-law of the Municipality could cut down an exemption allowed by the Legislature. If the Municipality has its bye-laws framed so as to cut down that exemption, such a bye-law would, I think, be clearly invalid. But this is a case of a terminal tax for which there is no such exemption given by the Statute. It is only under the bye-law that any one is entitled to the refund of the terminal tax at all. I cannot see why it should not be competent for the authorities which out of mere grace allow an exemption to prescribe and lay down under what conditions it will grant that exemption. That seems to me all the Municipality has done in this case. There is nothing unreasonable or harsh in the rule itself. In fact, I think that to say that goods which were imported with the view to the fulfilment of a Government contract should be free of liability to pay terminal tax, without at the same time prescribing what proof the Municipality would regard as proof sufficient of such goods having been so actually imported so as to enable itself to decide whether or no, refund should be granted would be in itself an unreasonable rule tending to cause frauds amongst the agents of the Municipality, hardship to importers who might not be able to satisfy the Municipality, hardship to the rate-payer who might be plunged into continual litigation. I cannot, therefore, think this particular bye-law is *ultra vires.*

The learned Judge of the Small Cause Court has proceeded on this basis which seems to me erroneous and as it is obvious that if this decision is upheld it might cause serious loss hereafter to the Municipality, it is not possible for me to say that this is not the case in which justice does not require us to interfere even though, it does appear, as a matter of fact, that these goods might have been exempted from the terminal tax, should the defendants have taken the correct procedure. It is moreover, noticeable that the defendants appear to be in error throughout as they failed to deposit the money which they should have deposited under Clause 2 of the Municipal rules in question before removing the goods. Had they done so, probably the necessity of obtaining these documents would have remained present in their minds. The Municipality on its side seems to have done nothing incorrect. I do not think that it would be in accordance

with justice to refuse the Municipality permission to recover its just dues.

As it is not clear whether the judgment is conclusive or merely a preliminary judgment, the best thing to do is to set aside the judgment of the Small Cause Court Judge who may dispose of the case according to law subject of course, to the above findings.

Costs to abid the result.

Aston, A. J. C.—I concur in the order of the learned Judicial Commissioner remanding the case to the lower Court. I would like, however, to add a few remarks. The facts in the case cited by Mr. Suganlal, namely, *The Poona City Municipality* v. *Ramji Raghunath* (1), seem to me in certain respects very similar to those in the present case. There the original plaintiff contracted to supply corn to Government at Poona, Kirkee and the Camp of Exercise and imported corn into Poona for the purposes of his contract. The case shows that he paid octroi duty upon all the corn under the revised octroi rules under section 59, clause (4) of the Bombay District Municipal Act, the octroi was only payable on goods brought within a certain limit, for consumption or use therein. And the ground on which the Municipality refused the refund was that the goods had not been delivered to Governments within the limits, but at Kirkee and the Camp of Exercise. In both cases, therefore, the payment was made to the Municipality in respect of goods eventually delivered to Government and in both cases if the correct system or the proper conditions had been observed the payment would have been exempted or the money returned. The original plaintiff, however, in *Poona City Municipality* v. *Ramji Raghunath* (1), suffered from an additional hardship for the judgment shows that the learned Judges in that case were not of a very decided opinion as to the interpretation of the rules. The rules which had been laid down for his guidance were wanting in charity.

The present circumstances can also be differentiated on the ground that the lower Court has held a great portion of rule 6, clause C, appendix D of the rules and bye-laws of the Karachi Municipality to be *ultra vires*. The consequences, therefore, in the present case are considerable. I am of opinion that the facts are such as to justify our intervention.

Z K. *Case remanded.*

(1) 21 B. 250; 11 Ind. Dec. (N. S.) 169.

MADRAS HIGH COURT.

CIVIL APPEAL No. 125 of 1920.

August 30, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

SUBBIAH PANDARAM—PLAINTIFF—APPELLANT

versus

ARUNACHALA PANDARAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Act. 11—Claim petition decided against minor—Suit—Limitation—Civil Procedure Code (Act V of 1908) O. 21, r. 63—Guardian and Ward—Suit instituted by guardian bona fide—Suit dismissed—Negligence of guardian.

When an order under section 283 Civil Procedure Code (Act XIV of 1882), is made against a minor, a suit in respect of that order ought to be filed within one year of his attaining majority under Art 11 of Sch. I to the Limitation Act. If such a suit is filed within one year from the date of the order by the minor's grand-mother and it is dismissed, this cannot extend the period of limitation. [p. 993, col. 2.]

If the guardian of a minor without taking into consideration the legal aspect of a case, but acting *bona fide*, institutes a suit on behalf of the minor, he is not guilty of gross negligence even though it would have been to the minor's advantage if he had not instituted the suit [p. 994, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in O. S. No. 86 of 1914 (O. S. No. 118 of 1913 on the file of the Court of the Subordinate Judge, Negapatam).

Mr. *K. S Jayarama Iyer*, for the Appellant.

Mr. *S. T. Srinivasagopalachari*, for the Respondents.

JUDGMENT.—The plaintiff in this case brings a suit for partition against his father

the 1st defendant and various other defendants who are alienees from his father. The property claimed for partition is enumerated in various schedules of the plaints, Schedules A to E, and a certain number of the claims made by the plaintiff have been admitted by the learned Subordinated Judge while others have been disallowed; and apparently, since the appeal was filed there has been some understanding arrived at between the parties, for a large number of the respondents do not now appear to oppose the appeal. Finally when the appeal was argued, it was only argued in respect of the following properties—A Schedule, C schedule, a portion of D Schedule, and Schedules F. 5. and E. 9.

The most important schedule is the A Schedule which comprises properties sold at Court auction. At the same auction, certain other properties were sold which have been held to be trust properties, but we are not now concerned with those. When the A Schedule properties were attached, the plaintiff was a minor, but his grandmother presented a claim petition on the 9th of February 1897 and this petition was dismissed and the properties were sold. Subsequently a suit was filed by the plaintiff's grandmother to set aside the order on the claim petition, O. S. No. 269 of 1899 in the District Munsif's Court of Negapatam. That suit was also dismissed. The plaintiff, who attained majority nearly three years before filing the suit, now comes to Court to recover possession of the properties which were then sold. The Subordinate Judge has found that, as there was an order against the plaintiff under section 283 of the Code of Civil Procedure, 1882, the plaintiff ought to have brought his suit within one year of attaining majority under Article 11 of the Schedule to the Limitation Act. It is now argued for the appellant that the order passed on his claim petition in 1897 was one passed without investigation and is consequently not an order under section 283. The claim petition referred not only to the A Schedule properties but to all the properties which were said to be dedicated to charity. The petition was filed on the 9th of February and returned for correction and various adjournments were granted, one at least, for securing the attendance of the petitioner's witnesses, and final orders were passed on the 3rd of May. It is not disputed that the order with regard to the charity properties was passed after investigation and that seems quite clear from the order itself, but it is said that there was no investigation of the plaintiff's claim in respect of the A Schedule properties. He had claimed that they had been attached in execution of the decree for a debt incurred by his father and that the debt was not true and was fraudulent. He further added an inconsistent statement that it was an immoral and illegal debt. He thus first denied the existence of the debt and then alleged that it was an illegal and immoral one. The Subordinate Judge in dealing with this allegation decided that "as a father has a disposing power of the ancestral property in respect of his debts which are not tainted with immorality, the Court can sell in execution whatever he can lawfully sell;" and he also held that,

> "although the son was not a party to the suit or decree, he ought not to be debarred from trying the fact as to the nature of the debt in a suit of his own."

It is contended that this order amounts to a refusal to adjudicate on the claim and merely refers the petitioner to a suit. So far as it is alleged that there was no debt, it is certainly an adjudication and decides that there was a debt, and that the son is liable unless he can prove the contrary. The Subordinate Judge did not think it necessary to discuss the nature of the debt but said that the claimant should file a suit, if so advised. That is not to say, that he did not investigate the claim put in and we are satisfied that there was an investigation within the meaning of section 278. The order was, therefore, one under section 283 and any suit filed in respect of that order ought to be filed within one year of the plaintiff's attaining majority. It is then contended that as a suit was filed within one year by the plaintiff's grandmother, that would in some way extend the period of limitation, but there is nothing to support this contention. It is difficult to see how the filing of a suit which was decided against the claimant would give a right in the future to extend the period of limitation. A further argunment is put forward that the plaintiff's guardian was negligent in preferring the claim petition which she need not have done. If she had been enabled to establish the claim, the property would

have been released from attachment and not passed into the hands of strangers. It is, therefore, difficult to understand how there was any negligence in trying to secure the property from passing into the hands of strangers for the benefit of the minor plaintiff. No doubt it might be now to the plaintiff's advantage if no claim had ever been preferred and possibly his present suit would be in time ; but to hold that the guardian, who did not take all these legal questions into consideration, was guilty of gross negligence although she was doing her best in the interest of the minor, is rather a far-fetched argument and we cannot accept it. In this view, the plaintiff's suit is barred by limitation, and it is unnecessary to consider the further question as to whether the question is also *res judicata*.

[The rest of the Judgment proceeds on certain points of fact and is not reportable.—*Ed.*]

S. D. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 15 OF 1919.

September 20, 1922.

Present :—Mr. Raymond, A. J. C , and Mr. Madgavkar, A. J. C.

AZIZALLAH KHAN AND ANOTHER —APPELLANTS

versus

GHULAM HUSSEIN *alias* BUKSHAN KHAN AND ANOTHER—RESPONDENTS.

Estoppel—Attestation of document, effect of—Civil Procedure Code (Act V of 1908), O. XXI, rr. 63, 103—Execution of decree—Claim proceedings—Order, finality of—Defendant, whether can question order.

Mere attestation by a person does not necessarily import knowledge of the contents of the document attested, but there may arise circumstances from which an inference may be deducible that the attesting witness was aware of the nature of the document, he or she was attesting. [p. 996, col. 1.]

The question whether attestation of a document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case.

Lakhpati v. *Ramabodh Singh*, 29 Ind Cas. 218; 37 A. 350; 13 A. L. J. 616, relied on. [p. 996, col. 1.]

No actual verbal representation is necessary to give rise to an estoppel. It is quite enough that the conduct of a party leads another to act in the belief that he asserts no claim to the property. The principle on which the doctrine of estoppel rests is that it would be most inequitable and unjust to a person that if another by a representation made or *conduct amounting to representation* has induced him to act as he would otherwise not have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it."

Sarat Chunder Dey v. *Gopal Chunder Laha*, 19 I.A. 203 : 20 C 296 ; 6 Sar. P. C. J. 224 ; 10 Ind. Dec. (N. S.) 201 (P. C.) ; *Pandurang Krishnaji* v. *Markandeya Tukaram*, 65 Ind. Cas 954 ; 49 C 334 ; 26 C. W. N. 201 ; 3 U. P. L. R. (P.C.) 85 ; 5 N. L. J. 6; 20 A. L. J. 305 ; 42 M. L. J. 436 ; 15 L. W. 486 ; 30 M. L. T. 249; 35 C. L. J. 409 ; 24 Bom. L. R. 557 ; 18 N. L. R. 1 ; (1922) A. I. R. (P. C.) 20 (P. C.), followed. [p. 996, col. 2.]

If A, with the knowledge of the recital in a sale-deed that the land thereby conveyed belongs to B and is in B's enjoyment as owner, attests the sale-deed executed by B in favour of a third person, he is estopped from setting up thereafter his title to the land.

Kandaswami Pillai v. *Rangaswamy Nainar*, 16 Ind. Cas 30 ; 36 M. 564 ; 12 M. L. T. 211 : (1912) M. W. N. 882 ; 23 M. L J. 301, relied on. [p. 996, col. 2.]

Where the summary order contemplated by O. XXI, r. 63 and 103 of the Civil Procedure Code, is not set aside in a regular suit brought within a year, it becomes conclusive and binding on all persons who were parties to it, and also on their successors-in-title, and they are thereafter precluded from asserting their rights contrary to the order, even as defendants.

Nemaganda v. *Paresha*, 22 B. 640 at p 643 ; 11 Ind. Dec. (N. S) 1009 ; *Surnamayi Dasi* v. *Ashutosh Goswami*, 27 C. 714; 14 Ind. Dec. (N. S) 469, relied on. [p. 996, col. 2.]

Appeal from the decree of the District Judge, Sukkur.

Mr. *Srikishendas Harbhagwandas Lala*, for the Appellants.

Mr. *Thanwardas Isardas*, for the Respondents.

JUDGMENT.

Raymond, A. J. C.—The facts of the case out of which this appeal arises are briefly as follows :— Plaintiffs - appellants Azizullah Khan and Teekchand Sojraj filed a suit in the Court of the Sub-Judge at Shikarpur, alleging that they had jointly purchased the building in suit, and that they were obstructed in the attempt to open a door in the eastern wall of the building which would lead to a court-yard common to them and defendants-respondents. They, therefore, prayed for an injunction restraining the respondents from interfering with their rights. Appellant's case was that the property in suit originally belonged to one Habibullah, who by a registered sale-deed, dated the 5th December 1897, sold it to Faiz Mahomed. The latter had two sons, Sher

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Mahomed and Ghulam Hussain and on the death of Faiz Mahomed, Sher Mahomed sold his half share in the property to the appellants, who filed a suit 334 of 1912 on the file of the Sub-Judge for partition against Ghulam Hussain and obtained a decree on the 2nd June 1912 in terms of which the eastern portion of the house was allotted to the appellants. On 17th May 1917 appellant Azizullah purchased from Ghulam Hussain by a registered sale-deed, the remaining half of the property and sold half his interest therein to the appellant Teckchand the day following, that is, 18th May 1917.

Of the two respondents Halim entered no defence to the action, but respondent No. 1 Ghulam Hussain stated that the property in suit belongs to *Musammat* Dada Nawab who died without issue, and he is entitled to it as her next-of-kin. Dada Nawab was a sister of Habibullah above-mentioned and the contention of respondent No 1 was that the property in suit originally belonged to Mahomed Rahim Khan from whom his daughter Sultan Bibi, the mother of Habibullah and Nawab, inherited it, and on the death of Sultan Bibi and Habibullah Nawabi became the sole owner of it. With regard to the sale-deed admittedly executed by Habibullah in favour of Faiz Mahomed and admittedly also attested by Sultan Bibi and Nawab, the argument is that these two attesting witnesses were unaware of the contents of the document and consequently estoppel cannot operate to prevent the right of Habibullah being challenged in disposing of the property. Respondent No. 1 also contended that the appellants have no right to the relief sought by way of injunction.

An important point I may also mention at this stage before discussing the merits and legal aspect of the case. In suit No. 23 of 1912 to which I have referred above, appellants applied for execution of the decree by possession of Sher Mahomed's share in the house which was then in the occupation of *Musammat* Nawab. As she obstructed the possession, an enquiry into her claim was made, and she was examined, and the Sub-Judge passed an order directing her to relinquish possession and the appellants notified delivery of possession on the 7th February 1913. It does not, however, appear whether this possession was physical or symbolical, for *Musammat* Nawab again entered into possession and was in occupation of the property till her death which took place about a year before the present suit was filed. The Sub-Judge, Shikarpur, held that appellants had not proved their ownership of the house in dispute and they had no right to open a door leading to the court-yard and, therefore, dismissed their suit for injunction. On appeal, the District Court of Sukkur remarking that the dispute between the parties really converged on the ownership of the house, framed fresh issues and remanded the case for findings on them to be recorded. Of the issues thus remanded the two main issues were whether the appellants are in possession of the property and whether they had a subsisting title to it through their vendors and the findings of the Sub-Judge were that the appellants are in possession of the property but they have no subsisting title to it as Habibullah the original vendor had no subsisting title to convey. On the receipt of the findings the District Court proceeded to dispose of the appeal and was of the opinion that the appellants "were endeavouring to obtain amenities not possessed by the house before to the detriment of defendant's user of the court-yard and held that this is not a case in which an injunction should be granted." At the conclusion of his judgment the learned Judge remarked as follows. "In the circumstance I consider it unnecessary to go into the merits of the case and decide the title of the parties in this suit for an injunction and I, therefore, dismiss the appeal with costs." On second appeal to this Court a Divisional Bench remanded the case to the First Appellate Court for recording a finding as to whether the appellants are the owners of the poperty in suit for if the judgment of the lower Court was reversed and the injunction sought by the appellants was granted, it would be a mere "*brutum fulmen*" if the ownership of the property in dispute had not been established in the first instance. The finding of the District Judge on remand is that appellants are the owners of the plaint property. The appeal has now been further argued before us by Mr. Lula for the appellants and Mr. Thawardas for the respondents.

As regards the appellants' purchase of the house in suit from Sher Mahomed and Ghulam

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Hussain the sons of Faiz Mahomed, there can be no reasonable doubt. The two sale-deeds, Exs. 39 and 40, appear to me uncontestable. Now Ex. 95 is the certified copy of the sale-deed of the suit-property by Habibullah to Faiz Mahomed, both of whom are now dead and this sale-deed is attested by both Sultan Bibi and *Musammat* Nawab. Mere attestation by a person does not necessarily import knowledge of the contents of the document attested, but there may arise circumstances from which an inference may be deducible that the attesting witness was aware of the nature of the document, he or she was attesting. In the case of *Lakhpati* v. *Ramabodhsing* (1) it was held that "the question whether attestation of a document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case and High Court cannot entertain it in second appeal." It is the mother and sister and not distant strangers that have attested the sale-deed by Habibullah and it seems difficult to conceive that such close relatives would not be aware of the nature of the document to which they were asked to append their signatures. It is not usual for Mahomedan *purdahnishin* women to attest documents and the attestation in the present case was in all probability insisted upon by the purchaser for, as Sultan Bibi and Nawab lived in the house that was being sold along with Habibullah it was intended obviously to bind them by the sale effected by Habibullah. If the attestation was to be confined exclusively to the signature of the vendor, it is most unlikely that the purchaser would be satisfied with the attestation of two witnesses so closely related to the executant. I am, therefore, of the opinion that both Sultan Bibi and Nawab were well acquainted with the contents of the sale-deed at the time of the attestation. Now respondent No. 1 derives his title through *Musammat* Nawab and the latter would be estopped from contending that Habibullah had no right to sell or was not the owner of the property in dispute. As remarked in the case of *Kandasami Pillay* v. *Rangasamwy Nainar* (2). "If A with the knowledge that the recital in a sale-deed that the land thereby conveyed belongs to B and is in B's enjoyment as owner attests the sale-deed executed by B in favour of the plaintiff he is estopped from setting up thereafter his title to the land." No actual verbal representation is necessary to give rise to an estoppel. It is quite enough that the conduct of a party leads another to act in the belief that he asserts no claim to the property. As observed by the Privy Council in *Sarat Chundar Dey* v. *Gopal Chundar Laha* (3) "the principle on which the law and statute rest is that it would be most inequitable and unjust to a person that if another by a representation made or *conduct amounting to representation* has induced him to act as he would otherwise not have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." As *Musammat* Nawab, therefore, would be clearly estopped from contending that Habibullah had no right to convey the property to Faiz Mahomed, respondent No. 1 who dervies his title through her is equally debarred.

There is, however, another formidable obstacle which would shut out Nawab conclusively from asserting her title to the property in suit. I have already referred to the execution proceedings wherein Nawab obstructed the appellants in obtaining possession and an order adverse to Nawab was passed. Now under article 11-A of the Indian Limitation Act the period of limitation for the unsuccessful claimant to establish the right which he claims to the present possession of the property comprised in the order is one year from the date of the order, and it has been held in a series of cases that where the summary order contemplated by O. XXI, rr. 63 and 103 is not overruled in a regular suit brought within a year it becomes conclusive and binding on all persons who were parties to it, and also on their successors-in-title, and they are thereafter precluded from asserting their rights, even *as defendants*. In *Nemagauda* v. *Paresha* (4), it was observed. "The authorities are quite clear about the general position

(1) 29 Ind. Cas. 218 ; 37 A. 350 ; 13 A L. J. 616.
(2) 16 Ind. Cas. 30 ; 36 M. 564 ; 12 M. L. T. 211 ; (1912) M. W. N. 882 ; 23 M. L. J. 801.

(3) 19 I. A. 203 ; 20 C. 296 ; 6 Sar. P. C. J. 224 ; 10 Ind. Dec. (N. S.) 201 (P.C.).
(4) 22 B. 640 at p. 643 ; 11 Ind. Dec. (N. S.) 1009

that the unsuccessful objector or intervenor whether he happens to be plaintiff or defendant in the regular suit is equally bound by the order in the miscellaneous proceedings, and the only way open to him is to establish his right by a regular suit brought within 12 months at the expiration of which period the order becomes conclusive as against him." To the same effect is the case of *Surnamoyi Dasi* v. *Ashuthosh Goswami* (5). When, therefore, a claim is disallowed and no suit is brought within a year the claimant is thereafter precluded from asserting in any capacity: Rustomji's Limitation Act, page 252. Now admittedly through an order adverse to Nawab was passed in February 1913, she took no steps till her death which took place in 1917 to establish her claim to the property in suit and the order of the Sub-Judge was conclusive and binding upon her and her successors-in-title.

The position, therefore, reduces itself to this, that Nawab's claim to the house in dispute cannot be considered and with it respondents No. 1's claim to the house also fails.

The question then remains whether appellants have proved their title to the property. This was the issue sent down to the District Court on remand, and it was held that appellants have proved their title to the property and with its finding on this point we concur. There, therefore, only remains the point for decision as to whether appellants are entitled to the injunction they seek.

The Sub-Judge disallowed the injunction as he was of opinion that the opening of the door in question would disturb the occupants of the other houses who use the court-yard, and as he held that plaintiffs had not proved their title to the house in which the door was to be opened, there was no possibility of granting them the relief they sought; the First Appellate Court refused the injunction as it was of opinion that its grant would be detrimental to the user of the court-yard by the respondents. We have had a sketch of the house and court-yard and the adjacent buildings abutting on it placed before us and from it, it appears and it is admitted that the court-yard is common to the houses south and west of it. At the time of the suit the house in question consisted of one large room with two door-ways, one opening on the east and the other into the court-yard. The two appellants who are, a Hindu and a Mahomedan propose to partition the room by the construction of a wall, running from south to north, and as the result of this will be that both the existing doors will fall in the eastern tenement it is absolutely essential to have an opening of the western part of the building. The only manner in which this can be done is by opening a door, leading to the court-yard. Now it appears that the court-yard is utilized by the woman-folk of the adjacent houses for sleeping purposes and the main contention of the respondents against the grant of the injunction is that their privacy will be entirely destroyed if the appellants are permitted to open the door they desire to do. But the court-yard is admitted not to be the exclusive property of the respondents, and the appellants have as much a right to its user as the respondents. One door of the house in suit already opens on to the court-yard and the occupants of this house can have easy access to it by this door, and the opening of another door a few yards away from the first would not make any appreciable difference since the privacy of the respondents could be as easily disturbed by the door in the eastern as by the door in the western tenement. It appears to me that the real objection lies to the intrusion by a Hindu owner on what has hitherto been a close preserve of a Mahomedan family, but this would be no ground for disallowing the injunction as the appellants have a legal right to the relief they claim. No doubt the Courts are given discretion to grant or withhold an injunction, but in the present case if the injunction is withheld it would be tantamount to depriving the appellants of the user of the property which they own, for it is not to be expected that a Hindu and a Mahomedan family could occupy one room jointly. The house can be brought into use only by means of a partition wall, and to make both the apartments habitable, the door proposed to be opened by the appellants is indispensable. I am of opinion that the appellants have made out a good case for the relief they seek and, I would reverse the decrees of the lower Courts and direct an injunction to issue to the repondents in terms

(5) 27 C. 714 ; 14 Ind. Dec. (N.S.) 469.

of the prayer in the plaint with costs on the respondents both of this Court and the Lower Courts.

Madgavkar, A. J. C.—I concur on the question of the effect of attestation. I would only refer to the very recent decision of the Privy Council, *Pandurang Krishnaji* v. *Markandeya Tukaram* (6). On the question of title the plaintiff's case appears to me stronger, because, firstly it is not proved that the property belonged to the father of Habibullah and Dada Nawab, secondly, the fact that Dada Nawab and her mother, both *pardanashin* women, brought out on purpose to attest the conveyance by Habibullah, leads to a strong inference of their knowledge of the contents of the conveyance. Thirdly, Dada Nawab took no steps to set aside by suit the order in execution proceedings against her and in favour of the plaintiff. The only point in her favour is her residence there till her death.

On the question of injunction, the joint ownership of the court-yard entitles the plaintiff to the injunction and the question of the creed of the parties is immaterial.

Z. K. *Appeal allowed.*

(6) 65 Ind. Cas. 954 ; 49 C 884 ; 26 C. W. N. 201; 3 U. P. L. R. (P C.) 85 ; 5 N. L. J. 6 ; 20 A. L. J. 305; 42 M. L. J. 436 ; 15 L. W. 486 ; 39 M. L. T. 249 ; 35 C. L. J. 402 ; 21 Bom. L R. 557 ; 18 N. L. R. 1 ; (1922) A. I. R. (P.C.) 20 (P.C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 814 OF 1923.
January 3, 1924.

Present :—Mr. Justice Broadway and Mr. Justice Fforde.

WALI MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS
versus
MUHAMMAD BAKHSH AND OTHERS—PLAINTIFFS AND ALLAH BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 44—Record of Rights, entries in—Presumption of correctness—Rebuttal—Extraneous evidence, whether necessary—Pedigree table, entries in, relating to devolution of property—Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal second—Additional evidence, whether can be taken.

An entry in a Record of Rights is not necessarily conclusive. It is an entry to which the presumption of correctness attaches under the provisions of section 44 of the Punjab Land Revenue Act unless and until the contrary is proved by legal evidence. If, however, the entry itself is inconclusive, or appears on the face of it to be erroneous, a court would be justified in rejecting it, and it would not be necessary in such a case, to produce extraneous evidence to prove the incorrectness of the entry. The question whether the presumption of correctness attaching to an entry in the Record of rights has been rebutted is one of fact and cannot be examined in second appeal. [p. 1001, col. 1.]

Semble :—R. 27 of O XLI of the Civil Procedure Code does not authorise an Appellate Court to allow the production of additional evidence in second appeal. [p. 1001, col. 2.]

Indarjit Pratap Bahadur Sahi v. *Ameer Singh*, 74 Ind. Cas. 747 ; 2 Pat. 676 ; 21 A. L. J. 554 ; 4 P. L. T. 447 ; (1923) A. I. R. (P.C.) 128 ; 1 P. L. R. 345 ; 33 M. L. T. 233 ; 45 M. L. J. 578 ; 18 L. W. 728 ; 25 Bom. L. R. 1259 ; 28 C. W. N. 277 ; 39 C. L. J. 318; distinguished.

Quaere :—Whether a presumption of correctness, under section 44 of the Punjab Land Revenue Act, attaches to entries in a pedigree table relating to the devolution of property. [p. 1000, col. 2 and p 1001, col. 1.]

Appeal from the decree of the District Judge, Sheikhupura, dated 26th March 1923.

Messrs. *Hassan Imam Abdul Rashid* and Lala *Badri Das*, for the Appellants.

Bakshi *Tek Chand*, Mr. *Noor-ud-Din* and Sheikh *Niaz Muhammad*, for the Respondents.

JUDGMENT.—The following pedigree-tables will assist in the appreciation of this case :—

WALI MUHAMMAD *v.* MUHAMMAD BAKHSH

A

Por Bakhsh

- Muhammad Bakhsh, Plaintiff No. 1.
  - Muhammad Hussain
    - Rahmat Ali, Plaintiff No. 3.
  - Shera
    - Hakim Ali, Defendant No. 8.
    - Muhammad Ali, Plaintiff No. 4.
- Sultan
  - Kala, Plaintiff No. 2.
  - Nawab (died childless).

B

Miran Bakhsh

- Allah Bakhsh, Defendant No. 1.
- Nur Elahi, Defendant No. 2.

C

Dare Khan

- Wali Muhammad, Defendant No. 3.
- Ali Muhammad
  - Muhammad Husain, Defendant No 4.
  - Hassan Muhammad, Defendant No. 5.
- Muhammad Bakhsh
  - Muhammad Yusaf, Defendant No. 6.
  - Muhammad Yunis, Defendant No. 7.

On the 17th of November 1920 the plaintiffs instituted a suit against the defendants claiming possession, by redemption of 200 *ghumaons*, 6 *kanals*, 11 *marlas* of land situate in *Mauza* Mehmunwalli in the district of Sheikhupura. They alleged that the land in question had been mortgaged by Muhammad Bakhsh and Sultan (Table A) to Miran Bakhsh (Table B) for Rs. 1,200 under a duly registered deed executed on the 15th of March 1880; that Miran Bakhsh had transferred his mortgagee rights to Wali Muhammad, Ali Muhammad and Muhammad Bakhsh (Table C; that the said transferees and their descendants had been since, and were still, in possession of the said land as mortgagees and refused to allow the plaintiffs to redeem the same on payment of the mortgage-money.

Nur Ilahi defendant No. 2 (Table B) and Hakim Ali defendant No. 8 (Table A) put in no appearance. Allah Bakhsh defendant No. 1 (Table B) admitted the allegations made

in the plaint. The remaining defendants admitted that the land in suit had been mortgaged to Miran Bakhsh as alleged, but pleaded that they had purchased the land from Muhammad Bakhsh and Sultan in 1890 and had paid off the mortgagees a few months later since when they had held possession as owners and not as mortgagees. Their other pleas are immaterial so far as this appeal is concerned.

Five issues were settled by the Trial Court, of which the first and fourth were as follows :—

(1) Does the relation of mortgagors and mortgagees subsist between the plaintiffs and defendants Nos. 3 to 7 ?

(4) Was the land in suit sold to defendants Nos. 3 to 7 by Sultan and Muhammad Bakhsh ?

These were decided against the plaintiffs and their suit was consequently dismissed with costs.

The plaintiffs thereupon preferred an appeal to the additional District Judge who decreed their claim holding that the defendants Nos. 3 to 7 (Table C) had failed to discharge the onus of proving the fourth issue.

The said five defendants (Table C) have come up to this Court in second appeal and their case has been very ably argued by Mr. Hassan Imam Mr. Tek Chand appeared for the plaintiffs respondents. Mr. Hassan Imam frankly conceded that the onus of proving issues Nos. 1 and 4 had rightly been pleased on the plaintiffs-respondents and appellants respectively. He also admitted that as the appellants had admitted the mortgage a presumption arose in favour of the plaintiffs respondents and that this presumption could only be displaced by the appellants proving the alleged sale in their favour. He claimed, however, that this duty they had discharged by proving that they had been entered as owners of the suit lands in such of the Revenue Records, since the Settlement of 1892-93, as were forthcoming. He urged that the claim made by the plaintiffs-respondents was the outcome of the disturbances that occurred in Gujranwala in 1919 when a great part of the Revenue Records were burnt, and that among the Records thus burnt were the Mutation Registers which would have placed the appellants' case beyond all dispute. In the absence of these registers, however, reliance was placed on the *Jamabandis* of 1892-93, 1905-06, 1916-17 and certain entries in the pedigree-table of the village proprietors, and it was argued that the learned Additional District Judge had not attached that weight to the presumption of their correctness that was due to them owing to the provisions of section 44 of the Land Revenue Act. Now it cannot be denied that such Revenue Records as have been produced show the appellants as owners of this land and section 44 of the Land Revenue Act undoubtedly enacts that entries in such records shall be presumed to be correct.

The learned Additional District Judge has, however, fully realised this aspect of the case and has considered and weighed this evidence with all possible care.

In the pedigree-tables referred to there appear certain entries relating to the devolution of lands in the village, and it is on these entries that Mr. Hassan Imam lays stress. The learned Additional District Judge has examined these entries very carefully and has come to the conclusion that no reliance can be placed on their correctness. It was contended that the learned Additional District Judge was not at liberty to come to this conclusion merely on an examination of the entries themselves, but was bound by section 44 of the Land Revenue Act to hold them to be correct till some extraneous evidence had been produced showing their incorrectness. This view cannot be accepted. The pedigree-tables, are, after all, pieces of evidence. They carry with them certain presumptions, but they can be examined and scrutinised with a view to determining their value without any such evidence as is suggested by the learned Counsel. Mr. Tek Chand contended that the presumption of correctness attached only to the pedigree-tables so far as relationships were concerned and that any entries relating to the devolution of property were unauthorised and, therefore, no presumption arose with regard to them. This contention is supported by the dictum of Martineau, J. in an unreported case (Civil Appeal No. 2398 of 1920) in which it was held that " although a presumption of correctness attaches to the pedigree-table (which is part of the Record-of-Rights under section 44

of the Land Revenue Act, I do not think that that presumption extends to an entry made in the pedigree-table with respect to an extraneous matter entirely unconnected with the question of the relationship of the persons named in the table." On the other hand Mr. Hassan Imam referred to Douie's Punjab Land Administration Manual and the same learned author's Settlement Manual. In the latter of these treatises in Appendix VIII, page XXIV, is given the form in which pedigree-tables are to be prepared. Paragraphs 8 and 10 of this document seem to authorise the making of entries relating to the devolution of lands in the village, although Mr. Hassan Imam was unable to show under what authority that Appendix was promulgated or whether it was in force in 1891. Assuming, however, that these entries were made in accordance with the requirements of the law, an entry in a Record-of-Rights is not necessarily conclusive. It is an entry to which the presumption of correctness attaches under the provisions of section 44 of the Punjab land Revenue Act unless and until the contrary is proved by legal evidence. If the entries themselves are inconclusive or appear on the face of them to be erroneous, a Court would be justified in not accepting them. In the present case the learned Additional District Judge has pointed out that the case of the appellants is opposed to the entries in the pedigree-tables and has declined to accept them. In other words he has held that the presumption of correctness astaching to them as entries in a Record-of-Rights has been rebutted. This is a question of fact which cannot be examined in second appeal, vide *Ram Kumar Chackerbutty* v. *Birindra Kishore manikya* (1).

Apparently recognising that his position in regard to the entries in the pedigree-tables was weak, Mr. Hassan Imam desired to be allowed to tender fresh evidence. This evidence consisted of certain remarks in the *micl haqqiat* or Record-of-Rights. He contended that the appellants had only discovered the existence of this new evidence within the last three or four months and that they had then, without any undue delay, moved this Court to send for the said *misl haqqiat*. It appears, however, that the Special Kanungo was examined and when he gave his evidence it is admitted that these particular documents were in his possession in Court. He was asked no questions in regard to them and apparently neither the appellants nor their Counsel thought it worth while to make an examination of the Revenue Records until long after the learned Additional District Judge had delivered his judgment. Mr. Tek Chand contended that r. 27 of O. XLI, Civil Procedure Code, did not 'authorise an Appellate Court to allow the production of additional evidence in second appeal, Mr. Hassan Imam referred to *Indarjit Pratap Bahadur Sahi* v. *Amar Singh* (2) where their Lordships of the Privy Council held that "the jurisdiction of an Appellate Court under O. XLI, r. 27 (1) (b) of the Civil Procedure Code, to admit additional evidence is not confined to cases in which the Court itself discovers a lacuna or defect and requires evidence to fill up or remedy it." They also held that the Judicial Committee has unrestricted power to admit documents where sufficient ground is shown for their not having been produced at the initial stage of the litigation." In that case, however, as pointed out by Mr. Tek Chand, the High Court of Patna was sitting as a Court of first appeal and the authority, therefore, is not in point. Further, there seems to have been no valid reason for the delay in the production of this evidence. As stated above this evidence was actually in Court during the trial and the failure to produce it was obviously due to the slackness on the part of the appellants and their legal advisers in failing to inspect the records with proper care. This evidence was not tendered in the lower Appellate Court and we cannot see our way to admit it at this late stage, even assuming we had power to do so.

Mr. Hassan Imam admitted that the onus of proving the sale lay on his clients. Whether a sale had or had not been effected is a question of fact and this question has been decided against the appellants by the learned Additional District Judge. In coming to his decision the learned Additional District Judge has not contravened any legal principles and

(1) 45 Ind. Cas. 65 ; 22 C. W. N. 449.

(2) 74 Ind. Cas. 747 ; 2 Pat. 676 ; 21 A. L. J. 554; 4 P. L. T. 447 ; (1923) A. I. R. (P. C.) 128 ; 1 P. L. R. 345 ; 33 M. L. T. 233; 45 M. L. J. 578 ; 18 L. W. 728 ; 25 Bom. L. R. 1259; 28 C. W. N. 277 ; 39 C. L. J. 318 (P. C.).

we are not, therefore, competent to examine the correctness of his finding.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 23 OF 1920.

August 14, 1922.

Present :—Mr. Kennedy, J. C., and Mr. Madgavkar, A. J. C.

JAMNOMAL GURDINOMAL—
APPELLANT
versus
GOPALDAS AND ANOTHER—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 144—Restitution—Sale, whether can be set aside—Auction-purchaser, position of—Bona fide *purchaser, who is—Decree set aside by suit, effect of.*

The language of clause (1) of section 144 of the Civil Procedure Code is wider than that of the corresponding section 583 of the Code of 1882 and the addition of clause (2) barring suits necessarily implies the widest possible construction of clause (1). [p. 1003, col. 1.]

The question of restitution of property sold under a decree, is restricted not merely to the parties themselves but also extends to their representatives within the meaning of section 47 of the Civil Procedure Code, and the term 'representatives' includes not merely legal representatives, but also assignees. [p. 1003, col. 1 & col. 2].

While as against a decree-holder who is himself the auction-purchaser, a sale can be set aside and restitution made, an innocent purchaser through Court cannot be so disturbed. [p. 1004, col. 1.]

By the phrase "*bona fide* or innocent purchaser" as distinguished from the case where the decree-holder is himself the auction purchaser, the Courts imply the test of knowledge of the pending proceedings whether by appeal or otherwise to set aside a decree, and opportunity to defend his own interests in those proceedings. [p. 1004, col. 2.]

The fact that the decree which was executed by sale was set aside, not in appeal, but by subsequent litigation, does not affect the question of restitution. [p. 1005, col. 1].

Case-law discussed.

Appeal from the order of the Assistant Judge, Sukkur.

Mr. *Kimatrai Bhojraj*, for the Appellant.

Messrs. *Dipchand Chandumal* and *Tahilram Maniram*, for the Respondents.

JUDGMENT.—The appellant Jamnomal, was a minor in 1910. His elder brother, Manghanmal and his father Gurdinomal filed an award in which the appellant was declared entitled to a third share of certain property. Dayaram, respondent No. 2, mortgagee of the property from Manghanmal filed an award in 1910 by which the property, including the appellant's share became liable for the mortgage amount. The latter award was filed in suit No. 114 of 1910, and in execution by Dayaram, the property including the appellant's share was attached and sold by auction through Court, and purchased by the respondent No. 1, Gopaldas in February 1914. In December 1913, after the attachment, but before the sale, the appellant brought suit No. 306 of 1913 against Dayaram and the other parties to the mortgage-decree, for a declaration that the appellant's one-third share was not liable on Dayaram's decree. After the purchase by the respondent No. 1, the appellant applied to implead the latter in his suit. Gopaldas, however, objected and the objection was allowed. The appellant's suit against Dayaram and the other parties then proceeded, but was dismissed in the Trial Court. The appellant failed in first appeal, but succeeded in second appeal in this Court, which held that the mortgage-decree as against the appellant was null and void and the appellant's share was not liable. The appellant now seeks restitution under section 144 of the Code of Civil Procedure against the auction-purchaser Gopaldas and the mortgagee-decree-holder Dayaram.

The Court of first instance ordered that the appellant should be placed in possession of his one-third share and the remainder re-sold. This order was set aside in first appeal by the Assistant Judge who ordered that the appellant should merely recover a third of the purchase amount from the respondent No. 2, Dayaram, but held that he was not entitled to any restitution as against the respondent No. 1 Gopaldas. The appellant appeals to this Court.

It is contended for the appellant that the order in first appeal does not grant the appellant the complete restitution to which he is entitled, whether under section 144 of the Code of Civil Procedure or under the inherent powers of the Court under section 151. For the respondent No. 2, it is contended that the lower Appellate Court passed an order for which none of the parties asked. For the respondent No. 1 (Gopaldas) it is urged that he was not a party either to the mortgage-decree or to the subsequent suit by the appellant and, therefore, no remedy lies against him under section 144; and further, that as a *bona fide* auction-purchaser through Court, the sale to him cannot be set aside. He is not a representative either of the auction-purchaser or of the judgment-debtor, and the doctrine of '*lis pendens*' has no application in his case.

The language of clause (1) of section 144 of the Civil Procedure Code is wider than that of the corresponding section 583 of the Code of 1882 and the addition of clause (2) barring suits necessarily implies the widest possible construction of clause (1). Even under the Code of 1882 their Lordships of the Privy Council in *Prosunno Kumar* v. *Kalidas Sanyal* (1) observed "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit, is interested in the result has never been held a bar to the application of the section." And it has been justly held that "section 583 must be read with section 244," corresponding to section 47 of the present Code, *Jamininath* v. *Dharmadas* (2). So read it would appear that the question of restitution of property sold under a decree, is restricted not merely to the parties themselves but also extends to their representatives within the meaning of section 47. The term 'representatives' includes not merely legal representatives, but also assignees: *Govindappa* v. *Hanumanthappa* (3). Where the decree-holder is himself the auction purchaser at a Court sale, he is liable under section 144 of the Civil Procedure Code: *Pray Narain* v. *Kamakhia Singh* (4).

On the question whether a stranger auction purchaser is a representative whether of the decree-holder or of the judgment-debtor, there has been some difference of opinion, as pointed out by Mr. Mulla in his Code of Civil Procedure. But even the High Court of Bombay which held that "the auction-purchaser is not a representative of the judgment-debtor;" *Narsinbhat* v. *Bando Krishna* (5) and held in *Gokulsingh* v. *Kishansing* (6) that "if the question raised by the judgment-debtor as to the legality of the court-sale is virtually one between the parties to the suit, (that is, between decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

This Court, in *Gokalsingh* v. *Awatmal* (7) held that "the auction-purchaser, was a representative of the judgment-debtor within the meaning of section 244 of the Code of 1882 and was rightly joined in execution proceedings as such." On these grounds we must hold that the respondent No. 1 was rightly joined as a party to the present application.

It is, however, undeniable that, in regard to a *bona fide* auction-purchaser, the Courts are reluctant to set aside the sale. It was observed by their Lordships of the Privy Council in *Rewa Mahton* v. *Ramkishensingh* (8) that "If a Court ordering a sale in execution of decree, has jurisdiction, a purchaser of the property sold, is not bound to enquire into the correctness of the judgment upon which the

(1) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 399.
(2) 33 C. 857; 4 C. L. J. 192.
(3) 17 Ind. Cas. 420; 38 M. 36; 23 M. L. J. 518; (1912) M. W. N 1152
(4) 3 Ind. Cas. 798; 31 A. 551; 10 C. L. J. 257; 11 Bom. L. R. 1200; 6 M. L. T. 303; 14 C. W. N. 55; 19 M. L. J. 599; 13 O. C. 180; 36 I. A. 197, (P. C.).
(5) 46 Ind. Cas. 113; 42 B. 411; 20 Bom. L. R. 495.
(6) 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539.
(7) 1 S. L. R. 158.
(8) 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.).

execution issues." Again in *Zain-ul-abdin-khan* v. *Mahomed Asghar Alikhan* (9) it was held that " There is a great distinction between the decree-holders who came in and purchased under their own decree which was afterwards reversed on appeal and the *bona fide* purchasers who bought at the sale in execution of the decree to which they were not parties and at a time when that decree was a valid decree, and when the order for the sale was a valid order."

These decisions have been followed in India in numerous cases such as *Piarilal* v. *Hanifun-Nissa Bibi* (10), *Meda Chinna Subbamma* v. *Papirddigari Chinnayya* (11); *Paresh Nath* v. *Hari Charan* (12).

While, therefore it has been held by all the High Courts including the Bombay High Court as in *Shivbai* v. *Yesso* (13) that while as against a decree-holder who is himself the auction-purchaser, a sale can be set aside and restitution made, it is equally clear that an innocent purchaser through Court cannot ordinarily be so disturbed.

On the other hand, section 144 merely gives effect to the principle enunciated by Lord Chairns in the case of *Rodger* v. *The Comptoir D'Escompte De Paris* (14) " one of the first and the highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. And when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression' to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

(9) 10 A. 166 at p. 172 ; 15 I. A. 12 ; 5 Sar P. C. J. 112 ; 6 Ind. Dec. (N. S.) 112.
(10) 34 Ind Cas. 303 ; 38 A. 240 ; 14 A. L. J. 302.
(11) 47 Ind. Cas. 628 ; 41 M. 467.
(12) 10 Ind. Cas. 361 ; 38 C. 622 ; 15 C. W. N 875 ; 14 C. L. J. 300.
(13) 48 Ind. Cas. 130 ; 43 B. 235 ; 20 Bom. L. R. 925.
(14) (1871) 3 P. C. 465 at p. 475 ; 40 L. J. P. C. 1 ; 24 L. T. 111 ; 19 W. R. 449 ; 7 Moo. P. C. (N. S.) 314 ; 17 E. R. 120.

The utmost relief which could be granted to the appellant as against the respondent No. 1 would be to set aside the sale to the extent of one-third and to place the appellant in possession of that share. The question in this regard, therefore, depends upon whether the respondent No. 1 can be considered to be a completely innocent purchaser.

By the phrase "*bona fide* or innocent purchaser" as distinguished from the case where the decree-holder is himself the auction-purchaser, the Courts imply the test of knowledge of the pending proceedings whether by appeal or otherwise to set aside a decree, and opportunity to defend his own interests in those proceedings. This is clear from the observations of the Privy Council already quoted above. In the present case it is admitted that the respondent No. 1 the auction-purchaser was a younger brother and a member of the joint-family and lived with his elder brother, the Pleader, who represented Dayaram throughout. The question of the extent of the respondent No. 1's knowledge of these proceedings was raised by the appellant from the outset. And it was in order to decide this point without further evidence that this admission above of the relationship and joint living of the respondent No. 1 with Dayaram's Pleader was admitted. It is impossible to believe upon this admission that even at the time of this purchase the respondent No. 1 could have been ignorant of the appellant's suit to set aside the attachment and execution proceedings in respect of his own share. For the purposes of the present application therefore we must differ from the learned Assistant Judge and hold that the respondent No. 1 when he purchased was aware of these proceedings. There is no doubt that immediately after his purchase he was formally made aware of them by the notice in which the appellant sought to implead him as a party. It is a matter of regret that he was not allowed to be joined, but was permitted to remain aloof so as to make the present objections and protract the proceedings. He knew of these proceedings, and even now there is no allegation that the suit by the appellant was not seriously contested by Dayaram. In fact the failure of the appellant in the first two Courts is sufficient proof that Dayaram supported as far as he possibly could, his own execution proceedings

and the sale thereunder. If, therefore, the respondent No. 1 knew these facts at the time of the purchase, was aware of the pending litigation and the appellant's position in regard to the attachment and the sale of his one-third share, if further, the appellant gave him express opportunity to join as defendant and defendant maintained the sale, but the respondent No. 1 declined to do so, and left it to Dayaram alone to uphold the same, then it appears to us that he does not fall within the category of " a *bona fide* stranger auction-purchaser," against whom the sale cannot be set aside. If, for instance in the proclamation of sale, the attaching Court had expressly mentioned the pending suit by the appellant and had sold the appellant's right, title and interest in the property subject to the final result of such litigation, the respondent No. 1 would have been bound to make restitution in case the applicant succeeded. The knowledge of the respondent No. 1 and the opportunity given to him are not very different from the circumstances of this hypothesis. These circumstances sufficiently distinguish the case from cases such as *Shivlal Bhagwan* v. *Shambhu Prasad Parvati Shankar* (15). The respondent No. 1, auction-purchaser's interests were identical as far as the up-holding of Dayaram's execution proceedings and auction-purchase went, with the interests of Dayaram, and to that extent he may be said to be his representative; *Gulzarilal* v. *Madhoram* (16); and the fact that he declined to join as defendant though expressly invited, and was, therefore, absent in the suit by the appellant, does not prevent restitution ; *Gurudhuj Prasad Singh* v. *Baijumal* (17).

The fact that the decree which was executed by sale was set aside not in appeal, but by subsequent litigation does not in these circumstances help the respondent No. 1 for the purposes of restitution; *Ghulam Mahomed* v. *Lalchand* (18) ; and the appellant is entitled to restitution *Shamsundarlal* v. *Kaisar Zamani Begam* (19). As their Lordships of the Privy Council observed in *Prag Narain* v. *Kamakhiasing* (4) " even if the point were doubtful, their Lordships would not be disposed at this stage of the proceedings to permit the expense, and delay of a separate suit. *Prag Narain* v. *Kamakhiasing* (4).

The sale, however, as regards the judgment-debtors other than the respondents stands ; and between setting aside a sale and deciding that plaintiff's right was not affected by it, there is a wide difference ; *Motilal* v. *Karrabuldin* (20).

The proper order of restitution as against the respondent No. 1 appears to be that the appellant should be placed in joint possession of his one-third share of the property sold, the respondent No. 1 being allowed to retain possession of the remainder.

The further equities as between the two respondents have also to be considered. The decree and sale to the extent of one-third having been held void by the Court, there appears no reason why the decree-holder respondent No. 2 Dayaram should be allowed to retain the entire sale-proceeds. His liability is clear and the respondent No. 1, the auction-purchaser is entitled in our opinion to obtain one-third of the purchase amount back from the respondent No. 2 Dayaram. As the respondent No. 1 has been in possession, it is not necessary to award mesne profits or interest. As regards costs, the appellant having succeeded, the respondent No. 2 must pay appellant's costs throughout, the respondent No. 1, bearing his own.

The appeal is therefore, allowed, the decree of the lower Court set aside and a decree made in the terms above.

Z. K. *Appeal allowed.*

(15) 29 B. 485 ; 7 Bom. L. R. 585.
(16) 26 A. 447 ; A. W. N. (1904) 61 ; 1 A. L. J. 65.
(17) 28 A. 887 ; 3 A. L. J. 110 ; A. W. N. (1906) 43.
(18) 53 Ind. Cas. 552 ; 18 S. L. R. 158.
(19) 29 A. 148 ; 4 A. L. J. 19 ; A. W. N. (1906) 315.
(20) 25 C. 179 ; 24 I. A. 170 ; 1 C. W. N. 639 ; 7 Sar. P C J. 222 ; 13 Ind. Dec (N.S.) 121 (P. C.).

JAINARAIN PANDE *v.* BHAGWAN PANDE

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1165 OF 1920.

May 16, 1922.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

JAINARAIN PANDE AND OTHERS
PLAINTIFFS—APPELLANTS
versus
BHAGWAN PANDE AND OTHERS
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint Family—Sale of ancestral property—Suit to set aside sale—Necessity—Part consideration only for necessity—Procedure.

In determining whether or not a sale of ancestral property for which only part of the consideration was for necessity, should be set aside or upheld, the point for determination is whether the portion of the consideration which was not taken for legal necessity was such a small part as ought not to be taken into account. [p. 1006, col. 2.]

Girdharee Lall v. *Kanto, Lall*, 1 I. A. 321 at p. 332; 14 B. L. R. 187 ; 22 W. R. 56 ; 3 Sar. P. C. J. 380, (P.C.); *Gobind Singh* v. *Baldeo Singh*, 25 A. 330 ; A.W. N. (1903) 57; *Ram Dei Kunwar* v. *Abu Jafar*, 27 A. 494 ; A. W. N. (1905) 68; *Nathu Ram* v. *Kanhaiya Lal*, 80 Ind. Cas. 226. *The Deputy Commissioner of Kheri* v. *Khanjan Singh*, (1907) 11 C. W. N. 474 ; 9 B. L. R. 591 ; 5 C. L. J. 344 ; 4 A. L. J. 232 ; 2 M. L. T. 145 ; 17 M. L. J. 233 ; 29 A. 331 ; 10 O. C. 117; 34 I. A. 72 (P. C.), examined.

Appeal from a decree of the District Judge, Benares, dated the 7th July 1920, reversing a decree of the Additional Munsif, Benares, dated the 26th February 1920.

Munshi *Harnandan Prasad*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—The plaintiffs in this case seek to set aside a sale-deed of a certain fixed rate tenancy, which was executed by Richhpal Pande in favour of the defendants on the 8th of June 1911. One of the plaintiffs is the brother of Richhpal Pande; the other plaintiffs are his sons. The allegation of the plaintiffs was that they were living jointly with Richhpal Pande, that the said property was their ancestral property and that Richhpal Pande transferred the same without any legal necessity. The sale was made for Rs. 375. The Trial Court found that Rs. 101 out of the sale consideration represented the amount taken for legal necessity, but the lower Appellate Court held that the amount taken for legal necessity was Rs. 275-3-0. The Court of first instance had decreed the claim for possession on payment of Rs. 101 to the defendants-vendees, but the lower Appellate Court dismissed the claim in its entirety, observing that Rs. 275-3-0 represented the bulk of the sale consideration.

The question in such cases, however, is not whether the consideration which was taken for legal necessity formed the bulk of the consideration, but whether the portion which was not taken for legal necessity was such a small portion as might reasonably be left out of account. In *Girdharee Lall* v. *Kantoo Lall* (1) the sale of a certain ancestral property, effected by a father for the payment of his debts, was upheld, though a small part of the consideration was not accounted for. Their Lordships there observed : "There is no suggestion either that the bond or the decree was obtained *benami* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved. On the contrary, it was proved that the purchase-money for the estate was paid into the bankers of the fathers and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue, and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bona fide* purchaser who gave value for the estate and to recover possession of it with mesne profits.

The point for determination in each case, therefore, is whether the portion of the consideration, which was not taken for legal necessity, was such a small part as ought not to be taken into account in determining whether the sale should be set aside or upheld. It is not always possible for the manager of a joint

(1) 1 I. A. 321 at p. 332 ; 14 B. L. R. 187 ; 22 W. R. 56 ; 3 Sar. P. C. J. 380 (P. C.).

Hindu family to sell property exactly for the amount for which the legal necessity might exist. He might be able to raise a loan by a mortgage, but it might not always be possible for him to find a mortgagee willing to take a mortgage of the property for the amount required, unless the security given leaves a sufficient margin to cover the principal and interest that might eventually fall due on the transaction. In many cases the sale of a portion might be out of the question and fail to command either a purchaser or its proper value.

The property here sold was a fixed rate tenancy, measuring 2·48 acres and assessed to a small rent, but probably yielding a considerable profit to the family. The amount required to meet the legal necessity was only Rs. 275-3-0, and it is not possible to say that Richhpal Pande could not have sold a portion of the property and raised the money that was required for the purpose of meeting the family requirements, and thus saved the rest of the property for the family use.

In *Gobind Singh* v. *Baldeo Singh* (2) and *Ram Dei Kunwar* v. *Abu Jafar* (3) sales have been set aside under similar circumstances. In *Nathu Ram* v. *Kanhaiya Lal* (4) the same question had arisen, and, following the above decisions, the sale was not upheld as the portion of the consideration for which no legal necessity had been established, was not such a trifling amount as could be left out of account. As there pointed out, it is difficult to decide cases of this nature upon any fixed arithmetical principle, and the circumstances established in each case have to be taken into consideration, with the nature of the property, to determine whether the amount, which represented the money not taken for legal necessity, was such a small or trifling sum as might be left out of account in determining whether the transaction should be upheld or annulled.

A reference has also been made to the decision in *The Deputy Commissioner of Kheri* v. *Khanjan Singh* (5). In that case the sale was annulled on payment of the amount for which the legal necessity was found to have been established. In *Felaram Roy* v. *Bagalanand* (6), stress was laid on the fact that "it would manifestly be impossible and possibly prejudicial to the interest of the estate, if the widow were held to be bound in every instance to sell property, for payment of a debt due from her husband, for exactly the sum due to the creditor." But that difficulty does not exist here, because a portion of the fixed rate tenancy could at any rate have been sold in order to raise the amount for which the legal necessity existed. In the circumstances the entire sale cannot be upheld.

We allow the appeal accordingly, set aside the decree of the lower Appellate Court and give the plaintiffs-appellants a decree for possession of the disputed property on payment of Rs. 275-3-0 within six months from this date. In case of payment, the plaintiffs will get their proportionate costs from the contesting defendants in all the Courts. If they fail to pay the said amount as above directed, the suit shall stand dismissed and the contesting defendants will get their costs from the plaintiffs-appellants in all the Courts.

W. C. A. *Appeal decreed.*

(2) 25 A. 330; A. W. N. (1903) 57.
(3) 27 A. 494; A. W. N (1905) 68.
(4) 80 Ind. Cas. 226
(5) (1907) 11 C. W. N. 474 ; 9 Bom. L. R. 591 ; 5 C. L. J. 344 ; 4 A. L. J. 232 ; 2 M. L. T. 145 ; 17 M. L. J. 233 ; 29 A. 331 ; 10 O. C. 117 ; 34 I. A. 72 (P. C.).

(6) 6 Ind. Cas. 207 ; 14 C. W. N. 895.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 2839 OF 1922.

November 13, 1922.

Present:—Mr. Justice Shah.

JASRAJ FOOAJI—PLAINTIFF
versus
AKUBAI AND OTHERS—DEFENDANTS.

Letters Patent (Bom) cl. 12—Mortgage suit—Property and mortgagor, outside jurisdiction—High Court, power of.

The Bombay High Court has power to entertain a mortgage suit even though the mortgagor resides, and the mortgaged property is situate, outside its territorial jurisdiction, where the cause of action arises within its jurisdiction. [p. 1008, col. 2.]

JASRAJ FOOAJI *v.* AKUBAI

Venkatrao Sethupathy v. *Khimji Assur Virji*, 80 Ind. Cas. 442 ; 26 Bom. L. R 535, followed.

Mr. *Campbell*, for the Plaintiff.

Mr. *Khan*, for the Defendants.

JUDGMENT.—In this suit a preliminary question as to jurisdiction has been raised on behalf of defendants Nos. 2 and 3 who have filed their written statements, though the point is not raised in their written statements.

It is urged that as the property mortgaged is situated outside the limits of the original jurisdiction of the High Court this Court has no jurisdiction to entertain the suit on a mortgage-bond relating to such property. In the present case the property is situated at Karachi and the defendants live at Poona. The debt is payable at Bombay or Poona or Karachi at the choice of the mortgagee under the bond and for the purpose of the present point it must be assumed that the debt is payable in Bombay and that apart from the mortgage the suit to recover the debt would be within the jurisdiction of this Court. It is conceded that the contention that this Court has no jurisdiction to entertain this suit to enforce the mortgage in question is opposed to the ruling in *Holkar* v. *Dadabhai Cursetji* (1). Since that decision the practice of this Court has been to entertain such suits. But the learned Counsel for defendants Nos. 2 and 3 relies upon *Harendra Lal Roy Chowdhuri* v. *Hari Dassi Debi* (2), and contends that the view taken in *Holkar* v. *Dadabai* (1) must be taken to have been overruled. He relies upon the following passage in the judgment at page 120 of the report :—

"The deed, therefore, could not be registered there nor had the Court of Ordinary Original Jurisdiction at Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage bond and its decree is of no validity."

On behalf of the plaintiff it is urged that the Bombay view has not been considered in that case, that the decisions of this Court were not cited before their Lordships and that even after the decision in *Harendra Lal Roy Chowdhuri* v. *Hari Dassi Debi* (2) the Court of Appeal has adhered to the view taken in *Holkar* v. *Dadabhai* (1) and that the practice in this Court has not been altered. Mr. Campbell has relied upon the unreported judgment of Scott, C. J. and Heaton, J., in *Venkatrao Sethupathy* v. *Khimji Assur Virij* (3).

It is hardly necessary for me to examine the point on its merits apart from the decisions on the point. Speaking for myself I find it difficult to reconcile the view taken by their Lordships of the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Hari Dassi Debi* (2), with the decision in *Holkar* v. *Dadabhai* (1) and I should have been bound to give effect to that view, had it not been for a subsequent decision of the Court of Appeal which also is binding upon me. I have read the unreported judgment of the Court in Appeal with care. It is true that there is no reference therein to the case of *Harendra Lal Roy Chowdhuri* v. *Hari Dassi Debi* (2), but it is subsequent to the decision in *Harendra's case* and I have no reason to think and I would not be justified in assuming that *Harendsa's case* was not considered by the Court of appeal. The learned Chief Justice has approved of the view taken in *Holkar* v. *Dadabhai*. (1) It is common ground that the practice of this Court has been consistently to entertain such suits even after the judgment in *Harendra Lal Roy Chowdhuri* v. *Hari Dassi Debi* (2). It is really for the Court of Appeal or the Privy Council to reconsider this point if at all. So far as this Court is concerned the point must be treated as concluded by the judgment in *Venkatrao Sethupathi* v. *Khimji Assur Viri*. I, therefore, hold that the Court has jurisdiction to entertain this suit.

N. H. *Order accordingly.*

(1) 14 B. 353 ; 7 Ind Dec. (N.S.) 695.
(2) 28 Ind Cas. 637 ; 41 I. A. 110 ; 16 Bom. L. R. 400; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817 ; 19 C. L. J. 484; 12 A. L. J. 774 ; 1 L. W. 1050 ; 41 C. 972 (P. C.).

(3) 80 Ind. Cas. 442 ; 26 Bom. L. R. 535.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS PETITION NO. 248 OF 1922.

October 13, 1922.

Present :—Mr. Raymond, A. J. C.

MESSRS. BEITH STEVENSON & CO. LTD.—RESPONDENTS NO. 1

versus

FIRM OF NAROOMAL KHEMCHAND—RESPONDENTS NO. 2.

Arbitration, reference to, what amounts to—Intention of parties—Error of law, what amounts to—Award specifying amount payable in pounds—Rate of exchange not specified—Uncertainty.

Where it appears from the terms of an agreement for the settlement of disputes that the intention of the parties was that there should be an inquiry in the nature of a judicial inquiry, and that their respective cases should be heard and a decision arrived at upon the evidence, there is a reference to arbitration. [p. 1010, col. 1.]

A contract for the purchase of goods contained the following clause;—"In the unlikely event of our failing to arrive at an amicable settlement of any disputes, claims or allowances we should be quite willing that the matter should be referred to two arbitrators, one to be appointed by each party, with the proviso that if they be unable to agree they should nominate a third party as their umpire and that the decision of the surveyors or their umpire should be binding on both parties."

Held, that it was the express intention of the parties that all disputes between them arising out of the contract should be referred to arbitrators for decision. [p. 1010, col. 2.]

A failure to pay a claim constitutes a matter in difference between the parties to a submission. [p. 1010, col. 2.]

James Finlay v. *Jeshanmal Kirpalani*, 12 Ind. Cas. 188; 5 S. L. R. 4, followed. [p. 1011, col. 2.]

An error in law on the face of an award must be distinctly collected from the face of the award or from some paper so connected with the award as to form part of it. [p. 1011, col. 2.]

U. M. Chowdhury & Co. v. *Jiban Krishna Ghose*, 69 Ind. Cas. 995; 49 C. 646; (1922) A. I. R. (C) 447, relied on.

An award specifying the amount to be paid by one party to the other in pounds sterling but omitting to specify the rate of exchange at which payment is to be made is not bad for uncertainty, but may be remitted to the arbitrators for determining the rate of exchange at which payment is to be made. [p. 1011, col. 2.]

Mr. *Kimatrai Bhojroj*, for the Respondents No. 1.

Mr. *Dipchand Chandumal*, for the Respondents No. 2.

JUDGMENT.—This is a Petition to file an award under the Indian Arbitration Act IX of 1899. Respondents No. 1 are the firm of Beith Stevenson & Co, whose principal place of business is in Manchester. By 3 Indents Nos. 264, 319 and 320, Messrs. Narumal Khemchand and Co. respondents No. 2 contracted to purchase from respondents 1 fifteen packages of piece-goods. The terms and conditions of the three Indents are identical and Ex. 7. which is one of them is signed by respondents 2 as follows: "Accepted subject to the modifications mutually agreed upon in correspondence." Clause 5 of Ex. 7 is thus worded: "All disputes, claims, and allowances are settled by friendly correspondence between Beith Stevenson & Co., and their correspondents and customers, and should they fail to agree, the case may then be submitted by mutual consent to the Chamber of Commerce in Bombay, Calcutta, Karachi or Manchester for arbitration, but Beith Stevenson & Co. are not parties to any other form of arbitration." The material part of the correspondence between the parties which preceded the signing of the Indents by respondents No. 2 is contained in a letter, dated 19th May 1916, addressed by respondents No. 2 to respondents No. 1, wherein they state that "In the event of disputes of any nature that could not be settled amicably these should be referred to two surveyors or arbitrators, one to be appointed by each party. Should the surveyors or arbitrators be unable to agree they should nominate a third party as their umpire. The decision of the arbitrators or surveyors or the umpire shall be binding on both the parties." Respondents No. 1 relied on this letter of the 21st June 1916 and with regard to the aforesaid clause stated as follows: "In the unlikely event of our failing to arrive at an amicable settlement of any disputes, claims or allowances, and if you should not wish to leave a survey to the Karachi Chamber of Commerce; we

should be quite willing that the matter should be referred to two surveyors, one to be appointed by each party, with the proviso that if they be unable to agree they should nominate a third party as their umpire and that the decision of the surveyors or their umpire should be binding on both parties." Respondents No. 2 then signed the indents.

Now, the first objection taken to the award is that there was no agreement between the parties to refer their disputes to arbitration under the Indian Arbitration Act, but provision was made only for a survey in the event of any disputes arising and this cannot be taken as justifying a reference under the Indian Arbitration Act. It appears to me that the parties have used the words "surveyor" and "arbitrator" indiscriminately and there can be no doubt that the intention of both was that there should be inquiry in the event of any disputes arising between them. Ex. 7, the indent, provides for a reference of the disputes to arbitrators and the letter of the 19th May 1916 of respondents 2 refers to the disputes being referred to "two surveyors or arbitrators," and though in their letter of 21st June respondents No. 1 refer to surveyors only, I feel no doubt that there was only a confusion of words, and both parties well understood that in the event of any disputes arising out of the contract there was to be a judicial inquiry by two persons appointed by them to determine their disputes, whether they be termed surveyors or arbitrators. Ex. 7, provides for a reference to arbitration of "all disputes" between the parties, which would certainly embrace *inter alia* disputes as to the shipment being in time, or as to the quality of the goods, and these would form legitimate subject-matter of the decision by arbitrators. No doubt, it is not in every case where two parties intend to be concluded by the decision of a third, that the third person is an arbitrator, for instance, a valuer may not be reckoned an arbitrator in the proper sense, but as pointed out in Russell on Arbitration, p. 44 "Where it appears from the terms of an agreement for the settlement of disputes that the intention of the parties was that there should be an inquiry in the nature of a judicial inquiry, and that their respective cases should be heard and a decision arrived at upon the evidence, there is a reference to arbitration." The Indents in the present case clearly contemplate that it was the express intention of the parties that all disputes between them arising out of the contract should be referred to arbitrators for decision, and the correspondence between the parties prior to the signing of the Indents does not restrict the scope of the dispute or change the character of the third party, to whom the disputes are referred for decision. In my opinion, therefore, the parties had expressly agreed to refer their disputes to arbitration, and respondents No. 1 were justified in demanding a reference to arbitration to dispose of the disputes that had arisen between them. Further another argument which points to the fact that respondents No. 2 clearly understood that disputes between them and respondents No. 1 were to be referred to arbitration appears from the letter of the former, dated the 23rd January 1922 where in response to the demand of respondents No. 1 for the payment of the amount due on the contracts they suggested a reference to "arbitration," and by their letters of the 30th January and 6th February 1922, respondents No 1. called upon respondents No. 2 not to appoint "surveyors," but "arbitrators" to decide the disputes between them.

But, argues Mr. Dipchand, there were no disputes between the parties to be referred to arbitration, and the claim for damages was never intended to be referred to arbitration. It appears from the documentary evidence filed that respondents No. 1 draw drafts on respondents No. 2 for recovery of the value of the goods consigned to them payable to the order of the Mercantile Bank of India, Karachi. These drafts were accepted by respondent No. 2 on presentation, but they subsequently failed to retire them. Respondents No. 1 sent a written notice to respondents No. 2 that if they failed to pay for the goods and take delivery of them they would re-sell them at their account and risk. This they did and claimed the loss thereby sustained. It is abundantly clear from the correspondence that respondents No. 2 never raised any dispute as to the quality or quantity of the goods under the contract or as to the shipment being late, and the only reason for their failure to retire the draft was because the exchange was against them. But a failure to pay a claim constitutes a matter in difference between the parties to a submission, *James Finlay* v. *Jeshanmal Kirpalani* (1), and the Indents

(1) 12 Ind. Cas. 188 ; 5 S. L. R. 4.

as I have already remarked provide for a reference to arbitration of "all disputes" between the parties. A dispute between the parties had, therefore, arisen which respondents No. 1 were justified in referring to arbitration. It was next argued that respondents No. 1 were not authorised to re-sell the goods as the indents do not make any provision for a re-sale; this argument has little substance in it, as section 107, Indian Contract Act gives an unpaid vendor the right of re-sale of which due notice was given to the purchaser; and equally the argument that the original cause of action between the parties was merged in the draft and there was no dispute under the contract, appears to me feeble. The drafts drawn on the Mercantile Bank were merely for the purpose of ensuring a satisfactory mode of payment for the value of the goods and they could not and did not extinguish the original cause of action.

Much argument was addressed to me as regards the final objection as to there being a patent error on the face of the award. By his award the arbitrator has awarded the claim of respondents No. 1 in pounds-sterling. It is argued in the first place that the award, gives respondents No. 1 an amount in excess of the draft, secondly, the arbitrator was in error in awarding the claim in pounds-sterling, as it should have been converted in the currency of the realm, and lastly the award is vague and indefinite as it gives no means of ascertaining at what rate of Exchange respondents No. 1 are to be paid.

After the sale of the 15 cases covered by the three indents Nos. 264, 319 and 320, respondents No. 1 submitted to respondents No. 2 an account sale, showing the sum of £1,799-3-3 due to them. A copy of this account sale was also placed before the arbitrator and the arbitrator has awarded respondents No. 1 £1,766-11-4. Of the two drafts—one was for £ 1,407-0 3 for Indents Nos. 319 and 320 and £763-17-3 for Indent No. 264. I am not satisfied that the arbitrator has erred in awarding the amount that he did to respondents No. 1 or that there is any error on the face of the award. The claim against the respondents No. 2 was not on the draft, but was for the the damages sustained by respondents No. 1 by their sale of the goods; a memo of the account was placed before the arbitrator, and respondents No. 2 had an opportunity of challenging its accuracy, the more so as they appeared before the arbitrator at the hearing. I see no reason for not upholding the claim awarded by the arbitrator. It is, however, argued that the award is bad for uncertainty as it decrees the claim in pounds-sterling and the rate of Exchange at which this amount should be paid has not been determined, and this constitutes an error on the face of the award. The recent case of *U. M. Chowdhury & Co.* v. *Jiban Krishna Ghose* (2) has laid it down that an error in law on the face of the award must be distinctly collected from the face of the awards or from any paper so connected with the award as to form part of them. In this case also the arbitrator had awarded the amount claimed in pounds-sterling and had said that the rate of Exchange for payment will be calculated at the Telegraphic Transfer rate of the rupee on the date of payment. It was urged in argument that such an award was bad for indefiniteness and uncertainty and the part of the judgment dealing with this argument is as follows:—"The awards did specify definitely the sums in pounds-sterling which were to be paid by the sellers to the buyers, but it was urged that an ambiguity arose by reason of direction as to the calculation of exchange. It is true that the awards did not specify the amounts which had to be paid by the seller in rupees, but in my judgment that is not sufficient ground for remitting the award if the arbitrators have given the rule for calculating the amounts to be paid." In the present case the award is silent as to the rate of Exchange, but I do not on that account consider the award bad for uncertainty as it clearly specifies the amount to be paid in pounds-sterling. All that, I think, need be done is to remit the award to the arbitrator for determining the rate of Exchange at which the amount awarded by him to respondents No. 1, should be paid. The question of costs is reserved.

Z. K. *Award remitted.*

(2) 69 Ind. Cas. 995; 49 C. 646; (1922) A. I. R. (C.) 447.

RAHMAT KHAN *v.* NAWAB KHAN

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1886 OF 1922.

March 5, 1923.

Present :—Mr. Justice Martineau.

RAHMAT KHAN AND OTHERS—VENDEES —APPELLANTS
versus
NAWAB KHAN—DECREE-HOLDER —RESPONDENT.

Pre-emption decree—Failure to comply with terms of decree, effect of.

A compromise decree arrived at in a pre-emption suit provided that if the plaintiff failed to pay to the vendee a certain sum by a certain date his suit shall stand dismissed. Plaintiff paid the sum specified in the decree except 4 annas within the time specified and obtained possession of the pre-empted property. When the defendant discovered the deficiency in the deposit made in Court, he applied for restoration of the pre-empted property to him and dismissal of the plaintiff's suit.

Held (1) that the Court had no jurisdiction to extend the time specified in the decree for payment of the amount ; [p. 1012, col. 2.]

(2) that there was no distinction in this respect between a decree passed on compromise and a decree passed after contest ; [p. 1012, col. 2.]

(3) that the decree not having been complied with the plaintiff's suit must be dismissed and possession of the pre-empted property restored to the defendant. [p. 1013, col. 1.]

Jam Hamid Ali v. *Kaim Din*, 37 Ind. Cas. 806 ; 26 P. W. R. 1917, distinguished.

Kanhaiya Lal v. *Mohammad Shafi Khan*, 18 Ind. Cas. 600 ; 3 P. W. R. 1913 ; 141 P. L R. 1913 ; *Wali Mahomed* v. *Kapuria Mal*, 80 Ind. Cas. 416 ; 2 L. L. J. 770, followed.

Appeal from the order of the District Judge, Gujranwala, dated the 21st April 1922, reversing that of the Munsif, 1st class, Wazirabad, District Gujranwala, dated the 6th December 1921.

Lala *Mehr Chand Mahajan*, for the Appellants.

Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—The respondent sued for possession of land by right of pre-emption and obtained a decree subject to the payment of Rs. 210 of which Rs. 105 were to be paid to a mortgagee and Rs. 105 were to be paid to the vendees within one month, failing which the suit was to stand dismissed. The parties were to bear their own costs. On the appeal of the vendees a compromise was arrived at, by which the amount payable to them was increased by Rs. 73-4-0, and payment was to be made by the 15th August 1919, otherwise the suit would stand dismissed. The decree drawn up by the Appellate Court stated that Rs. 105 were to be paid to the mortgagee, that Rs 248-4-0 were to be paid to the vendees by the 15th August 1919, that the parties should bear their own costs in that Court, and that the rest of the lower Court's decree remained unchanged.

The respondent paid the entire sum except 4 *annas* and obtained possession of the land. Later on when the vendees applied for the payment to them of the sum deposited by the pre-emptor they discovered that he had paid 4 *annas* too little. This was brought to the notice of the Munsif, who dismissed the respondent's application for an extension of time for depositing the money. On appeal the District Judge held that the terms of the decree had been substantially complied with, and that as the decree-holder had not been given a *parcha* specifying the terms, and the decree had been passed on a compromise, the omission to pay 4 *annas* within the time fixed should be condoned. He accordingly granted the respondent an extension of time, and on the latter paying the sum of 4 *annas* he directed that the decree passed on the compromise should stand. The vendees have preferred a second appeal.

The omission to give the decree-holder a *parcha* containing the terms of the decree is quite immaterial as there is no allegation that he was not aware of the terms. He in fact mentioned the terms in the statement which he made at the time of the compromise. The learned District Judge is also wrong in thinking that there is any distinction in law between a decree passed on a compromise and any other decree. *Jam Hamid Ali* v. *Kaim Din* (1) which he has cited,

(1) 37 Ind. Cas. 806 ; 26 P. W. R. 1917.

is not applicable, for in that case what the pre-emptor was required to do under the decree was, not to pay a sum of money, but to separate off and make over to the defendant a certain area of land, and he fulfilled the condition within the time fixed by ceasing to cultivate that area in order to let the defendant have possession.

In the present case the decree-holder was required to pay a certain sum of money by the 15th August 1919. It was expressly stated in the compromise that if the money were not paid by that date the suit would stand dismissed, and although in the Appellate Court's decree the consequence of a default was not expressly mentioned that decree, after setting forth the conditions which the decree-holder was to fulfil, provided that the rest of the first Court's decree would remain unchanged. The clause in the first Court's decree providing that the suit would stand dismissed if the money were not paid in time must, therefore, be regarded as incorporated in the decree of the Appellate Court, and as the decree-holder did not pay the whole of the money in the time fixed his suit must be considered as dismissed. It makes no difference that the amount which he omitted to pay is small, or that the omission was a mistake, or that it was not discovered till a long time after he had been put in possession of the land. It is argued on his behalf that the Executing Court is *functus officio*, but this is clearly wrong as the decree could not be fully satisfied until the decree-holder had paid all the money which he was required under the decree to pay.

Kanhaiya Lal v. *Mohammad Shafi Khan* (2) and *Wali Mahomed* v. *Kapuria Mal* (3) are cases similar to the present one. There also after the pre-emptors had been put in possession of the property it was found that they had by mistake paid a little less than the sums which they were required to pay, the deficiency being one anna in one case and one rupee in the other, and it was held that the vendees were entitled to have possession of the property restored to them.

I accordingly accept this appeal, reverse the order of the lower Appellate Court, and restore that of the first Court. As it was by a pure mistake that the respondent did not pay the full amount which the decree required him to do, and the deficiency was only one of four *annas*, I direct that the parties shall bear their own costs throughout.

Z. K. *Appeal allowed.*

(2) 18 Ind. Cas. 600 ; 3 P. W. R. 1913 ; 141 P. L. R. 1913.

(3) 80 Ind. Cas. 416 ; 2 L. L. J. 770.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

May 13, 1924.

Present :—Lord Phillimore, Lord Blanesburgh and Lord Darling, Sir John Edge and Mr. Ameer Ali.

THE IMPERIAL TOBACCO COMPANY OF INDIA LIMITED—APPELLANTS

versus

ALBERT BONNAN AND BONNAN & COMPANY—RESPONDENTS.

Trade Mark—Ordinary principles, whether apply in India—Tradesmen acquiring goods from manufacturer and reselling them—Competition with manufacturer, whether infringement.

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer. [p. 1016, col. 2.]

Ordinary principles of Jurisprudence with regard to trade marks and those forbidding the passing off of goods apply in India. [p. 1017, col. 1.]

Appeal against the Judgment of the Calcutta High Court, reported in 77 Indian Cases 193.

Messrs. *F. H. Mangham*, *A. C. Clauson*, *L. B. Sebastian* and *F. H. Bray*, for the Appellants.

Mr. *S. Hyam*, for the Respondents.

JUDGMENT.—Before the year 1901, the Company known as W. D. and H. O. Wills, Limited, had begun to manufacture a particular cigarette which got to be known as Gold Flake or Will's Gold Flake, and which soon acquired a considerable reputation.

In the year 1901, W. D. and H. O. Wills, and various other companies became amalga-

mated into one Company called the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and the whole business of W. D. and H. O. Wills, Limited, with its good will and trade marks was assigned to the Imperial Tobacco Company (of Great Britain and Ireland), Limited. In September 1902, this last-named Company made an agreement with a Company called the American Tobacco Company by which it was agreed that the American Tobacco Company should confine its trade to the United States and certain islands, and that the Imperial Tobacco Company (of Great Britain and Ireland) Limited, should confine its trade to Great Britain and Ireland, and that these two Companies should form a third to be called the British American Tobacco Company, Limited which should confine its trade to the rest of the world not included in the territories of the two first Companies. And accordingly, the British American Tobacco Company, Limited, was incorporated; and to it the other two Companies assigned their business, good will and trade marks outside their respective territories; and mutual covenants were entered into by the three Companies confining their trades to their respective territories.

At some date not specified in the record, a Company called the British American Tobacco Company (India), Limited, was incorporated to act as distributors in India for the British American Tobacco Company, Limited.

By an agreement made on the 1st September 1910, between the British American Tobacco Company, Limited of the 1st part, the British American Tobacco Company (India), Limited, of the 2nd part, and the appellant Company of the 3rd part, it was agreed that the appellant Company should buy the good will, business rights and other assets of the British American Tobacco Company, Limited, in India and certain other territories, with brands, trade marks, trade names, formulae and recipes, and the sole right and title to use in that territory the name of the British American Tobacco Company, Limited and the names of all firms and companies which it had acquired, and also the good will, business rights and assets of the British American Tobacco Company (India), Limited. This agreement, however, was not perfected by an assignment. By an indenture dated the 11th April 1922, and made between the British American Tobacco Company, Limited, and the appellant Company—but to which the other Company was not a party—the British American Tobacco Company, Limited (so far as it was concerned) performed its agreement to the appellant Company.

The Gold Flake cigarettes in question were sold at one time in tins of fifty cigarettes and afterwards in packets of stiff paper, each containing ten cigarettes. On the Broad flat top of the packets appeared in bold letters, words showing they were Gold Flake cigarettes and the name of W. D. and H. O. Wills, Bristol and London; and on the back with a number of medals, there was an inscription in the following words:—

"Every genuine packet of Gold Flake Cigarettes has the signature thus: W. D. and H. O. Wills.

On one of the ends of the packet—if they were packets to be sold in India by the appellant Company—appeared in very small print:—

"This label is issued by the Imperial Tobacco Co. of India, Ltd.,

Registered Trade Mark.
Successors in India to W. D. and
H. O. Wills Cigarettes, made
in England."

If they were manufactured by the British American Company for sale elsewhere, the words, in lettering of the same small size, were —

"Established by W. D. and H. O. Wills, Bristol and London, British American Tobacco Co., Ltd.

Registered Trade Mark.

Bristol, London, Liverpool and Virginia.
Successor. Made temporarily in the U. S. A."

No reliance was placed in argument by either party upon the difference in the two inscriptions at the ends of the packets.

The only other difference between the packets to be used in India and those to be used elsewhere was that the paper for the India pakets was of somewhat stouter material so as to afford a better resistance to damp.

Packets with this distinctive appearance and these trade-marks were manufactured by the British American Tobacco Company, Limited, and imported and distributed by the British American Tobacco Company (India), Limited, from about 1902 till the date of the agreement in 1910; after which date they were imported and distributed by the appellant Company. The manufacture was carried out by the British American Tobacco Company, Limited, at first in England. afterwards temporarily in the United States of America.

In the year 1921 the respondent Bonnan purchased about 21½ millions of Gold Flake cigarettes, surplus stores, sold by the British Army Canteen authorities, the sale being subject to the condition that they were not to be resold in the United Kingdom. These cigarettes had been sold, in the first instance, to the British Canteen Authorities by the British American Company, Limited. After so acquiring them the respondent Bonnan formed the respondent Company, and the respondents shipped a large quantity of these cigarettes to India and offered them for sale there. Thereupon on the 11th May 1922, the appellant Company brought a suit in the High Court at Calcutta, claiming an injunction to restrain the respondents from selling these cigarettes in India.

There being no Trade Marks Act in force in India the case for the appellant Company was rested upon the ordinary rights of every trader to protect his property and to prevent attempts by other traders to avail themselves of his reputation to pass off their goods as his own.

The issues which were settled were accordingly addressed to these points, the more important being those numbered (1), (2), (5) and (8), which are as follows:—

"(1) Does the get-up of the cigarettes described in paragraph 7 of the plaint denote to purchasers in India that such cigarettes are imported by the plaintiff Company?

"(2) Will the sale by the defendant Company of cigerettes in such get-up deceive the purchasers into the belief that the cigarettes have been imported by the plaintiff Company?

"(5) Is the plaintiff entitled as against the defendants either by reason of such importation or by reason of such purchase to prevent defendants from selling cigarettes with such get-up though they have in fact been manufactured by the British American Tobacco Company?

"(8) Are plaintiffs entitled to protect their right by injunction irrespective of consideration mentioned in the first two issues?"

The case was then heard upon oral evidence by Pearson, J., who found on these issues against the appellant Company and dismissed the action; and his decree was affirmed on appeal by Sanderson, C. J., and Richardson, J. It is from this affirmance that the present appeal has been brought.

At the trial some evidence was given on behalf of the appellant Company in order to show that it had a reputation as the sole vendor in India of Gold Flake cigarettes and that the respondents were trading upon this reputation. It is possible for an importer to get a valuable reputation for himself and his wares by this care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness; and if, therefore, goods though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

But the evidence offered by the appellant Company was met and in the opinion of the learned Judges displaced by the evidence given on behalf of the respondents.

Thus Pearson, J. said:—

"I find, therefore, upon this part of the case that the reputation of the brand of Gold Flake cigarettes in India is the reputation of the maker and not of the plaintiff Company as importers. The reputation originated in the days of Messrs. W. D. and H. O. Wills, the original manufactures, and the efforts of the plaintiff Company have been directed not to creating or acquiring (if such a thing is possible) an importer's reputation for themselves of the brand but in maintaining and developing the reputation of the brand as a manufacturer's brand. The issues, therefore, dependant upon this finding are answered in favour of the defendant."

And Sanderson, C. J.—

"There is no necessity for me to refer to the evidence in detail, for I agree with the

learned Judge's finding of fact. In my judgment the sole representation made by the plaintiff's user of the covering of the cigarettes was a representation that the cigarettes were the Gold Flake cigarettes manufactured by the successors of the well known firm of W. D. and H. O. Wills. There is no evidence to justify the alleged representation (on which the plaintiffs relied) that cigarettes, bearing the said wrapper or covering, had come through a particular channel or had been imported by the plaintiffs. In the same way the defendant by using the wrapper or covering was merely representing the cigarettes as Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills, *viz.*, the British American Tobacco Company. This was a perfectly true representation, and the defendant was in no way passing off or attempting to pass off the cigarettes sold by him as the plaintiffs' goods."

And finally Richardson, J.—

"Moreover, the learned Judge Pearson, J., before whom the case came in the first instance, has found, and, in my opinion, on the evidence rightly and conclusively found, that up to the date of the suit the Company had acquired no independent reputation as importers. Nor do they use any distinctive importers' mark."

Their Lordships see no reason to review these concurrent findings. Indeed they were not invited to disturb them as findings of fact; but it was suggested that the learned Judges had arrived at them as mixed findings of fact and law and in so doing had erroneously applied the law.

Another way of putting the case for the appellant Company was suggested by Counsel, which was to treat the first issue as wrongly stated. It ought, it was said, to have run as follows: "Does the get-up of the cigarettes denote the plaintiff's goods?" But even if the appellant Company were to be allowed so to remodel the issue, its case would not be further advanced. The appellant Company has still, as it was admitted, to show that the respondents are selling goods, not the production [or introduction] of the appellant Company, in such a way as to lead customers to believe that they are the goods which the appellant Company has introduced or marketed.

And the answer is twofold: (1) It is an immaterial accident that these particular wares had from 1910 onwards been brought into India by the appellant Company and the appellant Company only, if the appellant Company got no reputation in consequence; (2) The respondents are doing nothing to mislead customers and are breaking no covenants.

In truth, as was observed during the course of the argument, all the business about acquiring title from the British American Tobacco Company, Limited, or the British American Tobacco Company (India), Limited, which latter was never perfectly acquired (see *Performing Right Society Limited* v. *London Theatre of Varieties Limited* (1) is beside the question. No Trade Mark or trade reputation of either of these Companies is infringed. The right on which the appellant Company is seeking to rely is something which it claims to have earned for itself since 1910; and this right, as the learned Judges have found, it has failed to establish.

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer. It is not likely to be a successful business operation, unless in some exceptional case. This is just such an exceptional case. The British American Tobacco Company, Limited, might, when they sold this large consignment to the British Army Canteen authorities, have required an undertaking that they should not be resold in India or to any one who could lawfully resell in India. This it appears not to have done; and then there arose the question of the disposal after the war of this large surplus stock.

The respondents being unhampered by covenant, are selling goods manufactured by the British American Company as being what they are, namely Wills' Gold Flake cigarettes manufactured by that Company. There is no untruth and no attempt to deceive. The appellant Company says that all genuine Wills' Gold Flake cigarettes sold in India must be their goods. It may be answered that this has been so in times past as a mere matter of fact, and because the appellant Company was protected by a covenant with the manufacturers; but not because it had a title to a

monopoly which it could enforce against strangers to the covenant.

The claim of the appellant Company is that it can stop a trader, to whom goods have been lawfully sold under a particular description and by whom they have been lawfully brought under that description, from reselling them under the same description. Such a claim sounds extravagant. It might, however, possibly be maintained, if it could be shown that the time, place or circumstances of the resale imported some representation that the goods were other than what they were. But in this case there is no such time, place or circumstance.

It is not as if the respondents were attempting to pass off as Wills' Gold Flake cigarettes stuff not manufactured by the lawful successors in title of W. D. and H. O. Wills. Any such attempt would be at once restrained at the suit of the lawful successor ; and in India and for India the appellant Company would be the lawful successors.

There is nothing in the judgments in the Courts below or in the opinion which their Lordships are now expressing to give countenance to the idea that the ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods do not apply in India. But the cigarettes now in dispute are the genuine articles, lawfully acquired from the lawful manufacturers ; and as such the respondents may sell them.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

K. S. D.

Solicitor for the Appellants—Mr. *Macnaughten.*

Solicitors for the Respondents—Messrs. *Sanderson* and *Orr Dignam.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2767 OF 1920.

January 19, 1923.

Present : —Mr. Justice Mookerjee and Mr. Justice Walmsley.

ANANDA KUMAR DAS GUPTA—
PLAINTIFF—APPELLANT
versus
DWARK NATH MANDAL AND OTHERS
—DEFENDANTS—RESPONDENTS.

Guardian and Ward—Conveyance of ward's property—Guardian acting on his own behalf—Ratification—Transfer, setting aside of.

Where a guardian expressly executes a conveyance of the ward's property in his own right, the conveyance passes no title and can be avoided by the ward at any time. The principle that, where there is a doubt as to whether in making a conveyance the guardian has acted for himself or his ward, the executant may be deemed to have lawfully within the scope and in exercise of his authority, is inapplicable to such a case. Nor can any question of ratification arise in such a case, there being no unauthorised act done by the guardian on behalf of the ward which could be ratified. [p. 1018, col. 2.]

Watson & Co v. *Shamlal Mitter*, 14 I. A. 178 : 15 C. 8 ; 11 Ind. Jur. 395 ; 5 Sar. P. C. J. 66 ; 7 Ind. Dec. (N. S.) 591 (P. C.) ; *Hanooman Persaud Pandey* v. *Musammat Babooa Munraj Koonwaree*, 6 M. I. A. 393 ; 18 W. R. 81 N ; Sevestre 25 N ; 2 Suth. P. C. J. 29 ; 1 Sar. P. C. J. 552 ; 19 E. R. 147; *Hemantakumari Debi* v. *Brojendra Kishore Roy Chowdhury*, 17 I. A. 65 : 17 C 875 : 5 Sar. P. C J. 542 ; 8 Ind Dec. (N. S.) 1128 (P. C.) ; *Gopeemohan Thakoor* v. *Radha Nath*, (1834) 2 Knapp 228 : 12 E. R. 467 ; *Janardan Vishnu Kulkarni* v. *Anant Lakshmanshet*, 32 B. 386 ; 10 Bom. L. R 575 ; *Narain Chandra Mukerji* v. *Mohendra Nath Mukerji*, 14 Ind. Cas. 820; 15 C. L. J. 332, distinguished.

Appeal against the decree of the Subordinate Judge, 1st Court of Zilla, Backergunge, dated the 27th August 1920, reversing the decree of the Munsiff, 6th Court at Barisal, dated the 31st July 1919.

Babus *Mohes Chandra Banerjee* and *Promotho Nath Bandyopadhyay*, for the Appellant.

Babus *Trailokhhyanath Ghose* and *Jitendra Nath Ray*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for possession upon establishment of title. The disputed land belonged to the father of the plaintiff

and passed to him by right of inheritance when his father died. On the 22nd May 1909, when the plaintiff was still an infant, his mother granted a permanent lease of the subject-matter of the litigation to the defendants. On the 20th July 1918, the plaintiff instituted the present suit to eject the defendants on the ground that the lease was unauthorised. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the Subordinate Judge.

We have examined the lease and we find that it was granted by the lady on the assumption that she was the proprietor in possession, competent to deal with the property. There can be no dispute that this was not the true state of facts. As the defendant has stated in the written statement, a document was first drawn up which purported to transfer the property to the defendants, the mother of the plaintiff professing to act as his natural guardian. When the document was taken to the Registration Office, the registering officer declined to register it on the ground that no permission of the District Judge under the Guardians and Wards Act, authorising the mother to grant a permament lease of the property of her son, was produced. Thereupon, a fresh document, the one now before the Court, was drawn up. The recitals are undoubtedly untrue and there can be no dispute as to their meaning. The lady had no property to deal with as her own and consequently the grant did not create any valid title in the lessee.

Reliance has been placed, however, on the decision of the Judicial Committee in *Watson & Co.* v. *Shamlal Mitter* (1) in support of the contention that the document may be construed to mean exactly the reverse of what its language signifies, namely, a lease by the mother, not in her own right, but as the guardian of her infant son who is not even mentioned within its four corners. The case mentioned is, in our opinion, of no assistance to the respondents. There the name of the executant appeared on the face of the document and was followed by the description "mother and guardian of the infant." It was held that the description might be construed to indicate that the deed was executed by the lady on behalf and as guardian of her infant son. This principle of liberal construction of Indian documents inartistically drawn up was applied by the Judicial Committee in the cases of *Hunooman Persaud Pandey* v. *Munraj Koonwaree* (2), *Hemanta Kumari Debi* v. *Brojendrakishore Roy Chowdhury* (3) and *Gopee Mohun Thakoor* v. *Radha Nath* (4) which are all distinguishable. In each instance, the question was one of the intention of the party who executed a document, to be gathered from the language used, and it was pointed out that as there was no suggestion that the lady had claimed any interest in the estate as her own, she might be deemed to have acted on behalf of her infant ward. In the case before us, the history of the document has been disclosed by the defendants themselves. The original document was executed by the lady on behalf of her infant son. A difficulty, real or imaginary, was raised by the registering officer. The document was thereupon deliberately altered, so as to become a deed executed by her in her own right. It is impossible, in such circumstances, to apply the principle that where there may be a doubt as to whether the guardian is acting for himself or for his ward, the executant may be deemed to have acted lawfully within the scope and in exercise of his authority; see *Janardan Vishun Kulkarni* v. *Anant Lakshmanshet* (5) and *Narain Chandra Mukerji* v. *Mohendra Nath Mukerji* (6). In this view, no question of ratification arises, for there is no unauthorised act done by the mother on behalf of the infant which could be ratified.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. We direct, however, that from the amount recovered by the plaintiff as mesne profits the sum of Rs. 60 (sixty rupees) which was paid by the respondent as premium for the lease should be deducted. The appellant is entitled to his costs both in this Court and the Court of Appeal below.

N. H. *Appeal allowed.*

(1) 14 I. A. 178; 15 C. 8; 11 Ind. Jur. 395; 5 Sar. P. C. J. 66; 7 Ind. Dec. (N. S.) 591 (P.C.).

(2) 6 M. I. A. 393; 18 W. R. 81 N; Sevestre 25 N; 2 Suth. P C J. 29; 1 Sar. P. C. J. 552: 19 E. R. 147.

(3) 17 I. A. 65; 17 C. 875; 5 Sar. P. C. J. 542; 8 Ind. Dec. (N.S) 1128 (P.C.).

(4) (1834) 2 Knapp 228; 12 E. R. 467.

(5) 32 B. 386; 10 Bom. L. R. 575.

(6) 14 Ind. Cas. 820; 15 C. L. J. 382.

ABID HUSAIN KHAN *v.* KANIZ FATIMA

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

January 22, 1924.

Present :—Lord Carson, Sir John Edge and Mr. Ameer Ali.

Mirza ABID HUSAIN KHAN—
APPELLANT
versus
Mt. KANIZ FATIMA AND OTHERS—
RESPONDENTS.

Mortgage — Mortgagee in possession — Government revenue and cesses, liability to pay—Redemption—Accounts—Oudh Local Rates Act (IV of 1878), s. 5—Mortgagee in possession, whether landlord.

In British India, a mortgagee in possession of immoveable property under a mortgage made before the Transfer of Property Act came into force, was, under the ordinary law then in force, bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property, the Government land revenue which might during his possession be assessed upon it, and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against his mortgagor in the accounts. [p. 1021, col. 1.]

A mortgagee in possession of the mortgaged property is the "landholder" within the meaning of section 5 of the Oudh Local Rates Act. [p. 1020, col. 2.]

Appeal from a decree of the Court of Judicial Commissioner, Oudh, dated the 17th July 1919, varying a decree of the Subordinate Judge, Bara Banki, dated the 30th September 1916.

Messrs. *De Gruyther* and *E. B. Raikes*, for the Appellant.

Messrs. *A. M. Dunne* and *S. Hyam*, for the Respondents.

JUDGMENT.—This is an appeal by the representative of the defendant from a decree dated the 17th July 1919, of the Court of the Judicial Commissioner of Oudh, which varied a decree, dated the 30th September 1916, of the Subordinate Judge of Barabanki.

The suit in which this appeal has arisen is for the redemption of a mortgage with possession of the 15th May 1869, of the village of Pindra, and of a mortgage of the same village by conditional sale of the 24th June 1874. The original mortgagor and the original mortgagee died before suit. The suit was brought on the 21st August 1915, by the representative of the mortgagor against the representative of the mortgagee. The plaintiff and the defendant are now dead and each is represented in this appeal, but for the sake of convenience, they will be referred to respectively in this judgment as the plaintiff and the defendant as if living.

After the granting of the mortgages the mortgagee purchased a 4 annas share in the village, and it is admitted that the plaintiff is entitled to redeem the mortgages on payment of twelve-sixteenths of the amount which would otherwise be due under the mortgages. The questions now in dispute, which have to be considered in this appeal, are whether the defendant is to be allowed in the account of the money due to obtain redemption payments of enhanced land revenue and payments of certain cesses which were made by the mortgagee after the 15th May 1869.

It is not disputed that under the mortgage of 1869 the mortgagee in possession had to pay out of the usufruct, the Government land revenue payable under the Settlement in force in 1869 but it is contended by the defendant that he is entitled to charge in the accounts as against the mortgagor any enhancements of that land revenue which the mortgagee was obliged to pay.

In the mortgage of 1869 it was stated that the mortgagor had mortgaged the village to the mortgagee for a period of one year and had put the mortgagee in possession, and the mortgagor agreed amongst other things, that if he failed to redeem within one year he should not be entitled to redeem for twenty-five years; that he would cause mutation of names to be effected in favour of the mortgagee in the Government records, "and when revenue is paid the *dakhilas* (receipt) shall be issued to the mortgagee;" that until redemption the profits of the village, with all *zemindari* dues, should be appropriated by the mortgagee; "that power to enhance rent, to appoint and dismiss *Patwaris*, *Maqaddams* and

Chaukidars, and to resume *Muafi* land from the *Muafidars* who hold land as service grants, to populate Purwas and settle the tenants, to determine rights, etc., which had hitherto been exercised by the mortgagor, shall in the same manner be exercised by the mortgagee;" and that after redemption the mortgagor should not be entitled to claim any mesne profits.

The mortgagor borrowed further moneys from the mortgagee, and on the 24th June 1878, gave to the mortgagee a mortgage in the form of a deed of conditional sale, the second clause of which as translated is as follows:—

"2. That just as the mortgaged property is liable for the money due under the mortgage-deed, dated the 15th of May 1869, similarly the same property is and shall be liable for the money due under this deed, that if I, the executant, pay in one lump sum within five years from today, in a fallow season in the month of Jeth, the money due under this deed and the mortgage-money of the mortgage-deed as well as other amounts due, the mortgaged property shall be redeemed, otherwise the consideration of this deed and the mortgage money of the deed of mortgage shall be deemed to be the consideration money and this deed shall be deemed to be the sale-deed, and on the expiry of the stipulated period, I, the declarant, shall have left in me no right of redemption nor any other rights in respect of the mortgaged property and the said *Mirza* Sahib shall be entitled to have it foreclosed at any time he pleases, after the expiry of the stipulated period and to that I shall have no objection or claim whatever."

It appears to their Lordships that the mortgage-deed of the 15th May 1869, and the mortgage-deed of the 24th June 1878, must be read together, and that the parties intended that the mortgagee should be treated as having held the mortgaged property from the 15th May 1869, as a mortgagee in possession under a mortgage in the form of a mortgage by conditional sale.

At the time when the mortgage of the 15th May 1869, was made the land revenue payable to the Government in respect of the village was Rs. 1,300 per annum, but in the settlement of 1896 it was increased to Rs. 1,600 per annum, to be further increased in five years to Rs. 1,900. The increased revenue was paid by the mortgagee.

The cesses, the payments of which the defendant claims to charge against the plaintiff in the account were sums paid by the mortgagee in discharge of a local rate imposed on the village under Act IV of 1878, the Oudh Local Rates Act, 1878. By section 5 of that Act, "All sums due on account of any rate imposed under this Act, shall be recoverable as if they were arrears of land revenue due in respect of the land on account of which the rate is payable. Under that Act the "Landholder" was responsible for the payment of rates imposed upon the land, and by section 3 of the Act "Landholder" included the person in receipt of the rent of any land, and responsible for the payment of the land revenue, if any, assessed on the estate. The mortgagee was the "Landholder" within the meaning of the Act.

This suit to redeem the two mortgages already mentioned was tried by the Subordinate Judge of Barabanki, who disallowed the defendant's claims in respect of the payment of enhanced revenue, but allowing his claim to include as against the plaintiff in the account the payments of the cesses, made a decree for redemption on payment of the amounts mentioned in the decree, and in default of such payment decreed that the 12 annas share in the village should be sold. From that decree the plaintiff and the defendant respectively appealed to the Court of the Judicial Commissioner.

After the hearing of the appeal to the Court of the Judicial Commissioner had commenced the advocate for the defendant asked the Court to receive in evidence a document dated the 6th July 1871, which had been executed by the mortgagor in favour of the mortgagee and had not been previously produced in the suit. It related to the mortgage of the 15th May 1869. The learned Judges admitted the document in evidence, apparently on the ground that a provision in the document was incompatible with the mortgagee having a right to add the payments of the enhanced land revenue to the mortgage money. How that document could have assisted the defendant's case their Lordships do not see, nor did the learned Judges who admitted it in evidence. Independently of the

document of the 6th July 1871, the Judicial Commissioners held, to state their findings briefly, that the mortgagee as mortgagee in possession was bound to pay the enhanced revenue and the cesses out of the usufruct, and that the defendant was not entitled to charge such payments against the plaintiff in the account, and dismissed the defendant's appeal to their Court and substituted for the decree for sale of the Subordinate Judge a decree for foreclosure if the amount which they found to be due was not paid on or before the 17th January 1920. This appeal is from that decree.

The art of conveyancing was in 1869 and in 1878 little, if at all, understood in India, except possibly by some English Solicitors, practising in the Presidency towns, and the mortgages in question were made before the Transfer of Property Act of 1882 came into force and afforded some information as to how mortgages of immoveable property should be framed. Their Lordships have no doubt that the mortgagor and mortgagee intended that the mortgage of 1869 and the mortgage of 1878 should be read together, and that until they should be redeemed the mortgagee should be in possession of the mortgaged property in the position of a mortgagee by a conditional sale in possession, and that if the mortgages should not be redeemed the right to redeem should be determined by a decree of foreclosure.

In British India a mortgagee in possession of immoveable property under a mortgage made before the Transfer of Property Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against his mortgagor in the accounts.

Their Lordships will humbly advise, His Majesty that the time for payment of the Rs. 32, 268-2-0 redemption money into Court allowed by the Court of the Judicial Commissioners of Oudh should be extended to six calendar months after the receipt by that Court of His Majesty's Order in Council and that in other respects this appeal should be dismissed. The appellant must pay the costs of this appeal.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant—Messrs. *Watkins* and *Hunter*.

Solicitors for the Respondents—Messrs. *Borrow, Rogers* and *Nevill*.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1250 OF 1921.

October 26, 1922.

Present :—Mr. Justice Banerji and
Mr. Justice Gokul Prasad.

CHIDDU SINGH AND OTHERS—PLAINTIFFS —APPELLANTS
versus
JHANJHAN RAI AND OTHERS—DEFENDANTS —RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (IX) Civil Procedure Code (Act V of 1908), O XXXIV, r. 9—Redemption suit—Surplus profits, claim to recover—Court-Fee payable.

Under section 7 (IX) of the Court Fees Act the amount of Court-Fee payable in respect of a suit for redemption is to be calculated on the principal sum secured by the mortgage. [p. 1022, col. 2.]

Where in a suit for redemption the mortgagor claims a certain sum as surplus *mesne* profits, he is not bound to pay Court-Fee upon the surplus amount claimed in addition to the Court-Fee payable on the principal amount secured by the mortgage. [p. 1022, col. 2.]

Husaini Khanam v. *Husain Khan*, 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375; *Gopikishan* v. *Sorabjee*, 68 Ind. Cas. 226; (1922) A. I. R. (N.)262; relied on.

Appeal from the judgment of the Subordinate Judge, Budaun, dated the 6th May 1921.

JUDGMENT.—An office report has been put up before us, in which it is stated that the amount of Court-fee paid on the plaint was insufficient and that a further sum of

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Rs. 385 was payable on the plaint. Dr. Agarwala disputes the correctness of the office report and we have therefore to decide whether the amount of Court-fee payable on the plaint was or was not sufficient. The suit was one for redemption of a mortgage made in 1863. The principal amount secured by the mortgage was Rs. 960. It provided that the mortgagee was to remain in possession, appropriate the usufruct, deduct out of it the amount of interest payable on the mortgage which was at the rate of fifteen annas per cent. per mensem, and appropriate the balance towards the principal. The mortgagors remained in possession of a part of the property upon an undertaking to pay a rent for that part. In the present suit the plaintiffs sought to redeem the mortgage on the allegation that the full amount of the mortgage including interest had been discharged by the usufruct and that a surplus of Rs. 7,533-12 9 was due to the plaintiffs by the mortgagee. The plaintiffs accordingly claimed redemption and also asked that the defendant mortgagee be directed to pay to the plaintiff the aforesaid amount. Court-fee was paid upon Rs. 960, the principal amount of the mortgage in accordance with the provisions of section 7, Cl. (9) of the Court Fees Act. A dispute was raised in the Court of first instance as to the adequacy of the amount of the Court fee, but that Court held that the amount paid was sufficient. The plaintiffs obtained a decree from the Court of first instance for redemption subject to the payment of a certain amount to the mortgagee which that Court found to be due to the latter. The plaintiffs appealed in respect of that amount to the lower Appellate Court and that Court varied the amount. From this decree of the lower Appellate Court the present appeal has been prepared. The appeal raises a question as to jurisdiction and apparently as to the amount due. But the Office reports that Court-fee ought to have been paid on the Rs. 7,533-12-9 in addition to the Court-fee paid in respect of the principal amount of the mortgage.

In our opinion the report is not correct. The suit is one for redemption as contemplated by O. XXXIV of the Code of Civil Procedure. Under r. 9 of that order upon a decree for redemption being made the Court may order an account to be taken and if in the result any sum be found due by the mortgagor the Court should order the mortgagor to pay that amount within a time fixed by the Court. Similarly if any amount be found due to the mortgagor as surplus mesne profits the Court should direct the mortgagee to pay the said amount to the mortgagor. The suit however in every respect was a suit for redemption. Under section 7 Cl. (9) of the Court Fees Act the amount of Court-fee payable in respect of a suit for redemption is to be calculated on the principal sum secured by the mortgage. Therefore, in accordance with the terms of the Court-Fees Act the Court-fee payable would be regulated by the principal amount secured by the mortgage. This was the view taken by this Court in the case of *Husain Khanam* v. *Husain Khan* (1). A similar view was taken in the case of *Gopikishen* v. *Sorabjee* (2). Our attention has not been drawn to any ruling in which a contrary view has been taken. It is true that in a certain number of cases it has been held that if a dispute arises in appeal, as to the amount payable by or to the plaintiff the appeal should be valued with respect to the amount claimed by the appellant and *ad valorem* Court-fee ought to be paid on that amount, that is not the question put before us. The only question we have to decide is whether when a suit is brought for redemption and a certain amount is claimed as surplus mesne profits the plaintiff is bound to pay Court-fee upon the surplus amount claimed in addition to the Court-fee on the principal amount secured by the mortgage. This question was decided in the cases to which we have referred and in these cases it was held that the suit being a suit for redemption Court-fee was payable upon the principal amount secured by the mortgage. We agree with the view taken in these rulings which have as far as we are aware, not been dissented from by this Court or any other Court. In any case we feel ourselves bound to follow it and hold that the amount of Court-fee payable upon the plaint was rightly paid with reference to the principal amount secured by the mortgage.

Z. K. *Order accordingly.*

(1) 29 A. 471 ; A. W. N. (1907) 183; 4 A. L. J. 375.
(2) 68 Ind. Cas. 226 ; (1922) A. I. R. (N.) 262.

PRIVY COUNCIL.

APPEAL FROM CALCUTTA HIGH COURT.

May 2, 1924.

Present :—Lord Shaw, Lord Blanesburgh, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

ROY JATINDRA NATH CHOWDHURY AND ANOTHER—RESPONDENTS.

Bengal Alluvion and Diluvion Act (IX of 1847) *s.* 6—*Alluvial increments, whether subject to assessment—Objections—Proper Court — Fundamental irregularity, proof of—Onus—Mahal adjoining river, whether includes alluvial increments.*

Alluvial increments are subject to assessment, but the proceedings of the assessing authorities are subject to being quashed in the ordinary Courts of law if they have been tainted by any fundamental irregularity, such as a defiance or non-compliance with the essentials of the procedure. [p. 1026, col. 2.]

The burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. [p. 1026, col. 2.]

It is not sufficient to submit in a Court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body. [p. 1026, col. 2 & p. 1027, col. 1.]

The Board of Revenue is the proper Court to consider all objections as to assessment etc., and its orders are final. [p. 1026, col. 2.]

A *mahal* adjoining a river cannot be said to include the alluvial increments because its boundaries extended *ad medium filium*. [p. 1028, col. 2.]

***Secretary of State for India* v. *Maharaja of Burdwan*, 67 Ind. Cas. 886 ; (1922) A. I. R. (P. C.) 6 ; 49 C. 103 : 48 I. A. 565 ; 42 M. L. J. 61 ; 35 C. L. J. 92 ; 26 C. W. N. 619 (P.C.), referred to.**

Messrs *A. M. Dunne* and *Kenworthy Brown*, for the Appellant.

Messrs. *De Gruyther* and *B. Dube*, for the Respondents.

JUDGMENT.—This is an appeal from a decree dated the 15th March 1920, of the High Court of Judicature at Fort William in Bengal, which affirmed a decree dated the 27th July 1918, of the Additional Subordinate Judge of Backergunj.

The plaintiffs are Roy Jatindra Nath Chowdhury and Roy Harendra Nath Chowdhury.

They instituted this suit on the 30th January 1917, after due notice against the Secretary of State for India in Council, contesting the legality of the assessment imposed in the course of an alleged Diara Survey on lands in the villages of Amragach Hagalpati and Nizamia Gopekhali in the district of Backergunj.

These villages are part of an estate called Debnathpur bearing *towzi* No. 4903 of the Backergunj Collectorate owned and possessed by the plaintiffs. The plaintiffs' title to this estate is undisputed, and its earlier history is set forth in a Rubokari of the Sunderbans Commissioner of the 15th July 1872.

On the 1st September 1839, a grant was made by the Government to Debnath Roy, *benamidar* for the plaintiff's predecessors in title, of a tract of the jungle and forest land then known as Thshkhali, but later as Debnathpur. The grant was an *ijara* lease for 20 years, and was rent free.

Debnath Roy, taking advantage of rules recently framed by the Government, obtained a grant on the 17th November 1856, of the portion of waste land in the Sunderbans estimated to contain 34,000 *bighas*, described as Lot or Abad Debnathpur, shown in Captain Hodge's map and bounded on the south and west by the Sapleza and Baleswar rivers respectively. The transaction was evidenced by a *pottah* and a *kabuliyat* (Exhibit 3). The grant was at a progressive rent for a term of 99 years, to take effect from the 1st September 1839, and power reserved to the Government to make a survey and measurement at any time between the twentieth and thirtieth years from that date to ascertain the area of the land granted and to calculate the stipulated revenue. In the course of a survey of the leased lands directed by the Commissioner of the Sunderbans in 1858, a map was prepared in or about 1863, and it was determined that the grant included an area of only

14,505 *bighas* 5 *cottahs*. This led to a litigation (after-mentioned), as the result of which a *doul*, of 9th April 1870 (Exhibit H), was executed in favour of the plaintiff's predecessors in-title of 33,441 *bighas* 17 *cottahs* 7 *chittacks* of land known as Debnathpur for the remaining 68 years of the 99 years' lease. In 1870 Mr. Ellison, in the course of a survey, prepared a map (Ex. J) in which the plaintiffs' *mahal* is depicted. The plaintiffs have been paying revenue in accordance with the arrangement and their *mahal* has been numbered *towzi* No. 4908.

On the 2nd October 1900, the Government issued five separate notifications By No. 1959 T. R, the Lieutenant-Governor, in exercise of the powers conferred upon him by section 101 (1) of the Bengal Tenancy Act as amended and with the previous sanction of the Governor-General in Council, directed that a survey should be made and a Record of Rights prepared in respect of all lands included within the external boundaries of Thanas, Banphal, Nalchiti, Barisal, and Backergunj in the district of Backergunj, with certain exceptions therein specified. By Notification No. 1960 T. R., under the powers vested in him by section 3 of the Bengal Survey Act V of 1875, the Lieutenant-Governor ordered that a survey be made of the lands in Thanas, Barisal, Backergunj, Banphal and Nalchiti, and that the boundaries of estates, tenures, mouzas and fields be demarcated in lands to be surveyed. By notification No 1961 T.R, under section 4 of the same Act, Mr. Beatson-Ball was appointed to be the Superintendent of Survey for the purpose of carrying out the survey and demarcation of boundaries ordered in Notification No. 1960 T. R. By Notification No. 1962 T. R., under the same section, Babu Peari Mohan Basu was appointed to be an Assistant Superintendent of Survey for the same purpose. And by Notification No. 1967 T. R, under the powers conferred upon him by section 3 of Act IX of 1847, the Lieutenant-Governor ordered that a new survey be made of the lands falling within the district of Backergunj which were situate on the banks of rivers and on the shores of the sea, and that new maps be prepared according to such survey. By two later notifications of the 27th October 1902, and the 14th November 1903, Mr. Bedford was appointed Extra Assistant Superintendent and Mr. Beatson-Ball was again appointed Superintendent.

As already stated in 1900 the Government decided to make a Revenue survey of the Backergunj district in accordance with the provisions of the Bengal Tenancy Act (VIII of 1885). Whilst the Revenue survey was proceeding—itself a work of great labour, minuteness and complexity—it was considered desirable to make a survey also of the alluvial accretions that had taken place to the north and east of the two rivers—Sapleza and Baleswar, by the recessions of the rivers between the years 1872 and 1900. The entire proceeding is set out in considerable detail in the final report of the Diara Commissioner (p. 30 of Pt. III). This is an important document which requires full consideration to judge whether the Revenue authorities acted in accordance with the law or not in carrying out the Diara measurements:—

"It was originally intended" says the report "that the Diara survey should be carried out concurrently with the preparation of the Record-of-Rights in the district and by Notification No. 1967 T. R., dated the 2nd October 1900, published in the Calcutta Gazette of the 10th October 1900, a new survey was ordered of the lands situated on the banks of the rivers and on the shores of the sea within the district Backergunj according to the provisions of section 3 of Act IX of 1847. During the preparation of the Record-of-Rights, it was, however, found that the Settlement Officer's hands were too full to take up this additional work, which the Diara survey of 1879-1881, confined only to the Ganges and the Meghna rivers, had shown to be of considerable complexity, and it was then decided to postpone the Diara operations until after the final publication of the Record-of-Rights. The final publication was complete of the permanently settled portion of the district early in 1908 and the Collector in his letter No. 216 K. M., dated the 11th May 1908, to the Commissioner of the Dacca Division proposed the initiation of Diara proceeding in the district."

It appears to have taken eight years for the completion of the Revenue Survey. Then the Diara Survey was taken in hand. On its completion certain notices were issued by the

Diara Deputy Collector to the plaintiffs. That of 4th July 1914, will be hereafter cited.

It has to be borne in mind upon the one and only substantial question, namely, whether alluvion had taken place, that no doubt was or is thrown upon that as a matter of fact.

Nor, further, was any doubt suggested upon the proposition that emergent lands should certainly and naturally and under the statutes be lands from which Government revenue should be derived. The objections made on a variety of points, and with much minuteness, were that the correct procedure to enable such revenue to be imposed was defective, and that, consequently, up to date, the lands stood free from taxation.

On 4th July 1914, the following notice was sent to the plaintiffs by the Diara Deputy Collector :—

"Whereas by virtue of Government Notification No. 1967 T. R., dated the 2nd October 1900, issued under section 3 of Act IX of 1847, a new map has been prepared for the lands of *mouzah* Amragachia Hogalpati, No. 3500, on the bank of the Sanleza River in *thana* Matbaria and the said map has been compared with the Revenue survey map and it appears from such comparison that the undermentioned area has accreted to *mahal* Debnathpur, No. 4908, in the said *mouzah*."

Then it is added :—

"Be it further known that if there be any objection to this procedure the same should be filed within fifteen days from the date of receipt of this notice."

No objection appears to have been filed. The Diara Collector accordingly made his order for the assessment of the accreted lands on the 22nd October 1914. The objectors (the plaintiffs) applied for time (apparently for further representation) which was allowed three times. But they appear to have done nothing, and the order for assessment was finally enforced on the 2nd February 1915. The plaintiffs thereupon executed a *kabuliyat* simply stating that they would bring a suit in the Civil Court in respect of the said Diara lands and that they executed the *kabuliyat* under protest.

By a further notice of the 11th February 1915, it was stated that it had been found, on comparison with the Settlement map of 1870 that smaller areas had formed as Diara accretions. This correction was based upon the fact that it had been discovered that certain diluvion had taken place, reducing the extent of the emergent or alluviated lands. It was accordingly just and proper that the assessment should proceed upon the extent thus corrected. The parties were thus joining issue upon the fact (1) of alluvion and its extent, and (2) whether, notwithstanding alluvion, the emergent lands were assessable in law or were already assessed as within the existing *mahals*.

Objections were filed by the plaintiffs, but they were disallowed successively by the Deputy Collector, the Collector, and the Board of Revenue.

Revenue was accordingly assessed on the lands alleged to have accreted, and the plaintiffs executed under protest *kabuliyats* by which they undertook to pay this revenue.

The plaintiffs then instituted this suit in the Court of the Subordinate Judge of Backergunj, contesting the propriety and legality of this assessment. They allege in their plaint that "no new survey was made of any land on the banks of the rivers Sapleza and Baleswar in accordance with Government Notification No. 1967 T. R., dated 2nd October 1900, issued under Act IX of 1847, and that no map was prepared under the said Act." Therefore, they contended, all the operations in connection with the Diara proceedings were *ultra vires* and void.

The defendant's answer to this in his written statement was that new maps of *mouzas* Amragachia and Nizama on the banks of the two rivers "were prepared in the course of the District Settlement operation," and that from comparison and relay of these maps and the Revenue Survey maps, as well as the Settlement map of 1870, it appeared that land had been added to *towzi* No. 4908, Abad Debnathpur. Other pleas were advanced to which it is not necessary to refer at this stage. The fourth issue framed is in these terms:—

"Is the Diara proceedings valid and legal, and is it liable to be set aside?"

On the 27th July 1918, the Additional Subordinate Judge of Backergunj pronounced

judgment in the plaintiffs' favour and declared that all operations in connection with the Diara proceedings in respect of the lands in suit were *ultra vires* and void. The Court's decree was in accordance with the judgment.

An appeal from this decree was preferred by the defendant, but it was dismissed by the High Court on the 15th March 1920. From this decree of dismissal the present appeal has been preferred.

Numerous points have been raised in the course of the litigation, but with one exception they do not call for more than passing notice.

The plea of limitation has not been pressed, for the defendant seeks a decision on the merits and, in particular, on the legality of the assessment.

The plaintiff's contention that rule 745 of the Bengal Settlement Manual was expressly incorporated in their lease cannot be sustained nor is there any force in their argument that this rule was otherwise a bar to assessment proceedings even if legally initiated.

Equally ineffective is the contention that a survey after the thirtieth year from its commencement was in contravention of the terms of the lease; the survey proposed was of land not comprised in the lease. For this reason, too, the provision in the lease defining the rate of revenue has no application.

The High Court's view expressed in the forefront of their judgment that *mahal* Debnathpur is not, as Act IX of 1847 requires, "an estate paying revenue directly to Government" is obviously erroneous, as is its ground of decision on the position of the lands in dispute and the character of the rivers Baleswar and Sapleza.

With the exception of the one point about to be noted, their Lordships have now discussed all the objections that were dealt with in the course of a minute and protracted argument, and they are of opinion that these objections fail. As already mentioned it is not denied that considerable accretion of land by alluvion did in fact occur. Nor is it denied that the legislation upon this subject, including Act IX of 1847, will fail in its main object unless such lands be subjected to assessment.

Their Lordships desire to make it clear, however, that the proceedings of the assessing authorities may be still subject to being quashed in the oridinary Courts of law if they have been tainted by fundamental irregularity. Their Lordships say so in view of the provisions of section 6 of the Act of 1847. That section is in the following terms:—

"Whenever on inspection of any such new map it shall appear to the local Revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Board of Revenue, whose orders thereupon shall be final."

It appears to their Lordships that it is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities, with which the assessing officials on the one hand and owners on the other have presumably intimate local knowledge, such objection should be tabled to, and considered and reported upon by the Board of Revenue. The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation appear to their Lordships not only to be imperative but most salutary.

Two conditions, however, must be noted; the first is, that mentioned, *viz.*, that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would still give ground for questioning the proceedings in a Court of law. The second proposition is that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. Unless this last rule be adhered to it is manifest that the way will be opened to endless objections to procedure, even though these are substantially on questions of fact, and the object of the statute, namely, the assessment of lands, will thereby fail.

To these two conditions a third, by way of supplement, may be added, namely, that it is not sufficient to submit in a Court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the

Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body.

All other objections having been dealt with, the one which remains is set out in Article 7 of the plaint in the following terms :—

" That actually no new survey was made of any land on the banks of the rivers Baleswar or Sapleza in accordance with Government notification No. 1967 T. R., dated 2nd October, 1900, issued under Act IX of 1847, and that no map was prepared under the said Act."

This objection is in two parts, first that there was no new survey, and, second, that there was no map. On these subjects the two witnesses are the Diara Deputy Collector, Hara Kishore Biswas himself and Peari Mohan Hazra, the surveyor who was in service in the Diara office under the Deputy Collector. The result of the evidence is to leave no doubt upon these two points, namely, that there were previous maps to go by, and that the alluviated land was visited and surveyed in fact. The testimony of these witnesses makes that clear beyond question. The survey of 1862–3 and the maps of that date were used. Further information was obtained from the map prepared by Mr. Ellison in the year 1870, an important year in the history of this piece of ground. For a controversy had arisen which resulted in litigation under decree of the High Court dated 11th March 1868, establishing Debnath Roy's right to hold 33,441 bighas. A map called the Ellison map was made at the time, and, following these proceedings, on the 9th April 1870, the respondents' ancestors executed to the Government a doul *kabuliyat*, stating in detail the revenue to be paid. With these materials, namely the maps of 1862—3 and the map of 1870, the Deputy Collector in charge of the Diara operations and his surveyor proceeded to work. He reduced the district settlement map to a 4 inch scale map, then he superimposed it upon the revenue survey map, he himself prepared a comparative map, then he made comparisons locally " to test if the line was accurately drawn, and to find out where in the locality the line stood ". He then adds details such as these : —

" The *chowkidar*, *panchayet* and many other tenants were present. In comparing the map in the locality and finding out how much land of each individual tenant fell within the Diara area, I at first enlarged the map of 1870 to 16-inch scale and, superimposing the cadastral survey map over it, drew out the line and, locating it by measurement, found out the positions and drove pegs. . . I first of all tested the accuracy of the District Settlement map and found it correct. I was not entrusted to enquire how much land was diluviated —still, I made measurement and showed the line of diluvion in the District Settlement map and comparative map."

Various maps appear in a book on this appeal. One of these is No. 6, which was exhibit N in the Court below, which contains the line drawn to show the lines, not only of alluviation, but of the subsequent diluviation already referred to, and the witness explains that "the lines in yellow in Exhibits N, N (1), etc., are in my hand. I put them on that occasion in the locality. I showed the Diara as also the diluvion lines on the map."

As already explained, not only had this land been previously surveyed and maps made as mentioned, but much care seems to have been taken, not only to mark the alluvion in 1904-5, but in 1914 to give the benefit to the taxpayer by a re-survey and re-drawing so as to exclude from assessibility land subsequently diluviated.

After a careful and anxious examination of all the facts submitted, their Lordships are quite unable to affirm that a Diara survey was not made. It is true that one map was superimposed upon another, surely a very natural thing to do when land was supposed to have between two dates undergone accretion ; but the land itself was visited and surveyed.

What remains appears to be that—granted superimposition of plans—a separate map was not made of the alluviated land *per se*. That is to say, the results of the comparative map formed by inscribing the results of superimposition marked upon the maps used in that process, and when marked thus formed a comparative map, were not put upon a separate

piece of paper which contained the outline of the alluviated land.

Their Lordships are clearly of opinion that all this was in the practical region eminently cognizable by the officials acting in the revenue proceedings and eminently fit for settlement and decision by the Board of Revenue. So much so is this the case that it would appear to be pretty clear that, had this objection been made then and there, the Board of Revenue would at once have ordered the separate sheet to be prepared, which was desiderated.

Passages occur in the judgment of the Court below which seem to taint with illegality or impropriety the operation of superimposition of maps. There is nothing wrong with this from the legal point of view, and from the practical point of view the Revenue Court can deal with it. In *Rajcoomar Roy* v. *Gobind Chunder Roy* (1) this Board said:—

"In boundary cases of this kind nothing is easier than to propound riddles which cannot be answered by merely looking at the maps or reading the statement which appears in the Record. If it were enough to show to this tribunal difficulties which the respondent's counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local Courts have advantages over the remote ones."

In their Lordships' view the language aptly applies to Board of Revenue Court proceedings and more particularly so in view of the finality of that Board's orders under section 6 of the Act of 1847. In the same case the following pronouncement was made:—

"They can show many difficulties of a kind which probably no amount of mapping or verbal description would avoid. Mr. Madge's map does not, so far as their Lordships can see, show in terms, and on its face, the *Thackbust* line which was complained of and corrected in the mutnaza suit, nor the lands described in the plaint. But those objections were before the High Court, who were satisfied that Mr. Madge had shown the things required; and though it does not appear that Mr. Madge was present to explain his map, the Court could certainly have required his presence if any real difficulties had been felt on those points."

Again, their Lordships think it right to say that this language aptly applies to the Board of Revenue proceedings, and they further desire to add that, while the survey proceedings and the map proceedings had been the subject of the examination of the two officers practically and personally connected with this work, the respondents, who have resisted throughout having assessment made on these lands, did not appear as witnesses on the subject, although, in the evidence already given, it had been clearly shown that the survey had properly been made in the presence of many persons named.

It would rather appear as if the whole of this point was a mere incident in a case which was essentially founded on a mistake. The respondents resisted the assessment of this increment of the estate upon grounds which this Board has recently found to be unsound in law. They maintained, in short, that the mahal included the increment because its boundaries extended in the case of each of the rivers mentioned, namely, the Baleswar and Sapleza, *ad medium filum*. The High Court, in their judgment, erroneously treated this as a sound ground. Their judgment was pronounced upon the 15th March 1920.

But the law applicable to this subject is to an opposite effect, as has been settled in the case of *Secretary of State for India* v. *Maharajah of Bardwan* (2). That case was *a fortiori* of the present, and it was held that the Government is entitled to Public Revenue under Act IX of 1847, from chars formed in a non-navigable river, even where it flows through a permanently settled *Zamindary*, as well as up to the middle line of the river where that is the boundary of the *Zamindary*, and this even where it appears that the river bed was part of the permanently settled *Zamindary*. Against this judgment of the Board, delivered by Lord Cave, no argument could, of course, be raised at their Lordships' Bar.

That was the matter of substance, and fundamental, because if the respondents' mahal included the alluvion as already assessed land,

(1) 19 C. 660; 19 I. A. 140; 6 Sar. P. C. J. 140; 9 Ind. Dec. (N. S.) 688 (P.C.).

(2) 67 Ind. Cas. 835; (1922) A. I. R. (P. C.) 6; 49; C. 103; 48 I. A. 565; 42 M. L. J. 61; 35 C. L. J. 92 26 C. W. N. 619 (P.C.).

the fresh assessment thereof was necessarily illegal. That fundamental objection having been got rid of, however, the respondents were, of course, within their rights in raising the other points now dealt with, including that just descirbed as incidental. Upon that incidental point, however, whether there was or was not a new survey map prepared in such a way as to satisfy the requirements of the Act of 1847—it must be repeated that it lies upon the respondents challenging the assessment proceedings to prove the fundamental illegatity of which they complain.

As the result of a long and searching argument, the most that can be said is that the point may have been left not entirely cleared up. On principle, and on authority, this is entirely insufficient. The appellants have merely propounded a riddle. The case of *Kumar Basanta Roy* v. *Secretary of State for India* (3) has been cited by the Additional Subordinate Judge as an authority condemning the practice of finding an excess area by superimposition of maps. Their Lordships do not read the judgment in any such sense, but the passage of Lord Sumner's pronouncement, which is apparently referred to has, in the view of the Board, a direct bearing of another kind upon the present proceedings. It is to the following effect :—

The respondents' argument rested on three points : First that since 1886 they had been, as they said, in possession of certain portions of a char known as char Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906 it would be seen that part of the area disputed in this action, although claimed as part of char Raninuggur No. 2, really fell within char Raninuggur No. 1, and that there had been a confusion of *mauza* Jirat, which lay in the north of the disputed area, with an area called char Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now [*Rajcoomar Roy's Case*] (1) to deprecate the practice of propounding riddles of this kind, and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now."

The Board is of opinion that these observations fitly apply also to proceedings in the Board of Revenue, a Board specially charged with the settlement of disputes as to boundaries and changes therein and other matters of fact and procedure which are capable of being most satisfactorily treated with all the advantages of local and special and accumulated experience. It has been noted accordingly that objections were taken and discussed before the Collector of Backerganj, and, after his disposal thereof, two petitions of appeal were presented by the respondents to the Board of Revenue on the 31st March 1915 and 19th November 1915, the latter being confined to the Sapleza river. Every conceivable point seems to have been taken, but, in the course of the 12 paragraphs of statement, and the five reasons for appeal, this point as to the alleged absence of a proper map is not taken. For the reason about to be given, their Lordships express little surprise at this. For the Record of the proceedings of the Board of Revenue appear to disclose, not only that such an objection is ill-founded on fact, but must have been known to be so by the plaintiffs' local representatives appearing for the purpose before the Revenue Board.

On the 22nd October 1914, a long entry appears in the order sheet of the objection existing in the Diara Settlement office, and point (*b*) thereof is in the following terms : —

" By virtue of Government Notification No. 1967 T. R., dated the 2nd October 1900, a survey of the lands which are situated on the banks of the rivers within the district of Backerganj was made in the course of the District Settlement operations. An index map showing the surplus accretions was prepared by the Diara Officer. The portion diluviated since the District Settlement has also been shown in the comparative map after local enquiry."

The argument did not go so far as to suggest that this record is in any way impeachable. In

(3) 40 Ind. Cas. 337 ; 44 C. 858 ; 44 I. A. 104 ; 1 P. L. W. 593 ; 32 M. L. J. 505; 21 C. W. N. 642 ; 15 A. L. J. 398 ; 25 C. L. J. 487 ; 19 Bom. L. R. 480 ; (1917) M. W. N. 482 ; 6 L. W. 117 ; 22 M. L. T. 310 P C.).

these circumstances the map point may be said not to be left in doubt, but to disappear.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the suit dismissed with costs here and below.

K. S. D. *Appeal allowed.*

Solicitor for the Appellant—*Solicitor, India Office.*

Solicitor for the Respondents—Mr. *Douglas Grant.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 197 OF 1922.

February 9, 1922.

Present :—Sir Dawson Miller, Kt., C. J., and Mr. Justice Bucknill.

AMIR MANDAL—APPELLANT
versus
MOHAN CHANDRA MANDAL—RESPONDENT

Limitation Act (IX of 1908), s. 5—Court-fees not paid on appeal—Order for payment within fixed time or appeal to stand dismissed—Delay in obtaining stamp—Extension of time.

In the case of an appeal filed without proper court-fees, the Court passed an order that the appellant should deposit the required court-fee within a fixed period, otherwise the appeal would stand dismissed. The period allowed expired during Court vacation and on the reopening day the appellant tendered the requisite amount for the stamp to the stamp vendor. The stamp vendor had no stamp of the required value but promised to supply one before the Court closed for the day. The stamp, however, was not supplied on that day but on the next day when it was tendered in Court:—

Held, that there had been no negligence or laches on the part of the appellant and sufficient cause had been shown for the extension of time and for reinstatement of the appeal. [p. 1030, col. 2.]

Messrs. *Tribhuan Nath Sahay* and *Anand Prasad*, for the Appellant.

Messrs. *Purnendu Narayan Sinha* and *Nitai Chandra Ghose*, for the Respondent.

ORDER.—In this case an order was made on the 28th November to deposit the Court-fee within a month and the order provided that if the fee was not paid within a month the appeal would stand dismissed. The time expired during the Christmas vacation and on the first day of term, *viz.*, the 3rd January, the appellants applied to the stamp vendor and tendered the money for a stamp of Rs. 90 which was the stamp necessary to be filed. That was at about 10-30 in the morning. The stamp vendor had no Court-fee stamp of that value but promised to supply one by 3-30 P. M. on the same day. The money was thereupon deposited with the stamp vendor on his assurance that the stamp would be supplied by 3-30 P. M. When the clerk went again at 3-30 P. M. to obtain the stamp he found that the stamp vendor was not there and that he had not returned from the Treasury. The learned Vakil for the appellant waited for the stamp vendor in the High Court until 4-30 P. M. but as he did not turn up he was unable to get the stamp in time but he did obtain it on the following day and it was then tendered. The question now arises whether in face of the order made on the 28th November we can accept the stamp as that order stated that the appeal would stand dismissed if the stamp was not filed within a month. It is quite clear from what I have stated that there was no negligence or laches on the part of the appellants and so far as they are concerned they did their best to comply with the order. It is said that they ought to have applied for the stamp earlier but having regard to the fact that they would have had to apply sometime before the vacation, as the stamp vendor is not available during the vacation, we do not think that there was any laches on their part. It is not disputed that in the ordinary course there is no difficulty in obtaining stamps of the value of Rs. 90 as soon as they are applied for. The only question is whether in the particular circumstances of this case we can reopen the order which was made on the 28th November. We think sufficient cause has been shown even if an application were made before us for reinstating the appeal. The learned Vakil for the respondent is present and we have heard what he has to say about it and as we would have power to reinstate the appeal in spite of the order of the 28th November, we think we ought to hold that the time be extended upto

the 4th January when the stamp was actually filed. The appeal will proceed in the ordinary course. The stamp has been returned to the learned Vakil for the appellant. Let it be deposited again to-day.

N. H. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

December 18, 1923.

Present :—Lord Shaw, Lord Carson, Sir John Edge, Mr. Ameer Ali, and Sir Lawrence Jenkins.

MA THAUNG AND ANOTHER—APPELLANTS
versus
MA THAN AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Inheritance—Partition between father and children of first marriage—Second marriage — Death of father — Children of first marriage, whether entitled to share—Construction of document—Partnership of whole property—Partition.

A Burmese Buddhist before contracting a second marriage entered into an agreement with his children from his first wife whereby the whole of the existing moveable and immoveable property belonging to the father was transferred to a partnership between the father and the children, and the children were assigned definite shares in the property, a certain share being retained by the father. The latter then contracted a second marriage and died some years later;

Held, that the agreement entered into by him with his children before his second marriage was not merely a deed of partnership but amounted to a partition, and the children, therefore, were not entitled to share in any property retained by the father which he took to the second marriage. [p. 1033, col. 2.]

Where, after the death of a wife the husband partitions the property with his children and marries again, taking his share with him, on his death the children of his former marriage cannot claim from their stepmother any property which their father took to the second marriage, because they have already obtained their shares on partition. [p. 1034, col. 1.]

Ma Nhin Bwin v. *U Schwe Gone*, 23 Ind. Cas. 438; 41 I A. 121; 7 Bur. L. T. 105; 16 Bom. L. R. 877; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; 8 L. B. R. 1; (1914) M. W. N. 449 (P. C.), referred to

Appeal against the decree of the upper Burma Judicial Commissioner's Court, dated the 25th October 1921 reversing that of the District Judge, Mandalay, dated the 1st June 1921.

Messrs. *G. Lowndes, K. C.* and *J. M. Parikh*, for the Appellants.

Messrs. *A. M. Dunne, K. C.* and *K. Brown*, for the Respondents.

JUDGMENT.—This appeal arises out of a a suit brought by the plaintiffs in the Court of the District Judge of Mandalay, Upper Burma, for a share in the inheritance of one U Nyein, a Burmese, subject to the Burmese Buddhistic law. It was treated in the first Court as a suit for administration, and a decree was made therein by the District Judge on the 1st June 1920. This decree was reversed on the 25th October 1921 by the Judicial Commissioner of Upper Burma, and the plaintiff's claim was dismissed; hence this appeal to His Majesty in Council.

The facts of the litigation are set out with clearness and precision in the able judgment of Mr. Mosley, the District Judge.

U Nyein was a trader by profession and appears to have carried on in conjunction with his wife, Ma Gale, a profitable business in rice.

They had a rice mill which, it is stated, was opened in 1894 and appears to have been at the time of Ma Gale's death in December 1904, a valuable property. It is to be noted that in the Burmanese social and legal system the wife is to all intents and purposes, a partner.

U Nyein had by Ma Gale five sons and two daughters, who were all *suijuris* when she died. Although under the Burmese law, the eldest daughter became entitled on Ma Gale's death to a definite share in her property, no division took place, and the father and the children continued, as in her lifetime, working in common.

Some months after Ma Gale's death, U Nyein appears to have contemplated marrying again. Before, however, the marriage was actually contracted, on the 11th May 1905, he executed the document exhibit L on the construction and meaning of which the determination of this appeal turns. About a fortnight later U Nyein married Ma Than, the contesting respondent in this appeal.

MA THAUNG *v.* MA THAN

Exhibit L is in form a partnership deed, but the respondent contends that in fact it is a partition deed by which U Nyein divided his property amongst his children. It is urged on her behalf that, under the law of the *Dhammathats*, the children have, after the partition no right in the property retained by the father. The plaintiffs deny the correctness of the legal proposition on which the respondent bases her contention, and they urge that whatever the meaning of exhibit L, they are entitled to a share in their father's inheritance.

A number of issues were framed in the Court of the District Judge ; the two following embody the substance of the matter now in dispute.

(i) Was the deed of arrangement dated the 11th May 1905 (exhibit L) between U Nyein and his children a division of inheritance in view of his approaching marriage with Ma Than, or was it a mere agreement of partnership ?

(ii) Are his children who signed that agreement entitled as heirs to share in the property retained by U Nyein under that agreement ?

The District Judge on the form of the document coupled with the evidence to which he refers in his judgment, came to the conclusion that exhibit L was not a deed of partition but merely a partnership agreement, and he accordingly, as stated already, made an administration decree with respect to the inheritance of U Nyein.

On appeal the Judicial Commissioner has taken a different view. From the circumstances proved in the case he infers that contemporaneously with exhibit L there must have been between U Nyein and his children some agreement, necessarily parole, which led him to put the division in the shape it has taken. In one place he says as follows :--

" It is open to the parties to prove that it was a condition precedent to the attaching of any obligation under the contract, that the disposition should be regarded as a partition of property in view of the marriage, and that the claims of the children of U Nyein as his heirs on his death should be modified accordingly. Further Ma Than was not a party to the document, nor can she I think for this purpose be regarded as the representative in interest of such a party. She is, therefore, entitled under the provisions of section 99 of the Evidence Act to show a contemporaneous agreement. It does not seem to me, however, that Ma Than is trying to show such a contemporaneous agreement. She does not deny that the terms of agreement between the parties were those of a partnership. Her contention is that that agreement formed a part of a larger transaction and that it was made for the purpose of effecting a division of property. I am of opinion that it is open to her to prove her contention by oral evidence. At the time that the deed was drawn up Ma Than was a stranger to the family. It is not surprising, therefore, that she is unable to bring any direct evidence as to the intention of the parties when the deed was drawn up, and as to the effect of the deed."

He is, however, definite in his conclusion that the deed in question was drawn up in view of the approaching marriage, and that by this instrument U Nyein did effect a partition of his property with his children by Ma Gale.

Owing to this divergence of opinion between the two Courts in Burma, their Lordships have carefully examined the terms of the document (exhibit L). In their opinion, it speaks for itself. It begins with the usual formula :—

On the 11th May, 1905, corresponding to the 9th *Waxing* of the month of *Kason* 1267 (Burmese Era), at Mandalay, U Nyein and his son and daughters, in order to carry on business, execute this agreement as follows:—

U Nyein will transfer all the properties, which have been in his name up to this date, to the name of the partnership.

All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership.

The sums of money, which Maung On Shwe, Maung San Huyin and Maung Aung Min have taken before this date, will be considered as the money belonging to the partnership.

The mill and all machines connected with it, which have been already taken possession of, belong to the partnership.

Without the consent of the majority (but not one) of the partners, the husband wife or

co-heir of a partner cannot make use of the properties belonging to the partnership.

The shares, to which the partners have the right to ownership in all the partnership properties are shown below.

Either partner Ma E Yin or partner Ma Thaung will take charge of all the private properties belonging to partnership, such as jewellery, etc.

The partnership is responsible for all the debts which have been owed to, or owed by, other people up to this date.

The partnership will carry on business in accordance with the wish of the majority of the partners.

It then gives the shares as follows :—

1. U Nyein has the right of ownership to one-eighth share.

2. Maung On Shwe 3. Ma E Yin 4. Maung San Hnyin 5. Maung Aung Min 6. Ma Thaung	These 5 persons have the right of ownership to six-eighth share.
7. Maung Po Thaung 8. Maung Po Ka	These 2 persons have the right of ownership to one eighth share.

The deed was duly signed by all the executants.

The strange similarity of language between the terms of the provision contained in the second paragraph of exhibit L and the rules laid down in the Dhammathats for division of family property on the demise of one of the parents is striking. The paragraph in question provides that "all the house sites, buildings, rice, paddy, ponies, gharries, gold and money which have been in existence up to this date will belong to the partnership." In any ordinary partnership the inclusion of these articles would be regarded as unusual; but bearing in mind the rules of the Dhammathats it would be natural and in the ordinary course in a deed of partition. Again, the paragraph relating to jewellery appears to be unusual in a deed of partnership designed for carrying on business.

The provision is as follows :—

"Either partner Ma E Yin or partner Ma Thaung (two of the daughters) "will take charge of all the private properties belonging to the partnership such as jewellery, etc."

These particular provisions appear in their Lordships' opinion, to furnish the key to the solution of the question whether exhibit L is a deed of partnership or a deed of partition. U Nyein was about to contract a second marriage. Under the Burmese law whatever he possessed at the time of contracting the relationship which he contemplated, would become on the marriage the common property of his wife and himself. Nothing was more natural than that, influenced by the effect of such an eventuality on the position of his children by Ma Gale, he should, in order to provide for them during his lifetime, whilst he was absolute owner of the properties he possessed, decide upon a partition which would secure a definite share in his or her own right to each child. He accordingly, with the agreement and consent of his sons and daughters, entered into the arrangement embodied in exhibit L. None of them was entitled to any share in his lifetime. By this deed he allotted to five of his children a six-eighth share of his property and to the two younger ones one-eighth between them, retaining for himself an eighth share. The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. The mode, therefore, in which the sons and daughters of U Nyein dealt with their shares is material; it helps to strengthen the conclusion that exhibit L was more a record of a division of rights and interest rather than a deed of partnership.

There were not only independent dealings between one or other of the children, but also between them on one side and Ma Than and U Nyein on the other. In 1907 in a suit brought by the minor son of U Nyein's third son, against U Nyein and his other children the rights of the parties came into debate. In his written statement U Nyein distinctly states that the business of rice-mill was started by him on his own account with his own capital and that "by way of providing for his children he gave them the shares in the business mentioned in the partnership deed." U Nyein's statement was confirmed by the other defendants in a joint defence filed by them. The attempt to make out they had made that admission under the instigation of U Nyein signally failed in the first Court.

After her marriage with U Nyein Ma Than appears from the evidence to have assisted

him in his business and although there was no definite separation between U Nyein and his children by Ma Gale, the new *menage* was carried on quite independently and separately from them.

On the whole, their Lordships have come to the conclusion that exhibit L evidences a partition of the rice-mill business and other property U Nyein possessed at the time. That being so, the question arises whether the provision of law the respondent invokes in her favour excludes Ma Gale's children from sharing in the inheritance of U Nyein. It has to be noticed that U Nyein died nine years after his marriage with Ma Than and within this period U Nyein and Ma Than appear to have accumulated considerable property. The present claim, therefore, cannot be regarded as unreasonable or unnatural.

The passage on which the respondent relies is contained in section 213 of Mr. U Gaung's Digest of the Burmese Buddhist law, volume 1, page 276. The heading of the section runs thus :—

"After Partition between Children and Surviving Parent, the latter marries again and dies; the Children are not entitled to claim inheritance from the stepfather or stepmother."

The rule which follows is in these terms:—

"After the death of the husband, the wife partitions the property with her children and marries again taking her share with her. On her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage; because they have already obtained their shares."

"The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares."

It is contended on behalf of Ma Than that under the latter clause, the plaintiffs having received from U Nyein their respective shares, cannot claim any further share in his inheritance. On the side of the plaintiffs it is urged that this latter rule does not occur in any of the other Dhammathats and ought not, therefore, to have effect given to it.

Admittedly this is the only passage which expressly declares that the children will not be entitled to share in the inheritance of their father after a partition in his lifetime alloting them specific shares in the property he possessed.

The Burmese Dhammathats are numerous and the criterion for arriving at a definite conclusion with regard to a particular rule is indicated in the judgment of the Board in the case of *Ma Nhin Bwin* v. *U Schwe Gone* (1).

Their Lordships, however, do not think it necessary in the present case to go through all the Dhammathats for the purpose of discovering what the other Dhammathats declare. Nothing has been shown to militate against the authenticity or the binding character of the rule on which the respondent relies; and in the present state of the authorities, their Lordships are not prepared to dissent from the view expressed by the Judicial Commissioner. They are, accordingly, of opinion that this appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty to this effect. There will be no order as to costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellants—Mr. *E. Dalgado.*

Solicitors for the Respondents—Messrs. *Lowe & Co.*

(1) 23 Ind. Cas. 483; 41 I. A. 121; 7 Bur. L. T. 105; 16 Bom. L. R. 877; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C L. J 264; 41 C. 887; 1 L. W. 914; 8 L. B. R. 1; (1914) M. W. N. 440; (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2938 OF 1920.

May 25, 1923.

Present :—Mr. Justice Chatterjea and Mr. Justice Cuming.

PRIYA NATH BASU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TARA CHAND MORAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Pt. II, Ch. X ss. 103-B, 104-H 104-J—Rent Record of Rights, entry in

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conclusiveness of—Entry as to area—Presumption as to correctness.

When a settlement of rent has been made under Part II of Ch. X of the Bengal Tenancy Act, the entry in the Record of Rights is conclusive unless altered by means of a suit instituted under section 104-H of the Act. So, too, are other entries in the Record of Rights upon which the rent is settled so far as they affect the rent settled, *i.e.*, in so far as they bear upon the rent settled, and for that purpose only. [p. 1037, col. 2 & p. 1038, col. 1.]

Where, however, the question in controversy is not as to the rent payable but the quantity of the land included in the tenure, the entry in the Record-of-Rights as to area is not conclusive under section 104-J, although under section 103-B such an entry raises a presumption of correctness. [p. 1038, cols. 1 & 2.]

Appeal against the decree of the Additional District Judge of Zillah Khulna, dated the 15th September 1920, affirming the decree of the Additional Subordinate Judge, Zillah Khulna, dated the 16th August 1919.

Babus *Jogesh Chandra Roy* and *Anilendra Nath Roy Chowdhury*, for the Appellants.

Babu *Satindra Nath Mukerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of rent.

The plaintiffs-appellants alleged that the defendants held a tenure consisting of 1752 *bighas* of land at a rent of Rs. 915-12-6 under them, and the rent for the years 1321 to 1324 was claimed in the suit.

The main defence was that the tenure consisted of more than 2000 *bighas* of land, that the plaintiffs had let out about 600 *bighas* of land out of the lands of the defendants' tenure, to one Gobinda Mandal who had dispossessed the defendants from a portion of the tenure; that rent had also been realised on plaintiffs' behalf from some of the defendants' tenants on the land, and that the rent payable for the tenure should, therefore, be suspended. The Courts below have concurred in dismissing the suit, and the plaintiffs have appealed to this Court.

Three contentions have been raised on behalf of the appellants. The first is that the Court below is in error in holding that the disputed land was included in the defendants' tenure, and that it had misconstrued the defendants' *pottah*, dated the 7th March 1839, in so holding. The southern boundary of the lands of the tenure in the *pottah* was "*khas* land." It was the case of both parties that "*khas* land" meant the *khas* land of the Government, but they differed as to the location thereof. The Court below has elaborately discussed the question and has found that the disputed land was all along treated by the plaintiffs and their predecessors as being included within the defendants' tenure, that rent was assessed upon the disputed land in accordance with the stipulation in the lease, and realized, that the defendants through *dargantidars* and other tenants had been in possession of the disputed land from the very inception of the tenancy, and that the contractual rights and obligations of the parties under the lease were not affected by the subsequent settlement of some of the disputed lands taken by the plaintiffs in 1908 from the Government. It has also found upon the evidence that the plaintiffs dispossessed the defendants from the disputed lands by realising rents from the defendants under-tenants, and by granting a lease to a third party with respect to a portion of the defendants' tenure. We are of opinion that the *pottah* has been rightly construed by the Court below, and the above finding cannot be challenged.

The second contention is that the defendants acquiesced in the dispossession, and reliance is placed upon the mortgage-bond, Ex. I, executed by the defendants. But the circumstances under which the mortgage was executed have been stated by the defendants and the statement has been accepted by the Court below.

The last contention is that the entry in the Record-of-Rights which shows that Rs. 820-1-6 was the rent settled for the defendants' tenure of 1752 bighas and odd is conclusive not only as to the rent, but is also conclusive as to the area of the tenure under section 104 J of the Bengal Tenancy Act. That the rent settled under part II of Ch. X of the Bengal Tenancy Act is conclusive under section 104 J, has been held in a number of cases, but the question is whether an entry in the Record of Rights other than the entry as to the rent settled is conclusive.

In the case of *Ambica Charan Chakravarti* v. *Joy Chandra Ghosh* (1), plaintiff sued for rent at the rate of Rs. 20 at which it was settled in the settlement proceedings, and the

(1) 4 Ind. Cas. 470; 13 C. W. N. 210.

defendant having relied upon a *pottah* granted before the settlement, and which fixed the rent at Rs. 3-2-0, it was held that the settlement of rent having been made under part II of Ch. X of the Bengal Tenancy Act, the entry as to the rent was conclusive under section 104 J of the Act. The learned Judges pointed out the distinction between sections 103 B and 104 J, and observed that, " section 104J applies to the rent-roll alone; and to no other part of the Record of-Rights ". No question, however, arose in that case other than as to the rent settled.

In the case of *Prosanna Kumar Adhekari* v. *Rachimuddin* (2) there was a *kabuliyat* in respect of 96 *bighas* at a rent of Rs. 220 with a stipulation for payment of additional rent if the tenant was found to occupy more land than was specified in the *kabuliyat*. Subsequently there was a Record-of-Rights, and according to it the defendant was found to hold 117 *bighas* but the rent was fixed at Rs. 220. The Plaintiff having sued to recover rent for the 117 *bighas* at a rent of Rs. 268, it was held by Carnduff and Chapman, JJ., that the entry settling the rent was conclusive and observed :—" It appears that a suit was brought under section 104H in respect of the description of the defendant in the Record-of-Rights, and the description was altered from that of an occupancy *raiyat* to that of an under-*raiyat*, but no attempt was made under the provisions of section 104 to 104F to alter the entries as to the rental and the area. The latter entries are, therefore, in the view we take of the section, conclusive and this we may remark was the view taken by Stephen and Doss, JJ., in *Ambica Charan* v. *Joy Chandra* (1)."

It is to be noted that in *Prosonna Kumar's* case (2), the learned Judges observed that the " latter entries" (which related to both the area and the rent) are conclusive. But the area was not in dispute in that case ; only the rent was in dispute.

In *Baikuntha Nath Ghora* v. *Prasanna Kumar Mohapatra* (3), a rent suit was brought in respect of two tenancies in accordance with the Record-of-Rights. The defence was that the Settlement Officer had re-arranged the holdings and the two holdings were not held as they were originally, but they were different holdings although the same amount of land was comprised in the two holdings. It was argued for the tenant in that case that, although he may not be able to question the amount of rent, he may show that the land is not correctly stated in the Record-of-Rights and that, therefore, he is not liable to pay the rent which had been deemed to be correctly stated. But Fletcher, J., observed : " That seems to me to be quite impossible on the wording of the section. Correctness of the rent means that the amount of rent is correct with reference to the amount of land entered in the record. It is shown quite clearly by section 104 H, sub-section (3) (*d*), in giving one of the grounds on which a suit can be instituted by a person who is aggrieved by an entry of a rent settled in a settlement rent-roll. It is quite impossible to say that when the rent is deemed to be correctly settled the tenant can go behind the record and show that the record is wrong." It is to be observed that, in that case, the correctness of the area entered in the Record-of-Rights was challenged for showing the incorrectness of the entry as to the rent, which could not be allowed having regard to the provisions of section 104J.

The learned Pleader for the respondents has strongly relied upon the observations quoted above. It is true that the rent of a tenancy is settled with reference to the lands comprised therein, and Cl. (*d*) of section 104H provides for a suit being instituted on the ground, among others, that the land has been wrongly omitted from the land of a tenancy. But the decision of such question appears to be only incidental to the question of settlement of rent. In the case of *Jogendra Nath Singh* v. *Secretary of State* (4), the scope of a suit under section 104H was considered, and the learned Judges (Mookerjee and Holmwood, JJ.) observed:— "No doubt, the Court with a view to determine the question whether the entry of rent as settled is erroneous or whether there ought to be an entry of settlement must incidentally examine the grounds assigned by the plaintiffs as set out in the six clauses of sub-section(3) But the Court cannot be called upon, in a suit under section 104H, to make an ex-

(2) 15 Ind. Cas. 327 ; 17 C. W. N. 153.
(3) 46 Ind. Cas. 287 ; 23 C. W. N. 516.

(4) 17 Ind. Cas. 921 ; 17 C. W. N. 835 ; 16 C. L. J. 385.

press declaration upon any of the six matters mentioned in the sub-section."

In the case of *Profulla Nath Tagore* v. *Secretary of State for India* (5), the revenue officer in settlement proceedings settled the rent of the lands on the basis of the rent payable to the proprietor ignoring the existence of a tenure and certain holdings purchased by the proprietor in execution of decree for arrears of rent. It was found that the tenure had not merged in the proprietary interest, and the *raiyati* holdings (purchased before the amendment of the Bengal Tenancy Act in 1908) did not cease to exist. The Courts below held that the Court had no jurisdiction to settle the rent of the tenure and holdings. One of the members of this Bench (Chatterjea, J.) and Panton, J., held that a suit could be maintained on the grounds (*d*) and (*e*) of section 104H, and that under sub-section (4) of that section the Court had the power to settle the fair rent payable by the plaintiff as the holder of the tenure and the holdings. A declaration was made as to the right of the plaintiff as tenure-holder and *raiyat*. The declaration was, however, unnecessary, as it was only incidental to the settlement of fair rent, and for which purpose the case was remanded to the lower Court. The question whether such a declaration could be made in a suit under section 104H does not appear to have been raised in that case, nor does the case of *Jogendra Nath Singh* v. *Secretary of State* (4), appear to have been brought to the notice of the Court.

In *Prafulla Narain Majumdar* v. *Palku Mahammad* (6), two suits for rent were brought for two holdings, one at the rate of Rs. 50 and the other at the rate of Rs. 30-10-0. The Record-of-Rights showed a *jama* of Rs. 30-10 only. Subsequently a decree for rent for Rs. 50 was obtained *ex parte*, but it was found that the decree had been obtained by keeping back the Record-of-Rights, and that it was improbable that one of the *jamas* under the plaintiff had been omitted from the Record-of-Rights. It was held by Fletcher, J., and one of the members of this Bench (Cuming, J.), that section 104J precluded any evidence being given to contradict the statement as to rent mentioned in the Record-of-Rights where a settlement rent roll had been prepared under the provisions of sections 104A to 104F. It is true that a question arose as to whether there were two *jamas*, and it was held that there was only one, relying upon the Record-of-Rights, but the actual decision proceeded upon the ground that the entry as to the rent settled could not be contradicted. In any case, there was no express decision that any entry other than of the rent settled was conclusive. In the case of *Profulla Nath Tagore* v. *T. C. Tweedie* (7) the conclusive character of an entry as to the rent settled was recognized and the question whether an entry in the Record of-Rights other than as to the rent settled is conclusive was referred to but was not decided. The question in that case was whether having regard to the contract between the parties the landlord was entitled to any rent in respect of the *diarah* portion (of a big tenure held by the defendant) which was resumed by Government and settled with the landlord the rent whereof was settled in the settlement proceedings and the decision proceeded upon a consideration of the provisions of section 192 of the Bengal Tenancy Act. In the last reported case on the point, *Pratap Chandra Jana* v. *Secretary of State for India in Council* (8), it was held by Mookerjee, J., and one of the members of this Bench (Cuming, J.) that when a settlement of rent has been made under Part II of Ch. X of the Bengal Tenancy Act, the entry in the Record-of-Rights is conclusive unless altered by means of a suit instituted under section 104H. In that case there was no question of the conclusiveness of the area or any entry other than of the rent settled. In the unreported decision of Richardson and Suhrawardy, JJ., (9) all that appears to have been decided was that the rent settled could not be challenged by showing the incorrectness of other entries in the Record-of-Rights.

It will be seen that the decisions are agreed that an entry as to the rent settled is conclusive under section 104J. It may also be conceded that other entries in the Record-of-

(5) 63 Ind. Cas. 892 ; 26 C. W. N. 100.
(6) 58 Ind. Cas. 122 ; 23 C. W. N. 860.
(7) 65 Ind. Cas. 234 ; 35 C. L. J. 14 ; (1922) A. I. R. (C.) 248.
(8) 67 Ind. C. 375 ; 35 C. L. J. 304 ; (1922) A. I. R. (C.) 101 ; 49 C. 1026.
(9) Second Appeals No. 2763 of 1919 and 223 and 240 of 1920, dated the 8th May 1922.

Rights upon which the rent is settled cannot be challenged so as to affect the rent settled *i.e.*, in so far as they bear upon the rent settled and for that purpose only. The fact that the suit under section 104H is to be instituted on the grounds mentioned in that section by a person aggrieved by an entry of a rent settled indicates that the other entries in the Record-of-Rights can be challenged under that section only for the purpose of showing the incorrectness of the entry as to the rent settled. But whereas in the present case, the question in controversy is not as to the rent payable but the quantity of land included in the tenure, the determination of which is necessary not for deciding the amount of rent payable for the tenure, but for deciding the question whether the rent should be suspended because the defendants had been dispossessed from a portion of the tenure, we think the entry as to the area is not conclusive under section 104J. Section 104J lays down: "Subject to the provisions of section 104H, all rents settled under sections 104A to 104F and entered in a Record-of Rights finally published under section 103 A or settled under section 104G shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act." The section refers in terms only to rents settled and does not refer to any other entry in the record, and although a suit may be instituted under section 140H, Cl. (*d*) on the ground that land has been wrongly recorded as part of a particular estate or tenancy or wrongly omitted from the lands of an estate or tenancy, the decision of such question as pointed out in *Jogendra Nath Singh* v. *Secretary of State* (4), is only incidental to the determination of the question whether the entry of the rent as settled is erroneous. If the contention that as the rent of a tenancy is settled with reference to the area comprised in the tenancy, the entry as to the area as well as the rent should be held to be conclusive even in cases where the rent is not in dispute were accepted, we must hold that other entries in the Record-of-Rights, such as an entry as to the status of the tenant (with reference to which also the rent is to be settled) is also conclusive even where the rent is not in dispute. Having regard to the express terms of section 104J which refers only to the rent settled, we are of opinion that the entry as to the area is not conclusive for the purpose for which it is sought to be so used. Such an entry no doubt raises a presumption of correctness under section 103B, but the Court below has found against the entry upon the evidence.

We are accordingly of opinion that the appeal must fail, but we make no order as to costs of this appeal.

W. C. A. *Appeal dismissed.*

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE CALCUTTA HIGH COURT.

November 23, 1923.

Present :—Lord Atkinson, Lord Shaw, Lord Wrenbury, Lord Carson and Sir Robert Younger.

THE INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LIMITED—APPELLANTS

versus

THE DEKHARI TEA COMPANY, LIMITED, AND OTHERS—RESPONDENTS.

Carriers Act (III of 1865), ss. 2, 6—"Common carrier," who is—Liability of common carrier—Steamship Company carrying goods for Railway Company, liability of.

Plaintiffs consigned certain goods to a Railway Company for carriage to a certain destination. Owing to a breakdown on the Railway line, the Railway Company made arrangements with the defendant Steamship Company to carry the goods over a portion of the route by water. The ordinary business of the defendant Company was to transport goods over that portion of the route and no special terms were entered into between the Railway Company and the defendant Company. The goods were destroyed by fire while in the custody of the defendant Company. Plaintiffs sued the defendant Company for damages for loss of the goods;

Held, that the defendant Company was liable to the loss as common carriers of the goods. [p. 1039, col. 2.]

The words "for all persons indiscriminately" which occur in the definition of "common carrier" in section 2 of the Carriers Act, simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. [p. 1040, col. 1.]

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This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery. [p. 1040, col. 1.]

In order to limit the liability of a person who answers the definition of a "common carrier" under the Carriers Act, *viz.*, of transporting for hire goods from place to place for all persons indiscriminately, what is required is that the nature of the contract entered into by him must either have the limitation of his liability under section 6 of the Carriers Act made expressly and in writing, or the facts must be such that for the contract in question the carrier was departing from his usual business and engaging in a different type of business from that of common carrier. [p. 1040, col. 2 & p. 1041, col. 1.]

Appeals against the judgment of the Calcutta High Court, dated the 30th November 1923, affirming a judgment of the High Court on the original side, dated the 19th January 1921.

Messrs. *A M. Dunne, K. C.*, and *Kenworthy Brown*, for the Appellants.

Messrs. *A. Neilson, K. C.*, and *E. F. Spence*, for the Respondents.

JUDGMENT.—These are consolidated appeals against decrees dated the 30th November 1921, pronounced by the High Court of Judicature at Fort William in Bengal. These decrees affirmed seven decrees of Mr. Justice Rankin dated the 19th January 1921.

The action was directed by the respondents against the Assam-Bengal Railway Company as well as the present appellants, the India General Navigation and Railway Company. It was dismissed by consent against the former, called the Railway Company, and it proceeded against the latter, called the Shipping Company.

The plaintiffs' claim is for damages for the loss of certain tea, part of a consignment of their goods which in November 1915, was delivered by the respondents to the Railway Company for the purpose of transport from Assam to Chittagong for shipment to England. Consignments are in ordinary course thus taken and carried over all the Railway Company's own line without recourse to any other system of transport.

A section of the line, however, south of Lumding, in June 1915, broke down. It had broken down two years previously and arrangements had then been made for taking the goods by ships or flats from Gauhati on the Brahmaputra river down to Chandpur on the Meghna river. At the latter point the goods could again be put on rail and so reach Chittagong. This river service was performed both in 1913 and 1915 by the present appellants. The only bargain on the subject of the goods in the present case was contained in a single letter dated the 11th June 1915, from the Traffic Manager of the Railway Company to the Agents of the Shipping Company and was to the effect that

> "All tea from Upper Assam stations for Chittagong will be diverted *via* Chandpur and Gauhati. The division of the freight between the Steamer Company and this Railway following the precedent of 1913."

No conditions of any kind, other than that, were either produced or proved.

What happened to the goods was that they were conveyed from Bordubi Road (Assam) by rail to Gauhati. The railway having broken down the goods were there put on board the Steamship Company's flat "Cauvery" for carriage by river to Chandpur.

On the 21st December 1915, while the vessel was still lying at Gauhati, a fire broke out and certain of the tea was destroyed.

There were two questions in the case. First, whether the Steamship Company were liable to the respondents, the owners of the goods, in damages as a common carrier; and second, whether if not so liable, they were liable at common law, by reason of the fire having been caused through their negligence. Their Lordships have not thought it necessary to deal with this second legal head of claim, the materials for which are in the evidence, because they are of opinion that the judgments pronounced by both the Courts below on the first point are clearly right, viz., that the Shipping Company in the circumstances described were under the law of India common carriers and answerable to the owner in damages as per the decrees.

It was quite clearly established, to use the language of their own witness, Parrot, one of their staff: "We are undoubtedly common carriers so far as the river portion of the journey is concerned." The case for the appellants, however, was that by reason of the

special nature of the contract of carriage entered into in this case the denomination of common carriers could not apply to them nor the liability of common carriers attach.

There was considerable reference made to the law of England. Whether the result under that law would have been in any wise different from that arrived at is doubtful enough ; but the reference was unnecessary, because the point to be decided arises under the law of India. The true question in the appeal simply is whether under the Carriers Act, No. 3, which received the assent of the Governor-General in Council on the 14th February 1865, the definition of common carrier there mentioned covers the appellants *quoad* the present transaction. That definition is to the following effect:—

"In this Act, unless there be something repugnant in the subject or context—"Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately."

It is not denied that the appellants were *de facto* "engaged in the business of transporting for hire property from place to place by .....inland navigation." The challenge, however, is that this was not done "for all persons indiscriminately." There is no question raised as to the goods being beyond the appellants' carrying capacity ; they in fact, receiving a large consignment, supplied the ships or flats to carry it. So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery.

In the present case all of these propositions are admitted ; but it is said that there was here a contract of a special nature. The specialities in it were two, first that the Shipping Company did in fact assign particular flats for the considerable block of business coming to them at Gauhati by reason of the railway breakdown ; and secondly, that these flats were destined from Gauhati to Chandpur without calling at the ordinary intermediate ports. On the first of these points their Lordships would observe that there is no written proof in the case apart from the letter already referred to, which was simply to the effect that the rate for carriage would be the same as that charged in 1913. And as to special flats being employed there is no trace in the evidence that if there had been other customers' goods awaiting shipment for Chanpur and consigned to Chittagong, these could not and would not have been sent along with the cargo taken over from the Railway Company. In short, the idea of this portion of the river carriage being a temporary and exclusive monopoly for one single customer on special terms entirely disappears.

On the second point, *viz.*, that this was a through route, their Lordships fail to see how that circumstance decategorises the appellants from being common carriers under the statute, or relieves them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction, another and different type of business had been entered on.

When, for a particular contract, special terms are desired which involve a different category of liability, there is nothing to prevent that being secured; section 6 of the Indian Carriers Act can then be taken advantage of. The language of section 6 is as follows :—

"The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice ; but any such carrier.....may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same."

The goods were accepted for delivery by the appellants without any such special signed contract for limitation of liability.

What is required in the case of a person who answers the definition under the Indian Carriers Act, viz., of transporting for hire

goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. The Judges in both Courts appear to have not only correctly looked at the case from this point of view, but to have been entirely right in their conclusion. The learned Rankin, J., puts the matter thus :—

"The only question is whether, because it was doing this particular set of journeys for the Railway Company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur, it was departing from its usual business and engaging in a different type of business, *viz.*, the business of a sub-contractor for the Railway in such special sense as to take it *quoad* these journeys out of the avocation of a common carrier. On the whole I think it was not."

Their Lordships agree that the question is correctly thus put in law and the proper answer given in fact.

The learned Sanderson, C. J., quotes the passage just given and agrees with it, as do their Lordships ; and the learned Richardson, J., puts the matter simply, thus :—

"A common carrier cannot divest himself of his responsibilities as such without satisfying the Court that in the particular transaction he acted in some other capacity, and in this case, in my opinion, the appellant Company have not discharged the burden which lay upon them."

The above also appears correct.

As already mentioned all other points in the case have disappeared.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Z. K. *Appeals dismissed.*

Solicitors for the Appellants—Messrs. *Morgan, Price, Garden,* and *Manley.*

Solicitors for the Respondents—Messrs. *Sanderson,* and *Orr Digeram.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 543 AND 544 OF 1920.

July 7, 1922.

Present :—Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

CHHOTEY LAL—PLAINTIFF—APPELLANT

versus

CHANDRA BHAN—DEFENDANT —RESPONDENT.

Hindu Law—Adoption—Datta Homa *ceremony, necessity of—Adoption not challenged for long time—Presumption—Civil Procedure Code (Act V of* 1908), *s.* 11, *Expl. IV*—Res judicata—*Title and cause of action different—Alternative ground of attack—Different property—Appeal, second—Alternative title whether can be set up.*

The performance of the *Datta Homa* ceremony is not necessary where the adoptive father and the son to be adopted belong to the same *gotra.* [p. 1043, col. 2.]

Balgangadhar Tilak v. *Shri Shrinivasa Pandit,* 29 Ind. Cas. 639 ; 39 B. 441 ; 13 A. L. J. 570 ; 19 C. W. N. 729 ; 17 Bom. L. R. 527 ; 22 C. L. J. 1 ; 29 M. L. J. 34 ; 18 M. L. T. 1 ; (1915) M. W. N. 484 ; 2 L. W. 611 ; 42 I. A. 135 (P. C.), followed.

Where there is an initial probability that an adoption is likely to have been validly made and the conduct of the parties cognisant of the facts has been at last consistent with such an hypothesis, there is sufficient material to justify a presumption that the adoption was valid, even though direct evidence to prove that the necessary preliminaries had been performed is, owing to the lapse of time, not available. [p. 1044, col. 1.]

Chandra Kunwar v. *Chaudhuri Narpat Singh,* 29 A. 184 ; 9 Bom. L. R. 267 ; 2 M. L. T. 109 ; 17 M. L. J. 103 ; 5 C. L. J. 115 ; 11 C. W. N. 321 ; 4 A. L. J. 102 (P. C.); *Har Shankar Partab Singh* v. *Lal Roghuraja Singh,* 29 A. 519 ; 34 I. A. 125 ; 4 A. L. J. 497 ; 2 M. L. T. 391 ; 6 C. L. J. 13 ; 11 C. W. N. 841 ; 9 Bom. L. R. 757 ; 17 M. L. J. 354 (P. C.), followed.

Where an adoption has not been challenged for nearly half a century, it is permissible to presume that the *Datta Homa* ceremony, if it was necessary, must have been performed. [p. 1044, col. 1.]

A decision in a suit cannot operate as *res judicata* in a subsequent suit based on a different title and a different cause of action. [p. 1045, col. 1.]

The failure of a party to set up a title as an alternative ground of attack cannot operate to deprive him of his right to set up that title in a subsequent

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suit in regard to property which was not in dispute in the previous suit. [p. 1045, col. 1.]

A plaintiff may be permitted to succeed in second appeal on the basis of an alternative title not set up in the lower Courts where the facts established are so plain that *prima facie* it would be doing injustice to deny to him a right to which he is entitled on that basis. [p. 1045, col. 1.]

Skinner v. *Naunihal Singh*, 19 Ind Cas. 267 ; 35 A. 211 ; 40 I. A. 105 ; 25 M. L. J. 111 ; 11 A. L. J. 494 ; 13 M. L. T. 488 ; (1913) M. W. N. 500 ; 17 C. L. J. 555 ; 15 Bom. L. R. 502 ; 17 C. W. N. 853 (P. C.), followed.

Appeal from the decision of the Judge of Agra, dated 16th February 1920.

Dr. *Surendra Nath Sen*, Munshi *Girdhari Lala Agarwala* and Babu *Surendra Nath Gupta*, for the Appellant.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—These appeals arise out of a suit brought by the plaintiff appellant for the possession of a certain house and for mesne profits. The house originally belonged to a person named Sheola Mal and was his self-acquired property. Sheola Mal had a son Mathra Das and a daughter, who was the mother of Raja Ram and Ram Babu. The allegations of the plaintiff were that Mathra Das had been adopted by Kunj Lal, the brother of Sheola Mal, that on the 13th May 1906 Sheola Mal made a gift of the said house in favour of Raja Ram and Ram Babu ; that Ram Bubu predeceased Raja Ram and left no issue, and that the said house was sold in execution of a decree obtained by Baij Nath against Raja Ram and purchased by the plaintiff on the 18th September 1917.

The defendants on the other hand denied that Mathra Das had been adopted by Kunj Lal and asserted that if such adoption took place, it was invalid because no ceremony of adoption was performed. It was further asserted that Mathra Das and Sheola Mal lived jointly and were joint owners of the said house and that on the death of Sheola Mal it devolved on Mathra Das and his sons. The defendant Moti Lal claimed to have purchased that house, in execution of a decree held by Kunwar Chand and others against the sons of Mathra Das on the 3rd of April 1917. The other defendant Chandra Bhan claimed to have obtained this house from Moti Lal by virtue of a sale made by Moti Lal in his favour.

It appears that a suit had been filed in 1913 by Raja Ram for possession of the southern portion of the upper story of the house in dispute against *Musammat* Kalawati, the widow of Mathra Das and Raghunath, son of Mathra Das, which was dismissed on the 12th August 1913. The contention of the defendants was that the dismissal of that suit operated as *res judicate*.

The Court of first instance found that the previous suit operated as *res judicata* so far as the southern portion of the upper story of the house in dispute was concerned. It held the deed of gift executed by Sheola Mal in favour of Raja Ram and Ram Babu to be valid and Shecla Mal competent to execute it. It also held that the adoption of Mathra Das was proved and that the plaintiff had a good title to the house except as regards that portion about which the previous suit brought by Raja Ram against *Musammat* Kalawati and Raghunath had been unsuccessful. The lower Appellate Court, however, came to the conclusion that the adoption of Mathra Das was invalid and that the due execution of the deed of gift by Sheola Mal was not established. It also found that the finding in the previous suit that the deed of gift had not been proved operated as *res judicata* and was binding on the parties. It accordingly dismissed the suit.

The title of Sheola Mal, to the entire house is no longer disputed. The genuineness and validity of the deed of gift are, however, questioned. The deed is registered and is proved by the scribe to have been signed by Sheola Mal. But its due attestation is not established. The deed of gift recites that Sheola Mal had given his son Mathra Das in adoption to Kunj Lal, that Mathra Das was in possession of the property belonging to Kunj Lal in that capacity, and that his daughter's son Raja Ram and Ram Badu, whose parents were dead, were living with him and were being maintained at his expense. It then goes on to convey the entire house to Raja Ram and Ram Babu. That gift was attested by several witnesses, who state that the scribe took it to them for attestation. That evidence has been considered by the lower Appellate Court to be insufficient to prove due attestation and the learned Counsel for the plaintiff appellant concedes that he is not in a position to challenge the correctness of that

finding. That being so the deed of gift must be treated as inoperative.

There is another reason, however, why it is not open to the plaintiff to rely on the deed of gift in proof of his title. In the previous suit filed by Raja Ram against *Musammat* Kalawati and Raghunath, the execution of the deed of gift had been held to be not proved. That suit was decided after some portion of the evidence adduced by the plaintiff had been recorded. An adjournment had been obtained to produce other evidence on condition of the plaintiff paying certain costs to the opposite party but those costs were not paid. When the case eventually came up for decision on the adjourned date, the pleader for the plaintiff stated that he had no instructions and the Court proceeded to try the suit on the merits and came to the conclusion that the deed of gift had not been proved. That finding was finding arrived at in a suit to which the predecessor-in-title of the present plaintiff and the predecessor-in-title of the present defendent were parties, and it is not open to the plaintiff to go behind that finding in the present suit. It is argued on behalf of the plaintiff appellant that the Court which tried that suit was not competent to try the present one, because the value of the property now in dispute exceeds the sum of Rs. 1,000 and the Court which tried that suit could not, therefore, have tried the present one; but the value of the house as put down in the present plaint is only Rs. 1,000. There is an additional claim for Rs. 42 mesne profits; but that claim cannot be taken into account in determining whether the finding arrived at in the previous suit was arrived at by a Court which was competent to try the subsequent suit. The finding in the previous suit, therefore, operates as *res judicata* in the present suit.

If that finding is binding on the parties to the present suit, the title, which the plaintiff seeks to establish by virtue of that deed of gift, must fail altogether. It is, however, contended that even if that gift be treated as invalid, the plaintiff ought to succeed because Raja Ram and Ram Babu would, on the allegations made in the plaint, be also the legal heirs of Sheola Mal and were entitled to his property on his death. That leads us to the question whether Mathra Das had been adopted by Kunj Lal and whether that adoption was valid. On that point it is necessary in the first place, to refer to the deed of gift where the adoption is recited. In the second place, some evidence was adduced on behalf of the plaintiff to prove that adoption which was accepted by the Courts below. The ceremony of *Datta Homa* was not shown to have been performed but the validity of the adoption cannot be questioned now. As observed by their Lordships of the Privy Council in *Bal Gangadhar Tilak* v. *Shri Srinivas* (1) the performance of the ceremony is not really necessary where the adoptive father and the son to be adopted belong to the same *gotra*. The lower appellate Court points out that according to the statement of Kama Mal, a witness produced by the plaintiff, Kunj Lal himself had been adopted by his brother-in-law Beni Ram and as Beni Ram must necessarily have been of a different *gotra* from Kunj Lal the adoption of Mathra Das by a person of a different *gotra* was invalid unless it was accompained by the performance of the said ceremony. That was not, however, the ground set up by the defendants in their defence in derogation of the adoption. A solitary statement of that character elicited in cross-examination from a witness of the opposite party, which the opposite party had no opportunity for explaining cannot be utilized for the purpose of founding an objection which had not previously been taken or put into issue. It is possible that the plaintiff might have a good explanation as to how that statement was made or as to how such an adoption had taken place and could have been valid. In any case a plea of that character cannot be allowed to be entertained at a stage, when it is not open to the other party to meet it by calling other evidence. In fact in the memorandum of appeal filed by the defendant in the lower Appellate Court, no such plea had been taken and that plea must, therefore, be ruled as inadmissible.

In any event the adoption of Mathra Das took place according to the deed of gift about

(1) 29 Ind. Cas. 639; 39 B. 441; 18 A. L. J. 570; 19 C. W. N 729; 17 Bom. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 42 I. A. 135 (P.C).

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48 years ago and by virtue of that adoption Mathra Das was described as having been in possession of the property of Kunj Lal. In a suit filed in 1905 by a creditor of Mathra Das, the latter was described as the adopted son of Kunj Lal. The adoption has not been challenged by any member of the family during the last 48 years and though definite evidence is not now forthcoming to prove that the *Datta Homa* ceremony had been performed at the time the adoption took place, it is permissible to presume from the fact that the adoption had not been challenged for such a long period that if the ceremony was necessary, it must have been performed. In *Chandra Kunwar* v. *Chaudhri Narpat Singh* (2) their Lordships of the Privy Council, relying on an admission of the factum of adoption made by one of the parties to the proceeding observed that :—

" The admission shifted the onus from the other party to the party by which such admission had been made until the presumption that that admission was true was rebutted or satisfactorily explained."

In *Har Shanker Partab Sing* v. *Lal Raghuraja Singh* (3) their Lordships said, that " Where there was initial probability that the adoption was likely to have been validly made and the conduct of the parties, cognizant of the facts, has been at least consistent with such an hypothesis, there was sufficient material to justify a presumption that the adoption was valid, even though direct evidence to prove that the necessary preliminaries had been performed was, owing to the lapse of time, not available."

The plaintiff could not have been reasonably expected at this distance of time to produce direct evidence to establish what preliminaries had been performed 48 years ago. Sheola Mal is dead. So is Kunj Lal. So also Mathra Das. The evidence, which would have been available, had the adoption been challenged soon after it was made, has naturally disappeared with the lapse of time. In these circumstances it is reasonable to presume in the absence of anything to show the contrary that everything necessary that would have made the adoption valid was done ; for if that had not been done, some one or other of the family of Sheola Mal or of Kunj Lal would have taken some steps within this long period to challenge the adoption or to claim the property that had been left by Kunj Lal. The ground upon which the lower Appellate Conrt has held the adoption to be invalid cannot, therefore, be accepted.

If the adoption is valid, the necessary result would be that the property of Sheola Mal would devolve on his death irrespective of the deed of gift on Raja Ram and Ram Babu, his daughter's sons, and on the death of Ram Babu, his interests would devolve on Raja Ram and the sale held in execution of the decree and the purchase by the plaintiff of the interests of Raja Ram at a sale held in 1917 must be treated as valid and effectual.

It only remains to consider the question of *res judicata*, which has been raised on behalf of the defendants. As we have already pointed out, the decision in the previous suit must be treated as final, so far as it relates to the southern portion of the upper storey, which was the subject-matter of the claim at that time. That suit having been dismissed and the dismissal not having been set aside, that decision would operate as a final adjudication of the rights of the parties so far as that claim went. The defendants were present to prosecute their defence and the result of that decision was to invest them with an indefeasible title to the property, which was then the subject-matter of the claim of Raja Ram and over which they continued in possession till their rights were sold by auction and purchased by the defendant No. 2. The same, however, cannot be said about the remaining portion of the property. The cause of action alleged in the previous suit was that the defendants to that suit had taken possession of the southern portion of the upper storey with the permission of the agents of Raja Ram and Ram Babu during their minority and that they were wrongfully refusing to vacate the same. The title by virtue of which Raja Ram claimed to derive his right to sue was the deed of gift said to have been executed by Sheola Mal. The deed of gift not having been proved, the claim of Raja Ram failed. But the present suit, so far as it re-

(2) 29 A. 184; 9 Bom. L. R. 267 ; 2 M. L. T. 109 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A L. J. 102 (P.C.).

(3) 29 A. 519 ; 34 I. A. 125; 4 A. L. J. 497; 2 M. L. T. 391; 6 C. L. J. 13 ; 11 C. W. N. 841; 9 Bom. L. R. 707 ; 17 M. L. J. 354 ; (P.C.).

lates to the remaining property is, however, based on a different title and a different cause of action. So far as the deed of gift is concerned the title is common and must be set aside as no longer enforceable but so far as the right which Raja Ram and Ram Babu claim to derive by inheritance as daughter's sons of Sheola Mal is concerned, that title had not been tried or determined in the previous suit. It might have been open to Raja Ram to have set up that title as an alternative ground of attack but that omission could not operate to deprive him of his right to set up that title in regard to property which was not then in dispute. The cause of action in the present suit is also different. By virtue of his purchase at auction Moti Lal claims to have obtained possession of the disputed house and the decision in the previous suit cannot, therefore, affect the property, which was not the subject matter of the claim in the previous case.

It has been strenuously argued on behalf of the defendants-respondents that the plaintiff-appellant ought not to be allowed to urge in support of his claim an alternative title, which had not been expressly set up either in the plaint or in the memorandum of appeal filed in the lower Appellate Court. In the plaint Raja Ram and Ram Babu were described as the sons of the daughter of Sheola Mal and a reference was also made to the deed of gift executed in their favour by their maternal grand-father. The relationship set up in the plaint was denied by the defendants but it was found by the Courts below that Raja Ram and Ram Babu were the sons of the daughter of Sheola Mal. The daughter had died in the life-time of Sheola Mal. That gift was upheld by the Trial Court and it was obviously unnecessary to press an alternative title, when the other title had been duly recognized and accepted. It is not possible to say whether before the lower Appellate Court the title derived by inheritance was urged; but the facts established are so plain that *prima facie* it would be doing injustice to deny to the plaintiff a right to which he is entitled on that basis. In *Skinner* v. *Naunihal Shingh* (4) their Lordships of the Privy Council permitted an alternative case set up by the appellant on appeal to be the ground of judgment because "It seemed possible in that way to construct the material for a just decision of the true rights of the parties concerned which would be the best in the interests of all and prevent further litigation."

We allow S. A. No. 543 of 1920 and dismiss S. A. No. 544 of 1920 and setting aside the decree of the lower Appellate Court restore that of the Court of first instance except in so far that the parties will bear their own costs throughout.

Z. K. *Appeal No.* 543 *allowed.*
Appeal No. 544 *dismissed.*

(4) 19 Ind. Cas. 267; 35 A. 211; 40 I. A. 105; 25 M. L. J. 111; 11 A. L. J. 494; 13 M. L. T. 488; (1913) M. W. N. 500; 17 C. L. J. 555; 15 Bom. L. R. 552; 17 C. W. N. 853 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2286 OF 1920.

May 1, 1923.

Present :—Mr. Justice Abdul Raoof
and Mr. Justice Lumsden.

PREM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
HARDIT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Act (*X of* 1865), *s.* 111, *applicability of, to Punjab—Hindu Law—Will—Gift over, conditions and validity of.*

Section 111 of the Succession Act is applicable to cases governed by the Hindu Wills Act, but as the latter Act is not applicable to the Punjab, section 111 of the Succession Act has no application to the case of a Will made by a Hindu in the Punjab. [p. 1047, col. 1].

It is competent to a Hindu to make a devise of an absolute estate defeasible on the happening of subsequent event. But the event must happen, if at all, immediately on the close of a life in being at the death of the testator, and the gift over must be in favour of somebody in existence at the death of the testator. It is immaterial whether the property dealt with is ancestral or self-acquired. [p.1047, col. 2.]

Sreemutty Soorjeemoney Dassee v. *Denabundoo Mullick*, 9 M. I. A. 123; 1 Sar. P. C. J. 837; 19 E. R. 688; *Ram Chand* v. *Dewan Chand*, 18 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912, followed.

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Mohan Lal v. *Nirajan Das*, 60 Ind. Cas. 619 ; 2 L. 175 ; *Sures Chandra* v. *Lalit Mohan Dutta*, 31 Ind. Cas. 405 ; 22 C. L. J. 316 ; 20 C. W. N. 463, distinguished.

Appeal from the decree of the District Judge, Jullundur, dated the 14th August 1920, reversing that of the Subordinate Judge, Jullundur, dated the 14th July 1919.

Dr. *Nand Lal*, for the Appellants.

Lala *Badri Das*, for the Respondents.

JUDGMENT.—The facts of the case giving rise to this appeal are so fully detailed and discussed in the judgments of the two Courts below that it will serve no useful purpose to recapitulate them for the purposes of this appeal.

It appears that there were five sons of one Punjab Singh. Two of his sons Sher Singh and Hakam Singh used to live jointly. The latter died leaving three sons and a widow who married Sher Singh by whom she had a son Baggu. Sher Singh executed a Will on the 25th of August 1896. The material portion of the Will is translated and given in the judgment of the lower Appellate Court. It runs thus :—

"After my death my property moveable and immoveable would be owned that is inherited by Hardit Singh, Nand Singh, Dewa Singh, the sons of Hakam Singh, and Baggu, the son of Sher Singh, as follows :—

Sons of Hakam one-half, Baggu one-half. In case any son of Hakam dies childless, his share would be divided by the remaining sons of Hakam Singh and Baggu or their descendants half and half, and if Baggu dies childles, his estate will go to the sons of Hakam."

Sher Singh died in March 1918. On the 25th of May 1918, effect was given to this Will by mutating the names of the sons of Hakam Singh, in respect of half of the property and in respect of the other half in favour of Baggu. Subsequently Baggu also died on the 22nd of December 1918, without leaving any child and his estate was mutated in the names of the defendants, the sons of Hakam Singh. The plaintiffs, two of whom are the brothers of Sher Singh and one, the son of Thakar, another brother of Sher Singh, brought a suit claiming three-fourths of the estate of Sher Singh and challenged the Will on three grounds, namely : (1) that it was invalid being opposed to the custom applicable to the parties : (2) because Sher Singh had no power to make any disposition with regard to Baggu's property ; and (3) that there being a provision in favour of unborn persons the Will could not be supported according to law and custom. A fourth contention was also raised that Sher Singh was not competent according to custom or law to make a gift over to take effect in favour of the three sons of Hakam Singh after the demise of Baggu. A contention was also raised as to the ancestral character of the property. The Trial Court on these pleadings framed seven issues, namely :—

(1) Whether the property is ancestral ?

(2) Whether Sher Singh was the sole owner of the houses in dispute ?

(3) Whether the deceased executed the Will, dated the 25th August 1896, for services, and whether it was valid ?

(4) Whether Sher Singh was competent to dispose of Baggu's property, and whether such a Will was valid ?

(5) Whether a declaratory suit lies regarding the moveables ?

(6) If so, how much moveable property did Sher Singh leave, and is the Will invalid regarding that ?

(7) To what relief are the plaintiffs entitled ?

The Court found the land to be ancestral. It also held that as the houses belonged to an agricultural community they should also be held to be ancestral property. As regards the power of Sher Singh to execute the Will the Could held that he was justified under the law and custom to execute it. The Court, however, held that Sher Singh had no power to make any provision with regard to the future devolution of the property after the death of. Baggu. Evidently the Court relied on the well-known rule laid down in the celebrated case of Tagore family prohibiting the creation of a line of succession as opposed to the succession laid down in Hindu Law. The Court accordingly decreed the claim of the plaintiff with regard to the three-eighths of the property, namely, that representing the share of Baggu ; but it dismissed the suit with regard to the half of the property which had been devised in favour of the sons of Hakam.

Both the parties preferred appeals against the decision of the Trial Court.

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The lower Appellate Court dismissed the appeal of the plaintiffs but decreed that of the defendants and dismissed the plaintiffs' suit *in toto*: The plaintiffs have come up in second appeal to this Court and an elaborate argument has been addressed to us on their behalf by their learned Counsel Dr. Nand Lal. The first contention put forward by the learned Counsel was that the Will of Sher Singh was invalid inasmuch as it was not warranted by the custom applicable to the parties. The question of custom, however, was decided in favour of the validity of the Will by the lower Appellate Court and an attempt was made in this Court to question that finding. No certificate as required by section 41 of the Punjab Courts Act has, however, been produced and we have, therefore, not allowed Dr. Nand Lal to address to us any argument on the question of custom.

The main contention upon which the decision of the appeal depends was put forward by Dr. Nand Lal with some force. In support of his argument the learned Counsel first relied upon the provisions of section 10 of the Transfer of Property Act. That section, however, has no bearing on the question before us. He then relied on the provisions of section 111 of the Indian Succession Act. His attention having been drawn to the provisions of section 331 of the Indian Succession Act he very properly dropped this contention. As held by the lower Appellate Court section 111 has been made applicable to cases governed by the Hindu Wills Act. This Act, however, is not applicable to this Province. Therefore, section 111 of the Indian Succession Act cannot apply.

The real question which has been dealt with with great ability by the learned District Judge in appeal and which we have to decide here is whether Sher Singh was competent to make a gift over in favour of the sons of Hakam Singh to take effect on the death of Baggu. There is no dearth of authority on this point. The question was clearly decided by their Lordships of the Privy Council so far back as 1862 in the case of *Sreemutty Soorjeemoney Dassee* v. *Denobundoo Mullick* (1). At page 135 of the report [9 M. I. A.] their Lordships are reported to have made the following weighty observation :—

"Whatever may have formerly been considered the state of that law as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu Law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen if at all, immediately on the close of a life in being. Their Lordships think that there is not ; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist".

The learned Counsel for the appellant has tried to distinguish the facts of the present case, from those of the case decisided by their Lordships on the ground that in the latter case the devised property was the self-acquired property of the testator. It is, however, clear that the Privy Council decision did not turn upon this circumstance. The question really to be considered was whether a Hindu, who had a power to transfer his property, could make a will with a gift over and their Lordships decided in the affirmative. It will serve us useful purpose to cite here the numerous authorities which have followed the decision of their Lordships. In almost all the text books the rule on the subject is laid down in the clearest terms and no doubt can possibly exist as to it now.

Mulla in his Principles of Hindu Law, 3rd Edition, in paragraph 314 has thus stated the rule :—

"It is competent to a Hindu to make a grant of an absolute estate defeasible on the happening of a subsequent event. But the event must happen, if at all, immediately on the close of a life in being at the death of a testator, and the gift over must be in favour of somebody in existence at the death of the testator."

On the facts admitted in the present case all the conditions laid down in this rule are

(1) 9 M.I.A. 123 ; 1 Sar P. C. J. 837 ; 19 E. R. 683.

satisfied. This rule is thus stated in Trevelyan on Hindu Law, 2nd Edition, page 541:—

Before the passing of the Hindu Transfers and Bequests Act, 1914, and the Hindu Disposition of Property Act, 1916, a gift by will upon an event which was to happen, if at all, immediately at the close of a life in being would be good if the donee be in existence at the time of the death of the testator, but not otherwise On these conditions an estate could be divested."

Mayne in his book on Hindu Law and Usage has dealt with the matter elaborately and has referred to the decision of their Lordships in the case already referred to. The whole question is freely discussed at pages 586 and 587, 9th Edition.

A similar view was taken by the learned Judges of the Punjab Chief Court in *Ram Chand* v. *Dewan Chand* (2). Although no reference is made to the decision of their Lordships of the Privy Council in *Sreemutty Soorjeemoney Dassee* v. *Denobundoo Mullick* (1) in that case the principle decided therein is exactly the same as that laid down by their Lordships.

Our decision in this appeal is in no way contrary to the decision of a Division Bench of this Court in the case of *Mohan Lal* v. *Niranjan Das* (3). The will, the provisions of which were the subject of consideration in that case, by its third clause provided as follows:—

" The house known as Garhiwala, situate at Lahore, Kusha Mutsaddi Mal, was acquired by me (Rai Bahadur Gopal Das). It adjoins the walls of the house of Pundit Ganesh Das. *Mt.* Uttam Devi, my wife, will be the owner of this house. She will be at liberty to alienate it or dispose of it according to her wishes. None of my descendants will have any concern with it during her life-time. If my wife does not give or alienate it to any person, it will remain the joint property of Niranjan Das and Narsingh Das, my grand-sons."

The Division Bench, following the rule laid down by the Calcutta High Court in the case of *Sures Chandra Palit* v. *Lalit Mohan Dutta* (4), held that the provision as to the gift over was void for uncertainty. One of the rules stated by the Calcutta Judges was that " when an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though concluded in the most direct and precise words is void for uncertainty." From the following passages in the judgment of the Lahore case it is further made clear that the gift in that case was held to be void on the ground of uncertainty:—

" The first case was decided by the Bombay High Court before the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (5). Moreover, there was no element of uncertainty as to the devolution of the property in that case as the whole property was kept intact to be handed over to Mahalakshmi, see *Lallu* v. *Jagmohan* (6).

" The second case *Ram Chand* v. *Dewan Chand* (2), is also clearly distinguishable. In the Will construed in that case power of alienation was not given to *Musammat* Durga Devi. It was clearly understood that the whole property was to go intact to Hukam Devi."

In the present case there is no element of uncertainty. Therefore, the gift in this case cannot be held to be void on that ground.

The learned Judge of the Court below, in our opinion, took the correct view of the law and arrived at a correct decision. We, accordingly, dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(2) 13 Ind. Cas. 571 ; 65 P. R. 1912 ; 99 P. L. R. 1912 ; 209 P. W. R. 1912.
(3) 60 Ind. Cas. 619 ; 2 L. 175.
(4) 31 Ind. Cas. 405 ; 22 C. L. J. 316 ; 20 C. W. N. 463.
(5) 30 A. 84 ; 35 I. A. 17 ; 7 C. L. J. 131 ; 5 A. L. J. 67 ; 12 C. W. N. 231 ; 18 M. L. J. 7 ; 10 Bom. L. R. 59 ; 3 M. L. T. 141 (P. C.).
(6) 22 B. 409 at p. 418 ; 11 Ind. Dec. (N. S.) 855.

KOTAKAL *v.* MALABAR TIMBER CO.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT

NO. 1399 OF 1921.

March 31, 1924.

Present:—Mr. Justice Fawcett.

K. C. SHRIMAN NEDAN RAJAH KOTAKAL—PLAINTIFF

versus

THE MALABAR TIMBER CO. LTD. AND OTHERS—DEFENDANTS.

Letters Patent (Bom.) cl. 12—Land situate outside jurisdiction—Suit to declare charge on land—High Court, power of.

The Bombay High Court has, under Cl. 12 of its Letters Patent, jurisdiction *in personam* in regard to lands situate outside its teritorial jurisdiction, and can grant relief by way of a declaration of a charge on such lands. [p. 1049, col. 2, p. 1051, col. 2, p. 1052, col. 2.]

Case-law reviewed.

Mr. *Bahadurji*, with Mr. *Kanga* and Mr. *B. J. Desai*, for the Plaintiff.

Mr. *M. V. Desai*, with Mr. *Munshi*, Mr. *Taraporevala*, with Mr. *M. C. Setalvad*, for the Defendants.

FACTS.—The plaintiff a resident of Malabar, who held certain forest rights in a forest in Malabar outside the original jurisdiction of the Bombay High Court sold them to the 2nd Defendant a firm of merchants at Bombay, who again sold the same to the 1st Defendant.

In a suit by the plaintiff against both defendants for recovery of the balance of unpaid purchase money, he prayed for a declaration that he was entitled to a charge on the properties sold and for sale thereof in default of payment of the decree amount.

The Defendant contended *inter alia* that the forest being outside the jurisdiction of the Court, the Court had no jurisdiction to grant the prayers relating to the immoveable properties. A preliminary issue was joined on the question of jurisdiction and the Court delivered the following

JUDGMENT.—This issue comprises two main questions,

(i) Whether, as ruled in *Holkar* v. *Dadabhai Cursetji Ashburner* (1), this Court, has, under Cl. 12 of its Letters Patent, jurisdiction *in personam* in regard to lands outside the original jurisdiction of this Court; and

(ii) If so, whether this suit is one in which such jurisdiction can properly be exercised.

In regard to the first point I think the answer should be in the affirmative, for the following reasons :—

(*a*) The decision in *Holkar* v. *Dadabhai* (1) is one that *prima facie* binds me sitting as a Judge on the Original Side of this Court, and unless it is shown to have been overruled, or shaken to an extent that ought to prevent me from following it, I am bound by that decision. In *Sundara Bai Sahiba* v. *Tirumal Rao Sahib* (2), it is said that the authority of this decision and of *Sorabji Cursetji sett* v. *Rattanji Dossobhoy Karam* (3) is considerably shaken, if they are not overruled by the later decision in *Vaghoji* v. *Camaji* (4). But there are really five distinct questions involved in these cases, *viz.*

1. Whether a suit 'for land' within the meaning of this Cl. 12 is confined to a suit *for the recovery or delivery* of land. So far as *Holkar* v. *Dadabhai* (1) might be said to support this view, it is no doubt shaken by *Vaghoji* v. *Camaji* (4) but Jenkins, C. J. points out at pp. 254-5 that really the decision in *Holkar's case* (1) is not based on any such view.

2. Whether a suit 'for land' extends to a suit where the purpose is to obtain a declaration of title to foreign land. This is decided in the affirmative in *Vaghoji* v. *Camaji* (4) but is not dealt with in the other two cases.

3. Whether the High Court of Bombay has all the powers of a Court of Equity in England for exercising jurisdiction *in personam* in regard to land outside the jurisdiction. This was directly decided in the affirmative in *Holkar's case* and Jenkins C. J. (1), in *Vaghoji* v. *Camaji* (4) takes that decision as binding (see

(1) 14 B. 353; 7 Ind. Dec. (N.S.) 635.
(2) 3 Ind. Cas. 930; 33 M. 131; 20 M. L. J. 103; 6 M. L. T. 263.
(3) 22 B. 701; 11 Ind. Dec. (N.S.) 1050.
(4) 23 B. 241; 6 Bom. L. R. 958.

at page 255) : so the two previous Bombay decisions are certainly not overruled or shaken, so far as they proceed on deciding that question in the affirmative.

4. If so, whether such jurisdiction exists, even though the defendant does not reside or carry on business or personally work for gain in Bombay. This is impliedly decided in the affirmative by *Holkar's case* (1), for the defendant there did not reside or trade or carry on business in Bombay (see at pages 354-5), though no reference to this point is made in the judgment ; it is also decided affirmatively in *Sorabji* v. *Rattonji* (3), but merely on the basis of previous binding authority. The point is not referred to in *Vaghoji* v. *Camaji*, (4) so these decisions cannot be said to be affected by that case. They are no doubt affected by the criticism that a Court of Equity in England does not ordinarily exercise such jurisdiction *in personam*, except against persons residing or carrying on business within its jurisdiction. There are, however, exceptions such as one referred to in *Jenney* v. *Mackintosh* (5) and *Duder* v. *Amsterdamsch Trustees Kantoor* (6), compare Dicey's Conflict of Laws, 3rd Edition page 226, foot-note (*g*), and Rule 60, pages 250-278.

In the unreported case of *Venkatrao Sethupathy* v. *Khimji Assur Virji* (7) the Court of Appeal has held that such jurisdiction does exist, not only in cases where the defendants or some of them reside permanently within the jurisdiction but in cases where, according to the provisions of the Letters Patent, they have been lawfully caused to appear upon summons and where the cause of action or part of it has arisen in Bombay. It is, however, open to question whether this does not go further than the corresponding law in England which seems to allow of such extended jurisdiction outside the Court's territorial jurisdiction only when there is already one defendant who resides or carries on business in England: cf Dicey's Conflict of Laws, 3rd Edn., Exception 7 at p. 265.

5. Whether such jurisdiction can be exercised to the extent of passing a decree which may affect the possession or control of the foreign land, *e.g.*, by ordering a mortgage debt to be realised by sale of the land. This is answered in the affirmative by the decision in *Holkar's* (1) and *Sorabji's* (3) *cases*; but the question is not directly dealt with in *Vaghoji* v. *Camaji* (4) though some remarks in the judgment as to the limitation on the jurisdiction exercised by a Court of Equity in England (at pages 256-7) may be said to weaken the authority of those decisions. On the other hand the judgment in *Venkatrao Sethupathy* v. *Khimji Assur Virji* (7) holds that such a suit is not a suit for land.

Therefore, it seems to me that the decision in *Holkar's case* (1) is not affected by *Vaghoji* v. *Camaji* (4) except in regard to points (1) and (5) and that it is confirmed in regard to point (3), which is the main question now before me. Nor, for the reasons given in my interlocutory judgment No. 1, do I think that the Bombay decisions have been overruled by the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Hari Dassi Debi* (8).

(*b*) On the contrary it seems clear that there are two cases where such jurisdiction *in personam* has been exercised by the Madras and Calcutta High Courts respectively, and the Privy Council have held that the High Courts had jurisdiction to do so. In *Nistarini Dassi* v. *Nundo Lall Bose* (9) the Judge pointed out that in regard to the lands in suit he was exercising this jurisdiction *in personam*, and in the same case on appeal to the Privy Council *Benode Behary Bose* v. *Nistarini Dassi* (10), at page 191, the Privy Council approved of this, saying :—

"The High Court of Calcutta, in its Ordinary Jurisdiction, had a right to order administration of this estate, and, as ancilliary to such an order, to set aside deeds obtained by the fraud of the executor. Nor does the circumstance that a decree had been granted by the Court of the 24-Pergunnahs making a fraudulent award an order of Court protect that decree from the jurisdiction of the Calcutta Court, when redressing that fraud. In

(5) (1886) 33 Ch D. 595; 55 L.T. 733; 35 W.R. 181.
(6) (1902) 2 Ch. 132 ; 71 L. J. Ch. 618 ; 87 L. T. 22 ; 50 W. R. 551.
(7) 80 Ind. Cas. 442 ; 26 Bom. L. R. 595.
(8) 23 Ind. Cas. 637 ; 41 I. A. 110 ; 16 Bom L. R. 400 ; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6 ; 18 C. W. N. 817 ; 19 C. L. J. 484 ; 12 A. L. J. 774 ; 1 L. W. 1050 ; 41 C. 972 (P C.).
(9) 26 C. 891 at pp. 921, 922; 3 C. W. N. 670 ; 18 Ind. Dec. (N.S.) 1171.
(10) 33 C 180 ; 2 C. L. J. 189 ; 9 C. W. N. 961 ; 15 M. L. J. 331 ; 7 Bom. L. R. 887; 32 I. A. 193 (P.C.).

like manner, their Lordships consider the Calcutta High Court entitled, for the due administration of the estate, to set aside leases of land outside the territorial limits of their jurisdiction, those leases having been made as an incident of the same fraud."

Similarly in another administration suit, *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*, (11), the judgment of Subramania Ayyar, J. shows that similar jurisdiction *in personam* was exercised by the Madras High Court in regard to land outside Madras, and the High Court's jurisdiction was confirmed as "too plain for argument" by the Privy Council in the same case on appeal: *Srinivasa Moorthy* v. *Venkata Varada Aiyangar* (12). I may further refer to the remarks of Sir Arnold White C. J. in his judgment in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar* (11), that the law of England may be looked to for the purpose of ascertaining the intention of the legislature in enacting clause 12 of the Letters Patent, which support the decision in *Holkar* v. *Dadabhai* (1).

(*c*) A point to be remembered is that clause 12 of the Letters Patent is similar in language to section 5 of the first Civil Procedure Code of 1859, and the close connection between the two is pointed out by Jenkins, C.J. in *Sudamdih Coal Co. Ld.* v. *Empire Coal Co. Ld.* (13). The provisions of this section 5 were changed in the next Code of Civil Procedure, Act X of 1877, section 16 of which was enacted in almost the same terms as the present section 16 of the Code of 1908. This in effect gives a definition of the expression 'suits for the land', but contains a proviso which substantially allows the jurisdiction *in personam* in regard to foregin lands, such as is referred to in *Holkar* v. *Dadabhai* (1). It was with reference to section 5 of the Code of 1859 that it was ruled in *Yenkoba Balshet Kasar* v. *Rambhajivalad Arjun* (14), and in *John Young* v. *Mangalapilly Ramaiya* (15), that such jurisdiction *in personam* could be exercised by a moffussil Court, and the legislature has clearly endorsed that view. As pointed out in the arguments of Latham, Advocate-General, in *Holkar* v. *Dadabhai* (1), (at page 356), this Court has always since *Yenkoba* v. *Rambhaji* (14) exercised this jurisdiction *in personam*; and it would be a strange anomaly if the High Court is deprived of the power of exercising this valuable form of equitable jurisdiction, in consequence of strict construction of the words 'suits for land' in clause 12 of the Letters Patent, while a moffussil Subordinate Judge's Court is allowed to exercise such jurisdiction. (Compare *Kashinath* v. *Anant* (16) and *Durga Das* v. *Jai Narain* (17). It seems to me that the effect of the decision in *Holkar* v. *Dadabhai* (1), and the settled practice of this Court in regard to that jurisdiction is to add a proviso to clause 12, similar to that contained in section 16 of the Civil Procedure Code of 1908.

(*d*) It is not necessary for me to consider whether a suit to enforce a charge on immoveable property cannot be said to be one within this personal jurisdiction, inasmuch as in such a case the relief sought cannot be completely obtained by personal obedience of a defendant residing or carrying on business in the jurisdiction, but in the last resort entails a sale of the land in order to enforce the charge. Nor need I enter into the wider question (5) that I have mentioned in the para. (*a*) of this judgment. The only relief affecting the land which is sought in this suit is the declaration of a charge upon it and it seems to me obvious that such a declaration is, at the worst, on the same footing as an injunction which can undoubtedly be issued in the exercise of this personal jurisdiction. If an injunction can be issued against the defendants restraining them from dealing with or disposing of the land in such a way as to obstruct or defeat this particular charge, *a fortiori* a declaration is a form of relief which can be given in exercise of this jurisdiction *in personam*. It may be pointed out that one result of such a declaration would be to put the plaintiff in the position of a secured creditor as against the defendant No. 1 Company, should it become insolvent or be wound up

(11) 29 M. 239 at p. 241; 1 M. L. T. 71; 16 M. L. J. 289.
(12) 11 Ind. Cas. 447; 34 M. 257; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L J. 64; 21 M. L. J. 669; 10 M. L. T. 268.
(13) 31 Ind. Cas 581; 42 C. 942 at p. 951.
(14) 9 B. H. C. R. 12.
(15) 8 M. H. C. R. 125.
(16) 24 B. 407; 2 Bom. L. R. 47; 12 Ind. Dec. (N.S.) 804.
(17) 50 Ind. Cas. 156; 41 A. 513; 17 A. L. J. 567.

and that is a right which might be of very considerable importance to him in Bombay as against the liquidator who would have jurisdiction in regard to this land although it is outside Bombay. Compare the proviso to section 17 of the Presidency Towns' Insolvency Act, (1909). Even if, as ruled in *Webb* v. *Macpherson*, (18) the plaintiff has a statutory charge upon the land different from the equitable vendor's lien given by the English Law, still he would have the advantage of having had his right to this charge adjudicated upon by a competent Court in a suit to which the Company is a party. This in effect will simply declare an obligation of the kind referred to in sections 91 and 95 of the Indian Trusts Act, 1882, and is one which undoubtedly could be given by a Court of Equity in England. If I am wrong, then the question still remains whether I am not bound by the decisions in *Holkar's* and *Sorabji'i cases* (3) as well as the unreported judgment of this High Court in *Venkatrao Sethupathy* v. *Khimji Assur Virji* (7), which has already been referred to.

(*e*) No doubt defendant No. 3 is not alleged to reside or carry on business in Bombay, but he is not concerned with the relief sought in regard to the land, which now is held by the defendant No. 1 Company. Consequently the question (4) of those mentioned in para. (*a*) does not arise. In any case admittedly he was a mere nominee of the defendant No. 2 a firm, and the relief (if any) given would not affect him. Even if the suit did involve the grant of relief against him, I should, I think, be bound by *Holkar's* (1) and *Sorabji's* (3) *cases*, which are not affected on this point by *Vaghoji* v. *Camaji* (4).

(*f*) I would add that the view I now take is not, I think, inconsistent with that taken by me in *Yeshvadabai* v. *Janardhan Raghunath* (19). When the land is situated in Bombay, a suit to declare a charge on it can be a suit 'for land' within the meaning of clause 12 of the Letters Patent, so as to give this Court jurisdiction over the suit which it otherwise might not have (as in that case and in *Sundara Bai Sahiba* v. *Tirumal Rao Sahib* (2). But when the land is situated outside the territorial limits of this Court's jurisdiction, then the words 'suits for land' in clause 12 must be read subject to the qualification or proviso that this Court has a jurisdiction *in personam* similar to that exercised by a Court of Equity in England, and by a moffussil Court under the proviso to section 16 of the Civil Procedure Code of 1908. If this distinction is borne in mind, it seems to me that much of the difficulties and of the apparent inconsistencies that surround rulings regarding the words 'suits for land' in clause 12 disappears. I recognise that the addition of such a qualification or proviso is outside the ordinary canons of interpretation of a statute or other enactment like clause 12 of the Letters Patent, but it is a modification of the language to meet the intention of the statute—or at any rate what is said by authority binding upon me to have been its intention which is of the kind referred to in Chapter IX of Maxwell on the Interpretation of Statutes, 3rd Edition, pages 319-22. And it has behind it the authority of being a received construction in this High Court for a large number of years, and of confirmation by the legislature in regard to the similar provisions of section 5 of the Civil Procedure Code of 1859, as compared with the provisions of section 16 of the subsequent Codes. Clause 12 is put in very condensed language and it has been expanded in another way, *viz.*, the received construction as to its being read as if the part now under construction ran as follows:—"(*a*) In the case of suits for land or other immoveable property, such land or property shall be situated wholly, or in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court." See *Balaram* v. *Ramchandra* (20) and *Govindlal* v. *Bansilal* (21) This exemplifies how it may be legitimate to amplify the words of clause 12 in the way I seek to do.

N. H. *Order accordingly.*

(18) 31 C. 57 at p. 72; 30 I. A. 233; 8 C. W. N. 40; 5 Bom. L. R. 838; 13 M. L. J. 389; 8 Sar. P. C. J. 554.

(19) 81 Ind. Cas. 776; 25 Bom. L. R. 1172; 1924 A. I. R. (*B.*) 141.

(20) 22 B. 922; 11 Ind. Dec. (N.S.) 1193.

(21) 77 Ind. Cas. 931; 23 Bom. L. R. 1049 at p. 1054; 46 B. 249.

SWAMINATHA IYER *v.* RAMIER

MADRAS HIGH COURT.

CIVIL APPEAL NO. 356 OF 1921.

July 25, 1924.

Present:—Mr Charles Gordon Spencer, Offg. Chief Justice, and Mr. Justice Srinivasa Iyengar.

K. R. SWAMINATHA IYER AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

A. RAMIER AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (*I of* 1877), *s.* 42—*Proviso*—*Suit for office*—*No prayer for possession*—*Maintainability.*

In a suit for an office the plaintiff is not bound to ask for possession of properties relating thereto. [p. 1056, col. 2.]

Kunj Behari v. *Keshavlal Heralal*, 28 B. 567 at p. 571; 6 Bom. L. R. 475; *Rajagopal Naidu* v. *Ramasubramania Iyer*, 74 Ind. Cas. 198; 46 M. 782; 45 M. L. J. 274; 18 L. W. 326; (1923) M. W. N. 550; 33 M. L. T. 21; (1923) A. I. R. (M) 19; *Ramadoss* v. *Hanumantha Rao*, 12 Ind. Cas. 449; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2. M. W. N. 387; 36 M. 364, relied on.

Ratnasabhabathi Pillai v. *Ramaswami Iyer*, 5 Ind. Cas. 630; (1910) M. W. N. 112; 7. M. L. T. 311; 20 M. L. J. 301; 33 M. 452, distinguished.

Where the plaintiffs sued for a declaration that they were the trustees of a temple lawfully appointed by the Devastanam Committee and for a direction that defendants should be made to restore the office to them and for an injunction restraining them from interfering with the exercise of their duties as trustees;

***Held*, that the suit as framed was properly maintainable without a prayer for possession of the trust properties and that proviso to s. 42 of the Specific Relief Act did not operate as a bar to the suit.** [p. 1054, col. 2.]

Per Chief Justice.—**A trustee, claiming only a right to administer a certain trust should not be compelled to sue for physical possession of all the trust properties against defendants who claim only a similar right of management and should not be compelled to pay stamp duty calculated on the total value of the endowments of the trust.** [p. 1053, col 2 and p. 1054, col. 1.]

Per Srinivasa Iyengar, J.—**When the question is whether a suit as framed is maintainable or not, what has to be looked to is the plaint and the plaint alone.** [p 1055, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in O. S. No. 33 of 1918.

The Advocate-General and Mr. *T. S. Ramaswami Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer* and *N. A. Krishna Iyer*, for the Respondents.

JUDGMENT.

Spencer, O. C. J.—The plaintiffs brought this suit for a declaration that they and the 1st defendant were the lawfully appointed trustees of the temple of Sri Umamaheswaraswami in Thiruvalam village of Mayavaram Taluk; and they prayed for a direction that the defendants Nos. 2 and 3 should be made to restore the office of trustee to them and for an injunction restraining them from interfering with the exercise of the plaintiffs and 1st defendant of their duties as trustees. They valued the relief asked for at Rs. 5,500. The basis of their title was the order of the Devastanam Committee made in January 1916 appointing the plaintiffs and 1st defendant as trustees. The 4th and 7th issues in the suit raised the question as to the Devastanam Committee's jurisdiction and the right of the plaintiffs derived from their order of appointment.

The lower Court, without deciding these important issues, dismissed the suit as not maintainable on the ground that the plaintiffs did not ask for possesion of the temple and its properties, quoting the authority of *Ratnasabhabathi Pillai* v. *Ramaswami Iyer* (1). In my opinion the Subordinate Judge should not have dismissed the suit upon this preliminary point without trying the other issues. In *Kunj Behari* v. *Keshavalal Heralal* (2). Sir Lawrence Jenkins, C.J., quotes section 42 of the Specific Relief Act and points out that nothing is said about the dismissing of a suit in the proviso which is in these terms:—"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so". In the present litigation the plaintiff is asserting his right to an office of trust. He does not claim any proprietory interest in the temple. As I pointed out in the order of reference in *Rajagopal Naidu* v. *Ramasubramania Iyer* (3) it would be preposterous that a trustee, claiming only a right to administer a certain trust, should be compelled to sue for physical

(1) 5 Ind. Cas. 630; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. J. 301; 33 M. 452.
(2) 28 B. 567, at p. 571; 6 Bom. L. R 475.
(3) 74 Ind Cas. 198; 46 M. 782; 45 M. L. J. 274; 18. L. W. 326; (1923) M.W.N. 550; 33 M. L. T. 21; (1923) A. I R. (M) 19.

possession of all the trust properties against defendants who claim only a similar right of management and that he should be made to pay stamp duty calculated on the total value of the endowments of the trust, which were in that case valued at two lakhs of rupees. In the case of temples, owning very extensive and valuable lands, of which there are many in this Presidency, no one would undertake the duties of a public trustee if such a burden were placed on him before entering his office. In the present instance the plaintiffs, while claiming the restoration of the office to themselves and the 1st defendant, asserted in their plaint that the ownership of the temple was vested in the deity, that they had only a right of managing the temple affairs, and that the temple lands were in the possession of tenants who would attorn to whomsoever might be declared to be the lawful trustees. The 1st defendant set up the right of the villages in contradistinction to the Devasthanam Committee's right to manage this temple, the 2nd and 3rd defendants denied the right of the Devasthanam Committee to interfere in the affairs of this temple, denied also that the ownership of the temple vested in the deity, and set up a right of adverse possession as against the Devasthanam Committee. The lower Court omitted to decide issue 5 which relates to the claim of the defendants that the Committee's right, if any, had been lost by adverse possession. The maintainability of the suit must depend upon the allegations in the plaint and these allegations have not been disproved by evidence. *Ratnasabhabathi Pillai* v. *Ramaswami Iyer* (1), relied on by the Subordinate Judge was a suit against the Devasthanam Committee by a plaintiff claiming to be a trustee to recover damages for wrongful dismissal. In his plaint he mentioned that the defendants Nos. 8 and 9 had illegally taken possession of the temple lands and leased out the fishery in the tank and collected rent. The plaintiff in that case having, for reasons best known to himself, combined two actions in one, namely, one action against the temple Committee for the restoration of his trustee's office and for damages, and a second action for the recovery of the trust properties against persons who had wrongfully dispossessed him of such property, was bound to ask for the relief of possession of the temple properties to which he asserted a present right of possession. On the allegations in the plaint in that suit it may have been right to require the plaintiff to add a prayer for possession of the lands and if he refused to do so, his suit might have been dismissed. But he was not bound to sue for possession of the lands before he was restored to office. If he had chosen to strike out from his plaint his statement as to the part played by defendants Nos. 8 and 9 he might have waited till he was restored to his office of trustee, and he might then have brought a separate suit on behalf of the trust to recover the trust properties which had been wrongfully alienated. The facts of the present case closely resemble those in *Ramadoss* v. *Hanumantha Rao* (4). In that case also it was stated in the plaint that the temple properties were in the possession of tenants who were ready to pay rent to whomsoever held the office of *Dharmakartha* and the learned Judges adopting the reasoning of Sir Lawrence Jenkins in *Kunj Behari* v. *Keshaavlal Heralal* (2) held that on the allegations in the plaint, which had not been traversed, the suit was maintainable and that the proviso to section 42 of the Specific Relief Act was no bar to its maintainability. In my judgment that case was rightly decided although the difference between Rs. 10 and Rs. 2,600 in the plaintiff's valuation of the injunction does not really affect the question. I think that we should follow it, as it is in accordance with *Kunj Behari* v. *Keshavlal Heralal* (2) which correctly expounds the effect of the proviso to section 42 of the Specific Relief Act. The question whether this temple is under the control of the Devasthanam Committee or belongs to the villagers will have to be decided, also whether the right of the Devasthanam Committee has been lost on account of adverse possession by any of the defendants. Also it must be decided whether one or two trustees can act alone if the appointment was of three trustees and one does not accept the office. The appeal is allowed. The order dismissing the suit is set aside and the suit is remanded for trial on its merits. Costs of the appeal to be borne by the respondents (defendants Nos. 1 to 3). Costs in the lower Court to abide and follow the result of the suit. Appellants are entitled to refund of Court-fee on this appeal.

(4) 12 Ind. Cas. 449 ; 21 M. L. J. 952 ; 10 M. L. T. 356 ; (1911) 2 M. W. N. 387 ; 36 M. 364.

SWAMINATHA IYER v. RAMIER

Srinivasa Iyengar, J.—I agree with the judgment of my Lord the Chief Justice. The question with regard to the maintainability of the suit as framed was tried originally by the learned Subordinate Judge as a preliminary issue. For some reason not clear on the record instead of coming to a decision on the issue, he called upon the parties to proceed with the trial of the suit adducing evidence and ultimately, after the whole hearing was over, dismissed the suit on the preliminary ground originally raised regarding the maintainability of the suit itself, holding that it was not maintainable.

When the question is whether a suit as framed is maintainable or not, what has to be looked to is the plaint and the plaint alone. Reading the plaint in this case, it is clear that it is both in form and in substance a suit for the recovery of an office. The case of *Ratnasabhapathi Pillai* v. *Ramaswami Iyer* (1) was relied upon by Mr. T. R. Ramachandra Iyer, the learned Vakil for the respondents, as an authority for the position that all suits for an office are suits for a declaration and that in all such suits, therefore, if the plaintiffs should be able to seek by way of further relief possession of the property relating to the office and omit to do so, the suit would not be maintainable. It is possible, and perhaps also easy to frame a suit which is in substance one for an office as a suit in form only for a declaratory decree and injunction. If in such cases any question should arise with regard to the frame of the action, it would necessarily follow that the suit may be looked upon merely as a suit for a declaration, and all the rules applicable to declaratory suits would also be applicable thereto. But a suit for an office is a well-known form of action and, from the earliest times, all the Courts in this country and their Lordships of the Judicial Committee have frequently referred to such suits.

In explanation to section 9, Civil Procedure Code, the legislature itself has referred to a suit for an office as contradistinguished from a suit in respect of property. Suits for property so called are themselves really suits only for the establishment of certain rights over property. An office, though intangible, is something recognised by the law which attaches to the office certain rights and duties. In the case of *Ratnasabapathi Pillai* v. *Ramaswamy Iyer* (1) it is clear not only that the action was in form for a declaratory decree but that the question whether, though in form the suit was for a declaration, it was not in substance a suit for an office does not appear to have been either argued or considered. The learned Judges took the form of the action as they found it and laid down the law as applicable thereto. Though the decision is undoubtedly an authority for the position that the plaintiff in a declaratory suit should also ask for possession, if he is able to ask for such possession, it is scarcely an authority for the proposition contended for that, when in form a suit is for an office, it ought to be deemed to be merely a suit for a declaration and dealt with accordingly.

The real difficulty with regard to the whole question would appear to have arisen by a certain observation of their Lordships in the case of *Ramdoss* v. *Hanumantha Rao* (4).

The real ground of decision, as I understand it, of *Ramdoss* v. *Hanumantha Rao* (4) is that when the suit is for an office, the plaintiff need not ask for possession of properties relating to the office. But their Lordships in their anxiety to distinguish the case before them from the case of *Ratnasabapathi Pillai* v. *Ramaswamy Iyer* (1) have referred to certain circumstances in the case before them. These were that, in the case with which they were dealing, the injunction was valued at a substantial amount. It is difficult to see what the valuation of the relief has to do with the frame of the action except as indicating that, as a suit for an office, it is capable of independent valuation by the plaintiff. The second ground of distinction by the learned Judges referred to is that it was stated in the plaint before them that the temple properties were in the possession of tenants who will pay the rents to whomsoever holds the office of *Dharmakartha* and that such statement was not traversed in the written statement and should, therefore, be accepted as correct.

Their Lordships proceed to say that if, therefore, the plaintiff gets possession of the office of *Dharmakartha*, the tenants will pay the rents to him, and the plaintiff will obtain possession to which he is entitled; that is right to collect rent. It is difficult to understand how the mere willingness of the tenants to attorn to the rightful holder of

the office can affect the question whether or not the plaintiff is able to ask for further relief by way of possession. I do not understand their Lordships to have signified that in such circumstances it would be impossible for the plaintiff to ask further relief by way of possession or such possession as it is susceptible of.

The third ground of distinction relied upon was that, in the case of *Ratnasabapathi Pillai* v. *Ramasami Iyer* (1), and the cases relied on in that judgment, possession of the property may be said to have been adverse to the plaintiff and would have continued to be adverse even after the plaintiff had obtained the declaration sued for.

It is very doubtful if such a ground of distinction is warranted by the terms of the proviso in section 42 of the Specific Relief Act. But their Lordships proceed further referring to the case of *Kunj Behari Prasadji Purushotham Prasadji* v. *Keshavalal Hiraglal* (2) and quote with approval the observation of the Chief Justice, Sir Lawrence Jenkins: "How would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up?" Further on, the learned Judges observe as follows:—"The lands attached to a temple do not belong to a *Dharmakartha*, who is merley the manager, but belong to the temple or idol, the Privy Council having held that an idol may be regarded as a judicial person capable of holding property."

As I read and understand, therefore, the case in *Ramadoss* v. *Hanumantha Rao* (4), the real principle underlying that decision is based exactly on the considerations so clearly and forcibly set out by the present Officiating Chief Justice in his order of reference to a Full Bench reported in the case of *Rajagopal Naidu* v. *Ramasubramania Iyer* (3). Further it is significant that, whereas the learned Judges that decided the case of *Ramadoss* v. *Hanumantha Rao* (4) approved of the case of *Kunji Bihari* v. *Keshavalal Hiralal* (2) the learned Judges who decided the case of *Ratnasabapathi Pillai* v. *Ramaswamy Iyer* (1) have disapproved of the same.

I, therefore, prefer to regard and follow the case of *Ramadoss* v. *Hanumantha Rao* (4), as a direct authority for the position that, in a suit for an office, no possession of the properties relating to the office need be asked.

I, therefore, respectfully agree to the order proposed.

V. N. V.

Appeal allowed,
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Adverse possession—*Hindu Law—Widow, adverse possession by—Property acquired, nature of.*

Where a Hindu widow, who is only entitled to maintenance out of a certain estate, takes possession of the estate as against the reversioners who are immediately entitled to it, her possession is adverse as against the reversioners and after the lapse of the statutory period the title of the latter is destroyed.

A Hindu widow is not a life renter but has a widow's estate, that is to say, a widow's estate in her deceased husband's estate. If possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan*, but she makes them good to her husband's estate, and after her death the parcels pass to her husband's heir. **P C** LAJWANTI *v.* SAFA CHAND, 22 A. L. J. 304; (1924) A. I. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 P. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117 **788**

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——————— *Mortgage, void possession under—Mortgage, converted into sale, void—Possession, whether adverse—Redemption, right of.*

Where a person who is not the legal guardian of a Muhammadan minor executed a mortgage of the minor's properties on behalf of the latter and the mortgagee is put into possession of the properties, the mortgage is void and the mortgagee begins to prescribe for a mortgagee's title by adverse possession. If subsequently, the same person converts the mortgage into a sale, the sale is equally void as against the minor, but the nature of the mortgagee's possession is altered and from the date of the sale he begins to prescribe for a title as full owner, and after the expiry of the statutory period from the date of the sale, the minor's title to the properties is completely extinguished. The minor does not obtain a right of redemption on the sale being declared void, if the mortgagee has completed his adverse possession of the absolute title by that date. **M** AIYISA BEVI AMMAL *v.* KALANDARSA ROWTHER, 46 M. L. J. 501; (1924) A. I. R. (M.) 720 **561**

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——————— *Possession of family property by one heir—Hostile title—Exclusion—Non-participation in profits.*

Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by an open assertion of hostile title on the part of the former.

To prove title to land by adverse possession for the statutory period, it is not sufficient to show that some acts of possession have been done; the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor; in other words, the possession must be actually visible, exclusive, hostile, and continued during the time necessary to create a bar under the Statute of Limitation.

What is sufficient evidence of exclusion must depend on the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time. **S** BHAGBHARI *v.* KHATUN, 16 S. L. R. 25 **118**

——————— *Proof—Adverse possession between co-sharers—Release by one co-sharer in favour of other co-sharers, effect of.*

Where one of two co-sharers, equally entitled to the property, is in actual possession of a part of it and the other co-sharer is in constructive possession of the same and is also in actual possession of the rest, the circumstances do not establish a title by adverse possession by one co-sharer against the other.

A deed of release executed by a co-sharer setting forth an existing title in the subject-matter of the release and accepted by other co-sharers wipes off the adverseness of possession of the latter, if any. **O** CHHOTEY LAL *v.* HANOMAN SINGH, 10 O. & A. L. R. 924 **619**

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Agra Tenancy Act (II of 1901), ss. 4, 51—*Revenue, remission of—Abatement of rent—Lessee, whether tenant.*

Where a remission of Revenue is made by Government owing to failure of crops, the tenant is entitled

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to an abatement of rent under section 51 of the Agra Tenancy Act, even though he has expressly contracted not to claim abatement of rent under such circumstances.

For the purposes of section 51 of the Agra Tenancy Act, a 'tenant' includes a lessee. A FATEH CHAND *v.* MURARI LAL, 22 A. L. J. 759 8

——— **ss. 10, 34, 58.** *See* SIR RIGHTS 899

——— **s. 32 (2)**—*Joint occupancy holding—Suit for possession of specific plots, whether maintainable—Joint tenants—Separation.*

There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts of the joint holding, provided that their so doing in no respect prejudices the rights of the landholder.

When once co-tenants are in separate possession of separate plots out of the holding and one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed, so long as the suit is instituted against the co-tenants and not the landlord. Such possession does not in any way interfere with the rights of the landlord. A GHASI *v.* BHARTO 941

——— **s. 159**—Lambardar—*Co-sharer—Revenue paid by* lambardar *on behalf of co-sharer—Revenue also paid by co-sharer direct into treasury*—Lambardar, *whether entitled to recover from co-sharer.*

Where a *lambardar* pays revenue on behalf of a co-sharer under him and after payment by the *lambardar* the co-sharer also pays it direct into the treasury, without informing the *lambardar*, the *lambardar* is entitled to recover from the co-sharer the amount paid by him on his behalf. A AISHAH *v.* ABDUL GHANI 916

——— **s. 164**—*Suit for profits against* Lambardar—*Negligence—Burden of proof.*

Where in a suit for profits against the *lambardar* a co-sharer wishes to charge the *lambardar* beyond what is admitted, on the ground that he has collected more, or might, but for gross negligence or misconduct, have collected more than what is admitted, it lies on the co-sharer to prove how much more the *lambardar* has collected or might have collected, but for his gross negligence or misconduct, than is admitted. O GANGA PRASAD *v.* BACHCHU LAL, 9 O. & A. L. R. 910 469

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——— **s. 194 (1)**—Lambardar, *whether an agent of co-sharers—Presumption—Contrary arrangement, effect of.*

If a *lambardar* sues a tenant either for recovery of rent or for ejectment, the presumption is that he is appointed as agent to act on behalf of all the co-sharers. But it is open to the tenant to prove that in that particular *mahal* the arrangement between the co-sharers is such that the *lambardar* cannot be created as an agent of all the co-sharers.

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Where, therefore, a plaintiff rests his case upon establishment of title, the mere fact that the adjoining plot happens to be a courtyard or outer compound of a house and belongs to a certain person does not show that the plot on which the house stands must also belong to that person and a finding to that effect can be set aside in appeal. **C** AHIDANNABI *v.* NAGENDRA LAL **903**

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———————— Finding of fact, when can be disturbed. *See* CIVIL PROCEDURE CODE, ss 80, 100 **72**

————————, maintainability of — *Ex parte* decision. *See* CIVIL PROCEDURE CODE, s. 100 (2) **14**

———————— Misconception of evidence—High Court, whether can interfere. *See* CIVIL PROCEDURE CODE, s. 100 **25**

———————— *New question of law—Suit, institution of—Events subsequent to suit—Court, whether can consider.*

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy it is not only competent but expedient in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea.

The general rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement but under proper circumstances a trial, as well as an Appellate Court may take notice of events which happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. **N** NARAYAN *v.* TULSHI **607**

———————— *Question of law not raised before lower Appellate Court, whether can be entertained in second appeal.*

Questions of law dealing with the admissibility and the legal effect of evidence will not, as a general rule, be entertained in second appeal,

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if they have not been taken at least at the stage of the first appeal in the Court below. **A** RADHA KISHAN *v.* KEDAR NATH, 22 A. L. J. 761 **874**

——— Suit for contribution—Property not held jointly—Suit, whether cognizable by Small Cause Court. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 41 **353**

———, whether lies—Suit of Small Cause nature—Revision. *See* VENDOR AND PURCHASER **210**

———, whether maintainable — Judgment-debtor, death of, before decree Legal representative not brought on record—Abatement—Abatement set aside—Order, legality of. *See* CIVIL PROCEDURE CODE, O. XXII, RR. 4, 9, O. XXXIV, R. 5 **397**

Appellate Side Rules of Calcutta High Court, Ch. IX, r. 25—*Costs of paper-book—Documents common to lists of parties—Apportionment of costs.*

Where there are papers common to the appellant's list and the special list of the respondent with reference to his cross-objection, under rule 25 of Chapter IX of the Appellate Side Rules of the Calcutta High Court, the costs of preparation of the paper-book must to that extent be apportioned between the parties. **C** GOBIND DAS NATH *v.* NRITYA KALI DASI, 39 C. L. J. 342; (1924) A. I. R. (C.) 874 **790**

Arbitration—*Award based on equitable considerations, validity of—Arbitrator, duty of—Reference, scope of—Award based on erroneous grounds, legality of—Remission of award—Bias of arbitrator—Discretion of Court.*

An arbitrator is not competent to pass an award according to what he considers to be an equitable arrangement under the circumstances of a particular case, but must decide according to the legal rights of the parties.

An arbitrator is inflexibly limited to the decision of the particular matters submitted to him and his award must conform both in substance and form to the submission.

Where in his award an arbitrator states reasons for his decision which are erroneous on a point of law, there is an error of law on the face of the award and the award is bad and should be set aside.

A Court should in the exercise of its discretion decline to remit an award to an arbitrator when there is the existence of any circumstance in the situation of the arbitrator which tends to produce a bias in the mind of the arbitrator. **S** MAHOMEDALI A. KARIMJI & SONS *v.* CHARATSING BUDSING **596**

——— Award, decree based on —Arbitrator, whether entitled to receive payment of money on behalf of Court. *See* EXECUTION OF DECREE **238**

——— Award directing sale of mortgaged property—Procedure. *See* CIVIL PROCEDURE CODE, O. XXXIV, RR. 4, 5 **588**

——— *Award—Error of law, apparent on face of award, what amounts to—Sale of goods—Dispute as to quality—Burden of proof—Reference* **Arbitration**—contd.

stipulating survey of goods—Award made without survey—Jurisdiction.

An error in law on the face of the award which is sufficient to vitiate the award means that the award or some document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, contains a legal proposition which is the basis of the award and which is erroneous.

Ordinarily, where there is a dispute between a buyer and a seller with reference to the quality of goods, it is the duty of the seller to prove that the goods are of the quality contracted for.

Disputes arose between the parties out of a contract for the sale of goods, relating to the quality of the goods and the matter was referred to arbitration, the arbitrators being required to make an award after a survey of the goods. The arbitrators made the following award: "We have considered the papers and as the buyers are unwilling to produce the bales required for inspection, their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract:

Held, (1) that the mere fact that the buyers were unwilling to produce the bales required for inspection was not by itself a sufficient reason for making an award against them, especially as it was the duty of the sellers to prove that the goods were of the quality contracted for;

(2) that, therefore, the award was vitiated by an error of law which was apparent on the face of the award;

(3) that the award having been made without a survey of the goods was made without jurisdiction and was invalid. **C** CHANDMUL MULCHAND *v.* S. & C. NORDLINGER, 28 C. W. N. 261; (1924) A. I. R. (C.) 490 **151**

——— *Award—Extension of time—Application, whether must be in writing.*

An application for extension of the time limited for making an award need not be in writing. **B** SAKALCHAND MOTI *v.* AMBARAM HARIBHAI, 26 Bom. L. R. 280; (1924) A. I. R. (B.) 380 **260**

——— Award—Suit to set aside award, maintainability of. *See* COURT FEES ACT, s. 7 (iv) (*c*) **969**

——— *Proceedings* ex parte—*Arbitrators, duty of—Special notice, absence of, when does not vitiate award—Interest after date of award—Arbitrators, powers of.*

Although arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear, the true test in determining whether the absence of such notice would vitiate an award is, whether the party taking exception to the award has, in fact, been prejudiced by the omission of the arbitrators to serve the special notice on him. If it is established that, notwithstanding, such warning, he would not have appeared, he cannot invite the Court to set aside the award on the ground of the alleged defect in procedure

Arbitration—contd.

Arbitrators have authority to allow interest after the date of the award. **C** BHOWANIDAS RAMGOBIND *v.* HARSUKHDAS BALKISHENDAS, 27 C. W. N. 933; (1924) A. I. R. (C.) 524 **510**

——— *Reference, construction of—Error patent on face of award, what amounts to—Award set aside on basis of alleged error patent on face of award—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

A reference in respect of disputes "concerning the acceptance of a shipment and payment of the same" is not vague and is a sufficient authority for the arbitrators to decide the question of breach of the contract and payment of damages.

In finding out whether there is an error patent on the face of an award Courts are not to investigate beyond the award of the arbitrators and documents actually incorporated therein.

Where from an award itself or any necessary papers attached to it, it appears that the arbitrators have awarded payment of damages to a party who committed breach of a contract, there is an error patent on the face of the award, the arbitrators are guilty of a technical misconduct and the award should be set aside.

Where an award is ordered to be taken off the file on the ground of there being an error patent on the face of the award, whereas there is no such error to be found on the face of the award the Court assumes jurisdiction which, as a matter of law, it does not possess, to interfere with the findings of the arbitrators and such an order is liable to be set aside in revision. **S** RAMJIBHOY & Co. *v.* YUSIFALI MAHOMEDALI **403**

——— *Reference not in writing—Award, validity of Position of arbitrator.*

An award is nonetheless valid though the reference to arbitration was not in writing.

An arbitrator entrusted with the decision of a case can only decide the points referred to him and is not bound to consider or follow the reasons given by the Court whose decision on appeal is referred to arbitration.

Where parties prefer an amateur Court to a professional Court, they take the risk that the decision may not be technically perfect. **O** WALIULLAH *v.* BHAGGAN, 10 O. & A. L. R. 761; 11 O. L. J. 570 **7**

———, *reference to, what amounts to—Intention of parties—Error of law, what amounts to—Award specifying amount payable in pounds—Rate of exchange not specified—Uncertainty.*

Where it appears from the terms of an agreement for the settlement of disputes that the intention of the parties was that there should be an inquiry in the nature of a judicial inquiry, and that their respective cases should be heard and a decision arrived at upon the evidence there is a reference to arbitration.

A contract for the purchase of goods contained the following clause:—"In the unlikely event of our failing to arrive at an amicable settlement of any disputes, claims or allowances we should be quite willing that the matter should be referred to two arbitrators, one to be appointed by each party, with the proviso that if they be unable to agree they should nominate a third party as their umpire and that the decision of the surveyors or their umpire should be binding on both parties:"

Held, that it was the express intention of the parties that all disputes between them arising out of the contract should be referred to arbitrators for decision.

A failure to pay a claim constitutes a matter in difference between the parties to a submission.

An error in law on the face of an award must be distinctly collected from the face of the award or from some paper so connected with the award as to form part of it.

An award specifying the amount to be paid by one party to the other in pounds sterling but omitting to specify the rate of exchange at which payment is to be made is not bad for uncertainty but may be remitted to the arbitrators for determining the rate of exchange at which payment is to be made. **S** BEITH STEVENSON & Co., LTD. *v.* FIRM OF NAROOMAL KHEMCHAND, 17 S. L. R. 86; (1924) A. I. R. (S.) 117 **1009**

Arbitration Act (IX of 1899), s. 4—*Clause providing disputes shall be decided by particular Court, whether submission—Contract Act (IX of 1872), s. 28, applicability of.*

A policy of marine insurance contained the following clause:—

All disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England where the underwriters are alone domiciled and carry on business:

Held, that the clause amounted to a submission of any dispute arising under the contract to the English Courts, within the meaning of section 4 of the Arbitration Act.

An agreement which merely contracts that one of two Courts which would have jurisdiction to try any dispute arising under the agreement, should try such dispute, does not come within the meaning of section 28 of the Contract Act. **B** HAJI ABDULLA HAJI CASSUM *v.* GEORGE REGINALD STAMP, 26 Bom. L. R. 221; (1924) A. I. R. (B.) 381 **523**

Award—Error of law, apparent on face of award, what amounts to. *See* ARBITRATION **151**

——— Error patent on face of award, what amounts to—Award set aside on basis of alleged error patent on face of award—Revision. *See* ARBITRATION **403**

———, rectification of—Palpable mistake—Jurisdiction of Court. *See* CIVIL PROCEDURE CODE, SCH. II, PARA. 12 (*b*) **10**

———, validity of—Reference not in writing. *See* ARBITRATION **7**

Banker and customer—*Forged cheque, payment of, liability for.*

Before a banker can debit his customer's account with the amount of a forged cheque he must prove negligence on the part of the customer which was intimately connected with the drawing or encash-

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ment of the cheque which was the proximate cause of the loss. **R** AHMED MOOLA DAWOOD *v.* PEREIRAN CHETTY, 3 Bur. L. J. 22; (1924) A. I. R. (R.) 264 **261**

Benami transaction—*Suit against benamidar—Real owner, whether bound—Pre-emption suit against* benamidar—*Pre-emptor not entitled to preference over real vendee—Pre-emption, whether allowable.*

A suit against a *benamidar* binds the *benamidar* as much as the real purchaser, though the latter may not have been made a party to the suit, but the plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser, had he been brought on the record.

Where in a pre-emption suit it appears that the ostensible vendee is merely a *benamidar* the plaintiff cannot succeed if it is found that he is not entitled to any preference as against the real vendee, whom he has omitted to make a party to the suit. **A** RAM SAKHI KUAR *v.* LACHMI NARAIN LAL **42**

Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—*Alluvial increments, whether subject to assessment—Objections—Proper Court—Fundamental irregularity, proof of*—Onus—Mahal *adjoining river, whether includes alluvial increments.*

Alluvial increments are subject to assessment, but the proceedings of the assessing authorities are subject to being quashed in the ordinary Courts of law if they have been tainted by any fundamental irregularity, such as a defiance or non-compliance with the essentials of the procedure.

The burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it.

It is not sufficient to submit in a Court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body.

The Board of Revenue is the proper Court to consider all objections as to assessment, etc., and its orders are final.

A *mahal* adjoining a river cannot be said to include the alluvial increments because its boundaries extended *ad medium filium*. **P C** SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* ROY JATINDRA NATH CHOWDHURY, (1924) A. I. R. (P. C.) 175; 47 M. L. J. 48; (1924) M. W. N. 588; 35 M. L. T. 146; 29 C. W. N. 1; 51 C. 802 **1023**

Bengal Land Revenue Settlement Regulation (VII of 1822), s. 10 (8)—Malguzar, *appointment and status of—Bengal Tenancy Act (VIII of 1885), ss. 3 (4), 105, 188*—Malguzars—*Proprietary body—"Agent" in s. 188, whether means only one person*—Malguzars, *whether can start proceedings under s.* 105—*Rate of rent mentioned about excess land*—Mukarrari *holding—Presumption.*

The effect of the appointment of *Sadar Malguzar* is to suspend or take away for the time being the proprietary rights of the proprietors of the estate.

The *Sadar Malguzars* constitute the entire body of landlords within the meaning of section 188, Bengal Tenancy Act. For the time being the tenants must be held to be holding under the *Sadar Malguzars*. The right of the other proprietors under the law remains in abeyance so long as the property is managed by the *Malguzars* under the Regulation.

Malguzars may be considered as agents of the proprietors and as such they are entitled to maintain suits under section 105, Bengal Tenancy Act. The word "Agent" in section 188, Bengal Tenancy Act, includes "Agents." There is no special provision in the Bengal Tenancy Act or any other law which would restrict the meaning of words 'agent' to a single individual.

The mere fact that a certain rate is mentioned in respect of excess land to be found in possession of the tenants does not raise the presumption as to the *Mukarrari* nature of the holdings. **C** RAMIJUDDIN *v.* RAI RADHA KANTA AICH BAHADUR **987**

Bengal Tenancy Act (VIII of 1885), ss. 3 (4), 105, 188. *See* BENGAL LAND REVENUE SETTLEMENT REGULATION, s. 10 (8) **987**

——— **ss. 50, 115**—"*Thereafter*," *meaning of in s. 115—Record of Rights published—Presumption under s. 50.*

The word "thereafter" in section 115 of the Bengal Tenancy Act refers to a period subsequent to the publication of the Record of Rights, but what is provided is that the presumption under section 50 shall not thereafter, that is to say, after the particulars mentioned in section 102 have been recorded, apply.

Once the Record of Rights has been finally recorded as provided in section 115 of the Act, then the presumption under section 50 is no longer open to the tenants whether they are relying upon a payment of rent at a uniform rate either before or after the publication of the Record of Rights. **Pat** RAMSARAN MAHTON *v.* SYED MUHAMMAD ARADUT HUSSAIN **926**

——— **ss. 50, 115, Ch. X**—*Object of s. 50—*Raiyat *at fixed rate, status of—Presumption under s. 50—Occupancy* raiyat, *whether excluded from presumption—Rent receipts for twenty continuous years not produced, effect of.*

A *raiyat* at a fixed rate is not created by section 50 of the Bengal Tenancy Act, which merely furnishes a rule of evidence to enable a person to prove with facility that he is a *raiyat* at a fixed rate. Such a *raiyat* may become a settled *raiyat* of the village under section 20, and thus acquire a right of occupancy within the meaning of section 21. The status of a tenant at a fixed

rate can be combined with that of an occupancy *raiyat*, the higher status superseding so much of the lower as might be inconsistent with it, and either status might be used as a shield so far as it extends.

An occupancy *raiyat* is not excluded from the category of a *raiyat* for the purposes of section 50 of the Bengal Tenancy Act, nor does section 115 debar such a *raiyat* from the benefit of section 50, as that section only comes into operation when all possible proceedings under Chapter X have been exhausted.

To entitle a *raiyat* to the benefit of the presumption under section 50 of the Bengal Tenancy Act, what has to be established is not the actual payment of rent, but the fact that the tenancy has been held at a certain rate. Where, therefore, rent receipts for twenty continuous years are not produced, but the discontinuous receipts produced show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity infer that there has been no change in the intervening periods. **C** NARENDRA LAL CHOWDHURY *v.* BENODE BEHARI SADHUKHAN, 27 C. W. N. 740; (1924) A. I. R. (C.) 143 **577**

——— **s. 93** -- *Common manager, appointment of.*

The appointment of a common manager under section 93 of the Bengal Tenancy Act must be to the entire estate and not to a portion of it. **C** BASANTA KUMAR CHAKRAVARTI *v.* ASHUTOSH CHAKRAVARTI, 27 C. W. N. 1040; (1924) A. I R. (C.) 214 **654**

——— **Ch. X, Part II, ss. 103-3, 104-H, 104-J** *--Rent Record of Rights, entry in conclusiveness of--Entry as to area--Presumption as to correctness.*

When a settlement of rent has been made under Part II of Ch. X of the Bengal Tenancy Act, the entry in the Record of Rights is conclusive unless altered by means of a suit instituted under section 104-H of the Act. So, too, are other entries in the Record of Rights upon which the rent is settled so far as they affect the rent settled, *i.e.*, in so far as they bear upon the rent settled, and for that purpose only.

Where, however, the question in controversy is not as to the rent payable but the quantity of the land included in the tenure, the entry in the Record of Rights as to area is not conclusive under section 104-J., although under section 103-B such an entry raises a presumption of correctness. **C** PRIYA NATH BASU *v.* TARA CHAND MORAL, 27 C. W. N. 982; (1924) A. I. R. (C.) 341 **1034**

——— **ss. 103B, 111A**—*Record of Rights--Entry relating to non-agricultural land—Presumption of correctness—Tank belonging to one person –Right of another person to rear fish in tank, nature of--Declaration, suit for, whether maintainable.*

In the Record of Rights of the parties' village a tank was recorded as within the tenancy of the plaintiffs, but it was also recorded that the defendants were entitled to rear fish in the tank and use its water. Plaintiffs brought a suit for a declaratory decree under the proviso to section 111 A of the Bengal Tenancy Act, that the defendants had no right to rear fish in the tank:

Held, that the entry in the Record of Rights, if allowed to stand would restrict the absolute ownership of the plaintiffs and disentitle them from excluding the defendants from exercising some acts of possession, and that, therefore, the plaintiffs had a cause of action to bring the suit.

Although, strictly speaking, the presumption arising under section 103 B of the Bengal Tenancy Act, is not applicable to an entry relating to non-agricultural land to the extent to which it is applicable with regard to agricultural land, yet such an entry raises some presumption with regard to the fact recorded in it.

The right of one person to rear fish in a tank belonging to another person is a novel right which cannot be recognised by a Court of law. **C** CHAND MIA MUNSHI *v.* TUKAMIA, 28 C. W. N. 516; (1924) A. I. R. (C.) 667 **805**

——— **s. 141**. *See* CIVIL PROCEDURE CODE, O. XXI, R. 16 **881**

——— **s. 158 B**--*Decree for consolidated rent of two holdings—Sale of one holding--Purchaser, position of--Purchaser of portion of holding—Annulment of incumbrances.*

Where a decree is obtained for the consolidated rent of two holdings and one of the holdings is sold in execution of the decree, the sale does not confer upon the purchaser any greater title than the right, title and interest of the judgment-debtor. The same is the case where a portion of a holding is sold in execution of a decree for rent of the holding.

There is nothing in section 158B of the Bengal Tenancy Act which gives to a purchaser in execution of a rent-decree the right to acquire the rights mentioned in the section except by a purchase of the entire holding. **Pat** DIPA MAHTON *v.* SHEO NANDAN PRASAD, 1 P. L. R. 467; (1924) A. I. R. (Pat.) 342 **570**

——— **s. 170**, *scope of—Rent-decree—Attachment of holding—Claim, entertainment of.*

A Court executing a decree, purporting to be a decree for rent under the Bengal Tenancy Act, can entertain a claim to the property by a third person, where the property attached is not a tenure or holding. Section 170 of the Bengal Tenancy Act does not apply to such a case. **C** JOTINDRA MOHAN PAL *v.* BHOLA NATH, 27 C. W. N. 817; (1923) A. I. R. (C.) 715 **353**

——— **s. 170 (3)**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Co-sharer-landlord—Money-decree for rent--Non-transferable occupancy holding, sale of—Purchaser, whether entitled to make deposit.*

A co-sharer landlord who obtains a money-decree in respect of his share of the rent of a non-transferable occupancy holding and purchases the holding in execution of the decree, obtains nothing tangible by the purchase and has no

locus standi to make a deposit under section 170 (3) of the Bengal Tenancy Act, in order to save the holding from being sold in execution of a rent-decree. Nor has such a purchaser any *locus standi* to make a deposit under O. XXI, r. 89 of the Civil Procedure Code. **Pat** BISHUN DAYAL SINGH *v.* JAGDISH NARAYAN SINGH, 2 P. L. R. 12; (1924) A. I. R. (Pat.) 513 **823**

——— **s. 173 (3)**—*Sale of holding, setting aside of—Discretion of Court—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

It is in the discretion of the Court to decide whether a sale of a holding is voidable under section 173 (3) of the Bengal Tenancy Act or not and the High Court will not interfere in revision with its decision where no serious prejudice has been caused. **C** BROJENDRA NATH MUKERJEE *v.* JADUNATH PALTA **708**

——— **s. 179**—*Permanent and heritable tenure* —Mokurrari—*Rent, interest on—Rate fixed in* kabuliyat *excessive—Tenant, whether can get relief.*

Plaintiff-landlord sued to recover interest on rent payable by the tenant under *kabuliyat* which provided for payment of interest at the stipulated rate. It appeared that the word "*mokurrari*" had not been used in the document nor was there any express provision that the rent shall not be enhanced, but there was a provision that if there was an increase in the land on measurement, the tenant would have to pay rent separately at the stipulated rate:

Held, (1) that the tenure was permanent and heritable;

(2) that the rent was agreed on and could not be enhanced;

(3) that as there was no evidence on the record to show that any undue influence had been exercised by the *zemindar* the tenant was liable to pay interest at the stipulated rate. **C** CHANDY CHARAN LAW *v.* SREEMUTTY AZIZERNESSA, (1922) A. I. R. (C.) 18 **315**

——— **s. 180**—"Chur," *meaning of—Land reformed* in situ—*Owner, rights of.*

The word 'chur' as used in section 180 of the Tenancy Act must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil, and not to the site of the deposit.

When land re-formed on the site of a diluviated estate, the owner of that estate, if he had continued to pay revenue while the site was under water is entitled to claim the land as belonging to his estate.

Such land is not to be dealt with under the provisions of Regulation XI of 1825. **C** CHANDRA KUMAR AICH *v.* JIBAN KRISHNA NATH MOHAJAN **702**

Bill of Lading—*Exemption clause—Damage to goods consigned—Suit to recover damages—Perils of the sea, proof of*—Onus—*Negligence, what constitutes.*

In a suit for damages to plaintiff's goods consigned on defendants' schooner on a Bill of Lading containing the usual exemption clause as to "dangers

and accidents of the sea and navigation of whatever nature or kind," it is for the defendant to plead and prove "perils of the sea." If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendant's negligence.

The plaintiffs consigned a number of cases of safety matches by defendant's schooner. Four days later, there was a strong wind and rough weather though not amounting to a storm or cyclone and the steamer was driven away from the place where she anchored. The wind then changed its direction with the result that the schooner swung round and sat on her anchor causing a hole on her port side. The vessel stranded and there was water in the hold. The cases of safety matches were damaged by the sea water. In a suit for damages by the plaintiff against defendant alleging negligence on the part of the master in anchoring in shallow water:

Held, that the facts proved amounted to a peril of the sea and the defendant had not been guilty of negligence;

The mere fact that the accident might have been avoided by greater foresight does not make it negligence. There is no difference between ordinary and extraordinary perils.

The cause need not be extraordinary in the sense that the cause must be uncommon. Although negligence does not save defendants' liability, if reasonable care is taken, the perils of the sea while not including the effect of mere ordinary wear and tear will include the consequences of any kind of accident ending in damages by sea water. **M** ESUFALI MUHAMMEDBHOY ALLIBHOY *v.* THAHA UMMAL, 47 M. L. J. 150; 20 L. W. 91; 47 M. 610; (1924) M.W.N. 648; (1924) A. I. R. (M.) 773 **154**

Bombay District Municipal Act (III of 1901), ss. 24 (2), 179, 186 (9)—*Committee of management, powers of—Procedure, rules of, whether binding on committee—Chairman of committee, whether can vote.*

A committee of management appointed under section 179 of the Bombay District Municipal Act is not precluded from exercising the powers of a Municipality under section 183 (*a*) of the Act.

A committee of management is not bound to follow in its entirety the whole of the procedure laid down in the Bombay District Municipal Act. It is enough that the persons who are delegated to do the duties of a Municipality carry out their functions in a reasonable and equitable manner, keeping an eye, as far as possible, on the provisions of the Act, but not being bound by them with the same strictness as an elected Municipality would be.

Section 24 (2) of the Bombay District Municipal Act has no application to the Chairman of a committee of management appointed under section 179 of the Act. **S** SANTDASS MANGHARAM *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, 17 S. L. R. 46 **951**

Bombay Land Revenue Code (Act V of 1879), ss. 63, 64—*Alluvial accretions—Sale by Government to landlord—Permanent lessee, whether liable to pay extra rent.*

The holder of a *Mulgeni* (permanent) lease at a fixed rent is liable to pay extra rent for any

Bombay Land Revenue Code—concld.

alluvial accretion made to the land, if sections 63 and 64 of the Bombay Land Revenue Code have been put into operation with regard to it and the landlord has paid its price and assessment to Government, even though the lease recites that the parties would not claim an increase or a decrease of rent on any ground whatever. The alluvion in such a case must be treated as an entirely separate piece of land and the tenant cannot cultivate it as part of his original holding. **B** MANJAYA SUBRAYA *v.* TAMMAYA VASUDEO SHANBHOG, 26 Bom. L. R. 520; (1924) A. I. R. (B.) 449 **427**

——— **ss. 86, 87,** *order under—Suit to set aside order, maintainability of—Civil Courts, jurisdiction of.*

The object of sections 86 and 87 of the Bombay Land Revenue Code is to enable superior holders to recover rent or land revenue expeditiously when their title is clear, by a written application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. They are purely executive orders and the Civil Courts have no right to sit in judgment upon them.

A party dissatisfied with such an order may file a suit in the Civil Court, not to set aside the order, but the superior holder to recover such amount as he may deem still due to him and the inferior holder to recover the amount levied from him in excess of what was due. **S** HOTKHAN SHERKHAN *v.* PAHLUMAL UKERMAL, 17 S. L. R. 82; (1924) A. I. R. (S.) 87 **955**

Bombay Mamlatdars' Courts Act (II of 1906), s. 23—*Order of Mamlatdar—Interference by Collector, when justified—Revision—High Court, power of interference of.*

Under section 23 of the Bombay Mamlatdars' Courts Act, a Collector can set aside an order made by a Mamlatdar only if he considers that it is illegal or improper. The mere fact that the Mamlatdar has entered upon complicated questions does not entitle the Collector to set aside his order. However complicated the questions may appear to be the Mamlatdar is entitled to give possession to one party or the other, and there is nothing improper or illegal in such an order.

When a Revenue authority has clearly exceeded the powers granted under the Act, the High Court should interfere in the ends of justice. **B** JAGANNATH *v.* DHONDU, 26 Bom. L. R. 265; 48 B. 384; (1924) A. I. R. (B.) 352 **266**

Bombay Provincial Insolvency Rules, r. 27 (4). *See* PROVINCIAL INSOLVENCY ACT, s. 9 **482**

Bombay Regulation V of 1827, clause 15 (3)—*Construction of document—Mortgage possessory—Special agreement prohibiting sale—Mortgagee deprived of possession—Damdupat, rule of, application of.*

In the case of a possessory mortgage governed by Regulation V of 1827, under clause 15 (3) of the Regulation, unless there is a special agreement between the parties, when the bond is entered into, to the effect that the property shall not be

Bombay Regulation—concld.

brought to sale by the mortgagee, then the mortgagee has a right to institute a suit for the purpose of bringing the property to sale.

Under a possessory mortgage governed by Regulation V of 1827, interest was to be paid on the amount advanced, an account of rents and profits was to be made up after every year, and amount of balance was to be settled by the parties. Even if the mortgagor failed to pass the accounts, he undertook to have the property released after clearing off the total amount of balances struck in each year. It was also argued that if the mortgagor could get the money from any other source for the repayment of the debt, the mortgagee would accept the amount and release the property:

Held, that there was no special agreement between the parties prohibiting a sale of the property under the mortgage.

In the ordinary case of a usufructuary mortgage where the mortgagee is in possession of the mortgaged property either in lieu of interest entirely, or on the terms that he must render an account of rents and profits against interest, the rule of Damdupat would apply. But when the terms of the mortgage have been departed from, and the mortgagor has deprived the mortgagee of possession, then the principle of Damdupat can no longer apply as the relationship of the parties has changed. **B** NILKANTH BALWANT NATU *v.* VIDYASHANKAR BHARATI 26 Bom. L. R. 455; (1924) A. I. R. (B.) 387 **393**

Bombay Rent (War Restrictions) Act (II of 1918), s. 9—*Tenant remaining in possession after termination of tenancy—Rent payable—Standard rent.*

There is nothing in the Bombay Rent (War Restrictions) Act which prevents a landlord from charging his late tenant the standard rent under the Act, as soon as he claims protection under section 9 of the Act because the payment of that rent is the sole condition which the Act recognises as enabling a tenant to remain in possession.

There is no analogy between the provisions of the Act which enable a tenant, who has been charged without his cognizance a higher rent than the standard rent, to recover according to the terms of the Act the excess by deducting it from the current rent, and the ordinary proposition of law that a person in occupation of premises is bound to pay compensation for the use and occupation after the expiration of the contract between him and his landlord, which equally applies to a person who is allowed by the provisions of the Bombay War (Rent Restrictions) Act, to remain in possession. **B** KALIANMAL TILLOKCHAND *v.* DHARAMSEY JETHA & Co., 26 Bom. L. R. 141; (1924) A. I. R. (B.) 330 **253**

Buddhist Law, Burmese—*Inheritance—Partition between father and children of first marriage—Second marriage—Death of father—Children of first marriage, whether entitled to share—Construction of document—Partnership of whole property—Partition.*

A Burmese Buddhist before contracting a second marriage entered into an agreement with his

Buddhist Law, Burmese—concld.

children from his first wife whereby the whole of the existing moveable and immoveable property belonging to the father was transferred to a partnership between the father and the children, and the children were assigned definite shares in the property, a certain share being retained by the father. The latter then contracted a second marriage and died some years later:

Held, that the agreement entered into by him with his children before his second marriage was not merely a deed of partnership but amounted to a partition, and the children, therefore, were not entitled to share in any property retained by the father which he took to the second marriage.

Where, after the death of a wife the husband partitions the property with his children and marries again, taking his share with him, on his death the children of his former marriage cannot claim from their stepmother any property which their father took to the second marriage, because they have already obtained their shares on partition. **P C** MA THAUNG *v.* MA THAN, (1924) A. I. R. (P. C.) 88; 19 L. W. 477; 46 M. L. J. 618; 51 C. 374; (1924) M. W. N. 662 **1031**

——————— *Land occupied by* methila, *whether religious—Gift, oral, validity of—Trust, private, whether created.*

The predecessor-in-title of the plaintiff, who was a *methila*, held certain land on a squatter tenure on which she had built a small residence for herself. She subsequently gave up her vows and married. Afterwards she made an oral gift of the land to a monk who gifted it to the defendant:

Held, (1) that the land was not religious;

(2) that the oral gift in favour of the monk was invalid for want of a registered deed;

(3) that in the absence of a deed it could not be said that a private trust of the land had been created;

(4) that, therefore, the plaintiff's title to the land subsisted and he was entitled to recover it. **R** MG. PO THET *v.* MG. MIN DIN, 3 Bur. L. J. 7; (1924) A. I. R. (R.) 260 **255**

——————— *Pre-emption—Sale of undivided family property—Co-heirs, right of, to pre-empt.*

The right of a Buddhist widow to dispose of undivided family property after her husbad's death, *viz.*, that she has an absolute right of disposal over her own share and a life-interest in the remainder does not affect, but is subject to the general rule regarding the right of all co-heirs to pre-emption. **R** MAUNG PO GYI *v.* MAUNG PO SAING, 3 Bur. L. J. 21; (1924) A. I. R. (R.) 266 **259**

———, **Chinese** — *Inheritance, rules of—Daughters, whether succeed in presence to sons—Burmese woman married to Chinese Buddhist—Law applicable.*

Where a Burmese woman married to a Chinese Buddhist adopts her husband's form of religion, ecoming, to all intents and purposes, a Chinese uddhist, succession to her estate must be regulatd by the Chinese Customary Law. The rule of nheritance under Chinese Customary Law is that, when a man dies, all his property, real and personal, is divided equally among all his sons; daughters succeed only when there are no sons, and the widow succeeds only when there are neither sons nor daughters.

If there are sons or daughters, the widow has only a right to administer the estate and to be maintained out of it and a claim for provision for her funeral. **R** MA SEIN *v.* MA PAN NYUN, 2 R. 94; (1924) A. I. R. (R.) 219 **749**

Burden of proof—*Appeal—Findings of fact—Appellant, duty of.*

Where a case involves findings of fact it is for the appellant to satisfy the Appellate Court that the Trial Court's findings of fact and the deductions which he drew from those facts were wrong. **C** RASH BIHARI *v.* NARAIN DASS, 27 C. W. N. 231; (1923) A. I. R. (C.) 182; 50 C. 399 **485**

——————— Holder in due course—Presumption—Manager of Bank, whether has authority to transfer Negotiable Instrument. *See* NEGOTIABLE INSTRUMENTS ACT, ss. 9, 118 **741**

——————— Mortgage, suit on—Plea of legal necessity, scope of—Rate of interest. *See* PLEADINGS **791**

——————— Suit for profits against *lambardar*—Negligence. *See* AGRA TENANCY ACT, s. 164 **469**

Calcutta Rent Act (III of 1920), s. 18—*Application for fixing standard rent—Premises let for brothel—Rent Controller, whether will interrene—Sub-lease in favour of prostitutes—Contract, whether rendered illegal.*

The mere fact that the tenanted house is occupied by prostitutes as sub-lessees does not necessarily affect the validity of the contract between the landlord and the tenant.

But where the premises are let out for the purpose of continuing a brothel and are used as such, the contract becomes void and the Rent Controller will not intervene in an application of a party for fixing standard rent. **C** RADHA KANTA *v.* PANKOJINI **682**

C. I. F. Contract—*Property when passes—Intention of parties—Documents against payment—Draft containing items due on other accounts—Refusal of consignee to accept draft, whether justifiable.*

The question as to when property in goods sold under a *c. i. f.* contract passes to the purchaser is a question of fact as to the intention of the parties as appearing from the evidence. Where the consignor does not intend to deliver over the goods to the consignee until the draft is accepted, the property in the goods does not pass to the consignee on shipment.

Where the terms arranged under a *c. i. f.* contract are that the documents of title will not be delivered until acceptance of the relative draft, the draft should not include amounts which may be due to the consignor on other accounts. If the amount of the draft is in excess of the sum due for costs, insurance and freight, the consignee is justified in refusing to accept the draft. **B** MEHTA & Co. *v.* HEUREUX, 26 Bom. L. R. 382; (1924) A. I. R. (B.) 422; 48 B. 531 **766**

Carriage of goods—*Railway Company—Risk-Note, Form B—Goods carried by wrong route——Deviation—Loss of goods—Burden of proof.*

Where goods consigned to a Railway Company for carriage under Risk-Note, Form B are carried to a wrong destination over a route different from that intended by the consignor, and loss or damage is caused, the burden lies on the Railway Company to prove that the loss or damage did not occur during the deviation, and in the absence of such proof, the Railway Company will be liable for the loss or damage irrespective of the terms of the Risk-Note. **B** LAXMINARAYAN BIJERAM *v.* G. I. P. RAILWAY CO., 26 Bom. L. R. 285; (1924) A. I. R. (B.) 386 **256**

Carriers Act (III of 1865), ss. 2, 6—*"Common carrier," who is—Liability of common carrier—Steamship Company carrying goods for Railway Company, liability of.*

Plaintiffs consigned certain goods to a Railway Company for carriage to a certain destination. Owing to a breakdown on the Railway line, the Railway Company made arrangements with the defendant Steamship Company to carry the goods over a portion of the route by water. The ordinary business of the defendant Company was to transport goods over that portion of the route and no special terms were entered into between the Railway Company and the defendant Company. The goods were destroyed by fire while in the custody of the defendant Company. Plaintiffs sued the defendant Company for damages for loss of the goods:

Held, that the defendant Company was liable to the loss as common carriers of the goods.

The word "for all persons indiscriminately" which occur in the definition of "common carrier" in section 2 of the Carriers Act, simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business.

This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery.

In order to limit the liability of a person who answers the definition of a "common carrier" under the Carriers Act, *viz.*, of transporting for hire goods from place to place for all persons indiscriminately, what is required is that the nature of the contract entered into by him must either have the limitation of his liability under section 6 of the Carriers Act made expressly and in writing, or the facts must be such that for the contract in question the carrier was departing from his usual business and engaging in a different type of business from that of common carrier. **P C** INDIA GENERAL NAVIGATION AND RY. CO. LTD. *v.* DEKHARI TEA CO., 28 C. W. N. 302; (1924) A. I. R. (P. C.) 40; (1924) M. W. N. 158; 19 L. W. 277; 22 A. L. J. 173; 51 C. 304; 10 O. & A. L. R. 591; 26 Bom. L. R. 571 **1038**

Cause of action, when arises—C. I. F. Contract, incidents of—Seller, duty of—Property, when passes—Failure of buyer to make payment. *See* SALE OF GOODS **303**

C. P. Tenancy Act (XI of 1898)—Abadi—*Non-agriculturists' right to occupy houses, whether transferable.*

In the absence of an agreement to the contrary the right to occupy a house and site held by a non-agriculturist is not transferable without the consent of the *malguzar*.

Obiter.—A tenant or other person entitled to a site of a house can transfer his right only to occupy the site and that too within narrow bounds. **N** LAXMI PRASAD *v.* AHMAD KACHI **635**

C. P. Tenancy Act (I of 1920), s. 89—*Surrender of undefined share by co-tenant, validity of.*

If on the relinquishment by a co-tenant of his undivided share his sons succeed and the landlord recognises them as tenants instead of their father, the arrangement is valid. **N** SHER SINGH *v.* KALU SINGH **734**

——— **Sch. II, Art. 1**, *applicability of—Suit for possession—Dispossession by landlord, whether necessary—Amendment of plaint, when allowed.*

Article 1 of Schedule II to the C. P. Tenancy Act of 1920 applies to dispossession of a tenant by any person whether the landlord or not.

Plaintiff sued to recover possession of a holding alleging that he was an occupancy tenant of the holding and was dispossessed by the defendant in July 1920. The defendant contended that the plaintiff had been out of possession since 1918 and had surrendered his tenancy and that the defendant had been placed in possession by the *Malguzar*. In the course of the pleadings the plaintiff stated through his Pleader that he had been out of possession since the end of 1918 and that the defendant has not actually dispossessed him but that the suit was filed against defendant as he was in wrongful possession. In reply it was pleaded that the plaintiff not having been in possession of the land within 2 years from the date of the suit, his claim was barred by limitation under Article 1 of Schedule II to the C. P. Tenancy Act of 1920. On the date fixed for hearing arguments on the point of limitation the plaintiff applied to amend his pleadings on the ground that he had inadvertently stated that he was dispossessed in 1918 whereas he was dispossessed of 2 fields out of 3 in 1919 and of one field in 1920, and applied to put in copies of *jamabandis* in support of this:

Held, that as the plaintiff did not in his plaint rely on the *jamabandis* he could not be allowed to amend his pleadings in order to get out of the effect of his own admission;

(2) that under Article 1 of Schedule II to the C. P. Tenancy Act of 1920, the dispossession need not necessarily be by the landlord and that the plaintiff's suit was clearly barred under that Article. **N** RAGHUNATH SINGH *v.* GABDOO **355**

Champerty—Sale by person out of possession—Sale for consideration of costs of litigation to recover property—Validity of sale. *See* VENDOR AND PURCHASER **285**

Charitable Endowments Act (VI of 1890), s. 14. *See* CIVIL PROCEDURE CODE, O. VII, R. 11 495

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 17, 18—*Owner, position of—Manager, powers of—Contract by owner, whether binding.*

Under the Chota Nagpur Encumbered Estates Act, the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the Manager is vested and alone vested with such powers. The latter is in short, in the eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

In the performance of such duties the Manager is neither the servant nor the agent of another, be that other either intervener a private or a public or political or departmental officer. The Manager is himself the principal under the Statute, and he must conform in the discharge of his duties to the provisions of the Act.

A contract for the sale of part of an estate under the Chota Nagpur Encumbered Estates Act entered into by the owner is binding neither on the Manager nor on the estate. **P C** HUKUM CHAND *v.* RAM BAHADUR SINGH, (1924) A. I. R (P. C.) 156; 34 M. L. T. 120; 3 Pat. 625; (1924) M W. N. 710; 47 M. L. J. 562; 22 A. L. J. 935; 5 P. L. T. 639 841

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, O. XXI, r. 66—*Sale proclamation—Objection as to misdescription of boundaries—Order, whether final—Test—Appeal, whether competent.*

If an order falls within section 47 of the Civil Procedure Code and is a final order, it is a decree within the meaning of the Code and can be challenged by way of appeal.

In order to determine whether an order falls within the terms of section 47 of the Code it is necessary to see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree.

Per *Pearson, J.*—The determination of a question arising upon an application under O. XXI, r. 66, may also be an order passed under section 47, Civil Procedure Code. The test in each case would be whether there had been a judicial adjudication binding on the parties in a subsequent proceeding, finally determining the rights of the parties. **C** DEVENDRANATH BASU *v.* KAILASH CHANDRA KALU 861

——— s. 2 (3), O. XXI, r. 1 (b)—*Attaching creditor whether "decree-holder"—Payment to attaching creditor of decree-holder, whether payment to decree-holder.*

The term "decree-holder" as defined in section 2 (3) of the Civil Procedure Code does not include an attaching creditor of the decree-holder.

Therefore, payment out of Court of the decretal amount by the judgment-debtor to the attaching creditor of the decree-holder is not a payment to the decree-holder within the meaning of r. 1 (*b*) of O. XXI, Civil Procedure Code. **A** RAM BADAN SINGH *v.* RAM PARGASH SINGH 947

Civil Procedure Code—1908—*contd.*

——— s. 6 *See* PROVIDENT FUNDS ACT, SS. 2, 4 424

——— s. 11. *See* CO-SHARERS 827

——— s. 11—Res judicata *between co-defendants, requisites of.*

In order that a decision should operate as *res judicata* between co-defendants two conditions must be fulfilled, first, there must be an active controversy against each other between the co-defendants and secondly, the controversy *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff. **N** LAXMAN *v.* JANOO 389

——— s. 11—Res judicata—*Rule, whether exhaustive—Issue, decision on, whether* res judicata *—Property in dispute in subsequent suit, different, effect of.*

The rule of *res judicata* as stated in section 11 of the Civil Procedure Code is not exhaustive: the section does not supersede general principles of law on the subject of *res judicata.*

The general principle underlying the rule of *res judicata* is that persons should not be harassed by continuous litigation about the same subject-matter.

Under the rule as laid down in section 11 of the Civil Procedure Code, it is not only the decision of a suit which may constitute *res judicata* but the decision of an issue alone may operate as such, and it is immaterial that in the subsequent suit the property which is the subject-matter of the dispute is not identical with the property which was in dispute in the previous suit. **O** GAURI MISRA *v.* MOHAN, 9 O. & A. L. R. 1061 847

——— s. 11—*Suit for partition compromised—Subsequent suit, whether barred*—Res judicata.

A suit for partition compromised by the parties agreeing not to press their claim for partition, does not bar a subsequent suit for partition, because the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists any of the joint tenants may apply to the Court for partition of joint property. **A** RADHA LAL *v.* MULCHAND, 22 A. L. J. 749 933

——— ss. 11, 92, O. XXIII—*Suit in respect of public charities—Compromise decree, validity of—Addition of stranger as defendant—Suit, maintainability of*—Res judicata—*Decree, setting aside of—Mistake.*

Order XXIII of the Code of Civil Procedure dealing with adjustments of suits, does not restrict the jurisdiction of a Judge to pass a decree on the basis of a compromise in a suit brought under section 92, Civil Procedure Code.

In a suit brought under section 92 of the Civil Proceedure Code with the sanction of the Advocate-General the addition of a stranger as defendant does not render the suit bad.

A suit under section 92 of the Civil Procedure Code is brought by the plaintiffs on behalf of themselves and the general public.

The decision in a previous suit under section 92 of the Civil Procedure Code would bar a subsequent suit under that section by different plaintiffs

under section 11, Explanation VI of the Code, if the provisions of the Explanation are satisfied.

A judgment passed by a competent Court having jurisdiction cannot be assailed in a subsequent suit on any ground of mistake. **C** ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM **44**

——— **ss. 11, 102, 115.** *See* VENDOR AND PURCHASER **210**

——— **s. 11, O. II, r. 2**—*Suit for possession—Future mesne profits not claimed—Subsequent suit for mesne profits, whether barred.*

Both in section 11 and in O. II, r. 2 of the Civil Procedure Code the issues and claims there referred to are those which arise out of the cause of action and not those which arise out of some possible future cause of action.

Where, therefore, future mesne profits have not been claimed in a previous suit for possession, a subsequent suit for such mesne profits is not barred. **Pat** RAMJANAM SINGH *v.* KHUB LAL SINGH **710**

——— **s. 11, O. XXI, r. 16**—Res judicata, *principle of, whether applicable to execution proceedings—Application for execution by assignee from decree-holder—Judgment-debtor, duty of.*

The provisions of section 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently.

When a judgment-debtor on receiving a notice of an application by an assignee from the decree-holder for substitution of his name in the decree, fails to prefer any objection and a definite order of substitution is passed by the Court the judgment-debtor cannot afterwards object to an execution of the decree by the assignee.

Per *Mukerjee, J.*—It is incumbent on the judgment-debtor under O. XXI, r. 16 of the Civil Procedure Code, when he receives notice of an application for execution made by the assignee of the decree-holder, to come forward and raise any objection that he may have to the execution of the decree by the assignee, and if he fails to do so, he cannot afterwards object to such execution by him. **A** DWARKA DAS *v.* MUHAMMAD ASHFAQULLAH, 22 A. L. J. 928 **722**

——— **s. 11, Expl. IV**—*Madras Civil Rules of Practice, r. 161 (3)—Transfer of decree, application for—Notice to judgment-debtor—Failure to plead bar of limitation*—Res judicata—*Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182 (5)—Attachment before judgment—Injunction—Exclusion of time—Application by transferee for recognition of transfer—Step-in-aid of execution.*

On an application for transfer of a decree, it is not only competent to the judgment-debtors but it is incumbent on them, if they propose to rely upon it, to appear and plead that the execution of the decree is barred by limitation.

Where notice of an application for transfer of the decree was issued under Rule 161 (3) of the

Madras Civil Rules of Practice to the judgment-debtor and he had opportunity to appear and plead limitation but he raised no objection and execution was ordered to proceed:

Held, that it was not open to him on a subsequent application for execution to plead that the former application was barred by limitation.

An application by a transferee decree-holder to recognise the transfer and execute the decree is a step-in-aid of execution within the meaning of Art. 182 (5) of the Limitation Act so as to save the bar of limitation of a later execution petition by the decree-holder, notwithstanding the fact that in certain subsequent proceedings the title of the transferee decree-holder on that date is negatived.

Until an assignment of a decree is held to be invalid the transferees are the proper persons who have title to execute the decree.

An attachment before judgment of a decree absolutely prohibiting the execution of the decree by anybody operates as an injunction within the meaning of section 15 of the Limitation Act. A decree-holder is, therefore, entitled to deduct for the purposes of an execution application, the period during which such attachment is in force. **M** KALLEPALLI RAJILAGIRIPATHY *v.* KALLEPALLI BHAVANI SANKARAN, 19 L. W. 650; 47 M. L. J. 4; (1924) M. W. N. 527; 47 M. 641; (1924) A. I. R. (M.) 673 **103**

——— **s. 11, Expl. IV**—Res judicata—*Title and cause of action different—Alternative ground of attack—Different property.*

A decision in a suit cannot operate as *res judicata* in a subsequent suit based on a different title and a different cause of action.

The failure of a party to set up a title as an alternative ground of attack cannot operate to deprive him of his right to set up that title in a subsequent suit in regard to property which was not in dispute in the previous suit. **A** CHHOTEY LAL *v.* CHANDRA BHAN, (1923) A I. R. (A.) 176; 45 A. 59 **1041**

——— **s. 11, Expl. IV, O. II, rr. 2, 4**—*Suit for possession—Mesne profits, subsequent suit for, whether barred.*

Where a plaintiff sues for possession of immoveable property and obtains a decree for possession and mesne profits from the date of the suit, he can bring a separate suit against the same defendant for mesne profits prior to the suit. **B** RAMCHANDRA *v.* LODHA, 26 Bom. L. R. 288; (1924) A. I. R. (B.) 368 **259**

——— **s. 11, Expl. VI**—Res judicata—*Decree for declaration and accounts obtained by one trustee against others, whether binding.*

A decree obtained by one of the trustees of a trust on behalf of the trust against the other trustees either for a declaration that the property in dispute is trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property, is binding as much on the trustees who are parties to the suit as on all persons interested

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in the trust. A THAKUR SRI GAT ASHRAM NARAINJI *v.* JAISHTH MADHO ACHARIA, 22 A. L. J. 641; (1924) A. I. R. (A.) 504; 46 A. 651 406

——— **ss. 17, 38, 39**—*Mortgage comprising properties in two Districts—Execution of mortgage decree—Jurisdiction of Court in one District to sell property situated in other District—Mortgage decree, nature of—Specific performance.*

Where mortgaged properties are situated in two Districts, and the mortgage decree is executed in the Court of one District, that Court has jurisdiction to sell the property which is situated in the other District.

No Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. But in cases of decrees for sale of mortgaged properties an exception has been recognized.

Obiter:—A mortgage decree "is practically a decree for specific performance of the contract between the mortgagor and mortgagee" and where that is so "the authority given by section 17 of the Code of Civil Procedure must include the authority to make an order of this kind, that the property shall be sold, and to direct the mode in which the sale shall take place." **Pat** ABDUL HADI *v.* KABULTUNNISSA 901

——— **ss. 20, 47**—*Stay of execution proceedings—Costs, order as to—Refusal to set aside order—Appeal, whether maintainable — Costs, award of—Discretion of Court.*

Under section 2 read with section 47 of the Code of Civil Procedure an order passed by the Execution Court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree.

No appeal lies against an order in execution proceedings refusing to set aside an order as to payment of costs, on a stay of the proceedings, as such an order is not one involving a question as to the execution, discharge or satisfaction of the decree itself.

Order as to costs is ordinarily a matter in the discretion of the Trial Court and unless some question of principle is involved no appeal can ordinarily be entertained. **A** LACHMI NARAIN *v.* BRIJ RANI 39

——— **s. 20 (c).** *See* SALE OF GOODS 303

——— **ss. 21, 45**—*Jurisdiction, want of—Objection not taken in Trial Court—Revision—Decree, whether can be set aside—Failure of justice, proof of.*

A decree cannot be reversed in revision on the ground of want of jurisdiction in the Trial Court, unless objection to the jurisdiction of the Trial Court was taken in that Court at the earliest opportunity, and there has been a failure of justice as required by section 21 of the Civil Procedure Code. **Pat** INDIAN GENERAL NAVIGATION AND RY., COY. *v.* DAULAT RAM CHATURBHUJ, 2 P. L. R. 74; (1924) A. I. R. (Pat.) 527 745

——— **s. 34.** *See* VENDOR AND PURCHASER 87

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——— **s. 35.** *See* PRESIDENCY SMALL CAUSE COURTS ACT, s. 22 766

——— **s. 39, O. XXI, rr. 7, 8, 10, 11**—*Decree, transfer of—Court to which decree transferred, when can execute—Fraudulent decree—Remedy—Injunction to restrain institution of proceedings—Cause of action, when accrues—Jurisdiction.*

Where a Court transfers its decree for execution to another Court, the latter Court although clothed with jurisdiction to execute the decree as soon as the Judge orders that the necessary copy of the decree and certificate be filed in Court, will not and cannot execute it unless and until regular application for execution is made to it under O. XXI, rr. 10 and 11, Civil Procedure Code.

In the case of a fraudulent decree the remedy is by way of injunction to restrain the party from executing the decree.

Injunction can be legally claimed and granted in order to restrain the institution of proceedings that is in anticipation.

The right to the relief of injunction to restrain the decree-holder from applying to execute his decree on the ground that it was obtained fraudulently accrues and is enforceable by suit even though the decree-holder defendant has not applied for execution, or the Court has not actually put it into execution.

In cases other than those substantially falling within the scope of suits respecting immoveable property or suits for land, if the cause of action to sue for injunction has wholly or in part arisen within the jurisdiction of any Court that Court has jurisdiction to entertain the suit, under section 20, clause *(c)* of the Civil Procedure Code. **N** SULTANALI *v.* BALAJI 59

——— **s. 41**—*Execution of decree—Transfer for execution—Certification, what amounts to—Notification of payments—Jurisdiction to execute decree.*

Where a decree is transferred to a Court for execution that Court continues to have jurisdiction to execute the decree, until it certifies to the Court that passed the decree, under section 41 of the Civil Procedure Code, that the decree has been executed, or where it fails to execute the same, the circumstances attending such failure.

Where a decree has once been transferred to another Court, certification is a very important step, for its consequence is that the Court to which the decree has been transferred ceases to have jurisdiction to execute the decree. There must, therefore, be a formal certification by the Court to which the decree has been transferred for execution to the Court which passed the decree.

The mere fact that certain payments made under the decree are notified to the Court which passed the decree does not amount to certification within the meaning of section 41 of the Civil Procedure Code. **B** SHIVLINGAPPA *v.* SHIDMALLAPPA, 26 Bom. L. R. 345; (1924) A. I. R. (B.) 359 752

——— **s. 47**—*Defendant—Name struck off, whether party under s. 47.*

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A defendant against whom the claim is not dismissed but whose name is struck off from the record at the plaintiff's own instance is not and cannot be regarded as a party to the suit or the decree within the meaning of section 47 of the Civil Procedure Code, as there is no formal expression of an adjudication which, so far as he is concerned, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. **N** KANHAIYALAL KALAR *v.* LACHHI **470**

——— **ss. 47, 141, 144, 151,** *scope of—Money decree—Execution—Attachment of standing crops—Crops delivered to decree-holder for safe custody—Decree-holder, position of—Security bond—Decree, satisfaction of—Restitution of crops, application for—Executing Court, jurisdiction of—Separate suit, whether necessary.*

An Executing Court, which entrusts to a party to the decree or to a third person as a depository or *sapratdar* property taken by it under attachment or in execution of its process, has, either acting on its own motion or at the instance of a party to the decree, power

(1) to order him to produce it for sale if necessary, or even to return it to the judgment-debtor or to the objector or any other person from whose possession it was attached or taken, upon the decree being satisfied or objection being allowed or upon the termination of any proceeding in execution, or for any cause whatever, and also if necessary;

(2) to visit him with any penalty for his default in obeying its orders by proceeding against him in a summary manner, in order to prevent the abuse of its own process and for shortening the litigation or for the ends of justice.

The mere fact that the decree-holder becomes a depositary of the property taken in execution of a decree does not make him a stranger to the decree so as to prevent the Court from exercising its jurisdiction over him.

Section 151 of the Civil Procedure Code gives ample jurisdiction to a Court to pass orders for the restoration of or for the proclamation of the withdrawal of attachment of moveable property also.

The word 'decree' in section 141 of the Civil Procedure Code covers on 'order' and the word 'Court' includes Courts of every grade.

Section 244 of the Civil Procedure Code corresponding to section 47 of the new Civil Procedure Code is meant to provide "a cheap and expeditious remedy" by empowering the Court executing a decree to determine questions that may arise in execution proceedings, without requiring the parties to bring a separate suit in respect of *any questions* that may arise between them in such proceedings.

The surety bond which the *supratdar* has to execute, should be drawn up in such form as to clearly bring home to him the nature of his liability. **N** RAMJI *v.* ZIBLAJI, 7 N. L. J. 130; 20 N. L. R. 93 **49**

——— **ss. 47, 144**—*Restitution—Sale, whether can be set aside—Auction-purchaser, position of—*

Civil Procedure Code—1908—contd.

Bona fide *purchaser, who is—Decree set aside by suit, effect of.*

The language of clause (1) of section 144 of the Civil Procedure Code is wider than that of the corresponding section 583 of the Code of 1882 and the addition of clause (2) barring suits necessarily implies the widest possible construction of clause (1).

The question of restitution of property sold under a decree, is restricted not merely to the parties themselves but also extends to their representatives within the meaning of section 47 of the Civil Procedure Code, and the term 'representatives' includes not merely legal representatives, but also assignees.

While as against a decree-holder who is himself the auction-purchaser, a sale can be set aside and restitution made an innocent purchaser through Court cannot be so disturbed.

By the phrase "*bona fide* or innocent purchaser" as distinguished from the case where the decree-holder is himself the auction-purchaser, the Courts imply the test of knowledge of the pending proceedings whether by appeal or otherwise to set aside a decree, and opportunity to defend his own interests in those proceedings.

The fact that the decree which was executed by sale was set aside, not in appeal, but by subsequent litigation, does not affect the question of restitution. **S** JAMNOMAL GURDINOMAL *v.* GOPALDAS, 17 S. L. R. 73; (1924) A. I. R. (S.) 101 **1002**

——— **s. 47, O. XXI, rr. 22, 90**—*Limitation Act (IX of 1908), Sch. I, Arts. 166, 181—Execution of decree—Notice of attachment, absence of, effect of—Sale, whether void—Application to set aside sale, nature of—Limitation—Appeal, whether lies—Sale set aside—Terms.*

In a case where notice under O. XXI, r. 22 of the Civil Procedure Code has not been issued and the omission is due not to the fact that sub-rule (2) of the rule has been applied, but to the fact that notice was not asked for a sale held in execution is void and not merely voidable as against the person to whom notice should have been but was not issued.

Where a sale in execution of a decree is void as against a party and he applies for relief under section 47 of the Civil Procedure Code or otherwise, the case is governed by Article 181 and not by Article 166 of Schedule I to the Limitation Act.

Schwabe, C. J. and Waller, J.—An application to set aside a Court sale on the ground that no notice was given of the application for attachment and order for sale of the property is not covered by O. XXI, r. 90 of the Civil Procedure Code but comes under section 47 of the Code and an order passed on the application is, therefore, appealable as a decree.

Where an application is made to set aside a Court sale on the ground of want of notice in accordance with the provisions of O. XXI, r. 22 of the Civil Procedure Code and the sale is set aside and it appears that the defendant judgment-debtor was properly before the Court and his interest is liable to be sold in satisfaction of the decree,

the petitioner can only be permitted to recover possession of the property on payment to the purchaser of what he has paid together with interest less any amount he may have received for mesne profits. **M** RAJAGOPALA AIYAR *v.* RAMANUJACHARIAR, 46 M. L. J. 104; 19 L. W. 179; (1924) M. W. N. 182; 47 M. 288; (1924) A. I. R. (M.) 431 **92**

——— **s. 47, O. XXI, r. 58**—*Same person both prior and puisne mortgagee—Decree obtained by him as prior mortgagee also against him as puisne mortgagee—Objection by him against sale of property in execution of later decree, nature of.*

P. mortgaged his property twice to *K.* and then to *G.* and to *K.* again. *K.* sued *P.* and *G.* on his two earlier mortgages and obtained a final decree. During the pendency of *K.'s* suit *G.* sued *P.* and *K.* on his mortgage and obtained an *ex parte* final decree. On *G.'s* application for execution of his decree, *K.*, lodged an objection on the ground that he was the owner of the property on a title prior in time to *G.'s* mortgage :

Held, that *K.'s* objection was not under section 47, Civil Procedure Code, by a party to the decree but under O. XXI, r. 58 by a stranger and that it was a direct attack on *G.'s* decree for the sale of property. **N** GANGARAM *v.* KANHAILAL **626**

——— **s. 47, O. XXI, r. 91**—*Execution sale—Judgment-debtor having no saleable interest—Suit for refund of purchase-money, whether maintainable.*

A suit for refund of purchase-money is not maintainable by the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the land. **C** BANKA BEHARI DAS *v.* GURU DAS DHAR, 28 C. W. N. 20; (1924) A. I. R. (C.) 172; 40 C. L. J. 157 **257**

——— **s. 48**—*Fraud—Wilful evasion of arrest by judgment-debtor—Limitation.*

When a judgment-debtor, who is able to pay, evades arrest in execution of the decree he is guilty of fraud within the meaning of section 48 of the Civil Procedure Code and consequently the period of limitation is extended under the section. **M** RAMANATHAN CHETTIAR *v.* MOIDEEN SAHIB, 47 M. L. J. 428; 20 L. W. 475; (1924) M. W. N. 745 **731**

——— **s. 48, O. XXI, rr. 60, 63**—*Effect of orders—Suit*—Lis pendens—*Execution—Attachment — Release — Fraud —Absence from jurisdiction of Execution Court—Limitation, fresh start of*—Res judicata *in execution proceedings.*

The effect of the judgment in a suit brought in accordance with O. XXI, r. 63, Civil Procedure Code, is to supersede the order passed upon a claim made under r. 58 and to render it inconclusive.

A suit under O. XXI, r. 63, Civil Procedure Code, is a continuation of claim proceedings. It is a suit to set aside the order passed upon the claim and is merely a form of appeal in the guise of an original suit.

A private transfer of the attached property, after the date of its release, at the instance of a claimant or objector, is bad on the ground of *lis pendens*, and does not affect the right of the party in whose favour the suit may be decided.

An order of release under O. XXI, r. 60, Civil Procedure Code, is not final but provisional, and although it operates to prevent the attaching creditor from proceeding to sell the attached property it does not operate so as at once to remove the attachment and leave the judgment-debtors free to deal with the property as they like. If they do deal with it, they and those with whom they deal, do so subject to the result of the suit as to the attachment being maintained.

Ordinarily, for a decree-holder to execute his decree for money two things are at least essential. Either the person or the property of the judgment-debtor must be made available against which the execution could issue; if his property be not available, at least the arrest of his person must be possible.

Conduct is the best proof of intention.

Under section 48, Civil Procedure Code, the word "fraud," is used in a much wider sense than that in which it is generally used in Englisn Law. Locking up the house so as to prevent attachment of moveable property; or evading arrest by any contrivance; or dishonestly evading payment by eluding service of warrant, is a fraud within the meaning of the section. Similarly, a fictitious transfer of property made by a judgment-debtor to defeat or delay the execution of a decree, that may be passed against him amounts to fraud within the meaning of the section.

Fraud on the part of a judgment-debtor at any stage of the execution gives a new starting point for the period of limitation. Therefore, a judgment-debtor's continued absence from the jurisdiction of the Executing Court is a continuing fraud, and keeps the right of the decree-holder to apply for execution alive, from day to day during his period of absence from the jurisdiction of the Court.

If an Executing Court holds rightly or wrongly that a decree is executable, even after the twelve years have elapsed, and orders execution to issue and the judgment-debtor does not challenge the order by way of appeal, review or revision, the order is binding on him and on principles analogous to those of *res judicata* strictly so-called, he is precluded from challenging the order at a subsequent stage of execution proceedings. **N** KHAIRULLA *v* DHANRUPMAL **905**

——— **s. 52**—*Income from impartible* zemindari, *whether liable for debts of deceased* zemindar—*Attachment—Mode of execution.*

Under section 52 of the Civil Procedure Code, the income of landed property which has passed from one *zemindar* to the next, the property being an impartible *raj*, is liable in execution for the debts of the deceased *zemindar*.

Income which has accrued since the death of the late *zemindar* and has come into the hands of the new *zemindar*, can be attached in execu-

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tion for the debts of the late *zemindar* and dealt with according to the provisions of the Code. **M** KADIRVELUSWAMY NAICKER *v.* EASTERN DEVELOPMENT CORPORATION LTD. 46 M. L. J. 261; (1924) M. W. N. 346; 47 M. 411; (1924) A. I. R. (M.) 530 **163**

——— **ss. 52, 152**—*Personal decree against legal representative—Amendment of decree—Belated application, whether maintainable.*

It is not competent to a Court to pass a decree against the legal representative of a deceased defendant so as to make him personally liable and the mistake should be rectified even though it is brought to the notice of the Court at a rather late stage of the proceedings. **B** JAYAVANT RAO NARAYAN DESHMUKH *v.* NARSING SAKHARAM DESHMUKH, (1923) A. I. R. (B.) 414 **180**

——— **s. 60**. *See* PROVINCIAL INSOLVENCY ACT, ss. 2 (*d*), 28 **642**

——— **s. 60 (e)**. *See* TRANSFER OF PROPERTY ACT, s. 6 (*e*) **141**

——— **s. 64**—*Transfer of Property Act (IV of 1882), ss. 53, 54—Execution of decree—Attachment—Agreement to sell by judgment-debtor prior to attachment—Specific performance, decree for, after attachment, effect of—Remedy of creditor.*

Where a judgment-debtor agrees to sell certain property prior to an attachment effected by the decree-holder and the purchaser obtains possession of the property under a decree for specific performance of the agreement, after the attachment, the attachment cannot prevail against the rights of the purchaser under his decree for specific performance, and the only manner in which the decree can be questioned by the attaching decree-holder is by a suit under section 53 of the Transfer of Property Act. **M** SUNKARI SITAYYA *v.* MUDARAGADDI SANYASI, 46 M. L. J. 361; 19 L. W. 455; 34 M. L. T. 110; (1924) M. W. N. 329; (1924) A. I. R. (M.) 610 **388**

——— **s. 73, O. XXI, r. 72, sub-r. (2)**—*Sale-purchase by decree-holder—Set off - Rateable distribution—Receipt of assets—Jurisdiction—Revision.*

The jurisdiction of a Court in entertaining an application for rateable distribution of the assets under section 73, Civil Procedure Code, depends on the *sine qua non* of its being made before the receipt of such assets.

A Court in receiving and disposing of an application under section 73, Civil Procedure Code, in defiance of the conditions on the existence of which the jurisdiction rests, exercises its jurisdiction with material irregularity and its order is open to revision.

Where a decree-holder himself is the purchaser and claims a set-off against the price of property purchased which is allowed by the Court, no application for rateable distribution under section 73, Civil Procedure Code, can be entertained after the termination of the sale. The Court in such a case obtains constructive seisin over the purchase-money immediately after the conclusion of the sale and the order allowing set-off under O. XXI, r. 72 of the Code is not equivalent to receipt of the assets but a mere disposal thereof

Obiter: In a case where an application for set-off is made and there are no obstacles to the granting of it, *e. g*, absence of an application under section 73, Civil Procedure Code, it is doubtful whether there can ever be a 'receipt of assets' by Court within the meaning of section 73, Civil Procedure Code. **O** MOHAN LAL *v.* AMAR NATH **40**

——— **s. 73, cls. (a) (b) (c)**—*'Any property,' meaning of—Decree on the basis of security of moveable property, legality of.*

There may be mortgage or hypothecation of movable properties. Such hypothecation or mortgage not accompanied by possession confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it.

The words 'any property' used in clauses (*a*) and (*b*) of the proviso to section 73 of the Civil Procedure Code as contradistinguished from the words "immoveable property" in clause (*c*) tend to show that hypothecations of moveables were intended to be included therein. Therefore, a decree based on a security of moveable property cannot be held to be without jurisdiction. **C** JATINDRA CHANDRA CHOWDHURY *v.* RANGPUR TOBACCO CO. LTD. **20**

——— **s. 75, O. XLI, r. 25**—*Local investigation—Commissioner, report of, when can be overruled—Remand—Lower Court, whether can take view inconsistent with remand order.*

Where a matter has been referred to a Commissioner for local investigation, it is not safe for a Court to act as an expert and to overrule the elaborate report of the Commissioner whose integrity is unquestioned, whose careful and laborious execution of his task is proved by his report and who has not blindly adopted the assertions of either party.

When a case is remanded to the lower Court it is not open to it to take a view inconsistent with that followed in the order of remand. **C** AMRITA SUNDARI DEBI *v.* MUNSHI SERAJUDDIN AHMED CHOUDHURY, 28 C. W. N. 318; (1924) A. I. R. (C.) 620 **755**

——— **s. 79 (1)**—*Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 32 (2)—Railways Act (IX of 1890), s. 3 (6)—Suit against State Railway—Manager, whether can be sued—Defendant, proper—"Railway administration," definition of, scope of—Interpretation of Statutes—Interpretation clause, scope of.*

Where an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that if that word is used more than once in the Act it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration.

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The extended meaning given to the expression "railway administration" by the words "and includes the Government" in section 3 (6) of the Railways Act, does not apply appropriately in all cases where that expression occurs in the Act, but, it can be availed of when the subject or context shows this is legitimate, as in the case of suits falling under Chapter VII of the Act.

The Railways Act contains no clear indication that a suit against a State Railway can be brought against the Manager, and on the contrary, the definition of "railway administration," in the case of a railway administered by the Government, as including the Government, suggests that a suit like this should be brought against the Government.

By virtue of the provisions contained in section 79 (1) of the Civil Procedure Code and section 32 (2) of the Government of India Act, the Secretary of State for India is the real and proper defendant in a suit against a State Railway. **B** SUKHANAND SHAMLAL *v.* OUDH AND ROHILKHAND RAILWAY, 26 Bom. L. R. 71; 48 B. 297; (1924) A. I. R. (B.) 306 **531**

——— **ss. 80, 100**—*Suit against public officer—Tortious act—Notice, whether necessary—Second appeal—Finding of fact, when can be disturbed—Precedents—Case distinguished, effect of.*

For a suit against a public officer notice under section 80 of the Civil Procedure Code is equally necessary whether the act complained of was not in good or bad faith.

The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capcaity within the ordinary meaning of the term "purport." The motives with which the act was done do not enter into the question at all.

Findings of fact must be accepted in second appeal unless it can be said that there was no evidence to support them or that they are based on some error of law.

The fact that a decided case was distinguished in a judgment in a subsequent case does not show that it was accepted as good law. If a case is distinguished it is unnecessary to express any opinion as to its correctness, and it is notorious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them. **A** ABDUL RAHIM *v.* ABDUL RAHMAN, 22 A. L. J. 812; 10 O. & A. L. R. 837 **72**

——— **s. 85, O. XXXII**—*Ruling Prince—Majority—Personal law—Guardian* ad litem, *whether necessary—Manager, suit by, maintainability of.*

It is not necessary to appoint a guardian *ad litem* of a Ruling Prince not living within the limits of British India and not domiciled in British territory who has attained majority under his personal law, although he is a minor under the Indian Majority Act. Such Prince is not a minor within the meaning of O. XXXII, Civil Procedure Code. He is, moreover, entitled to act through his manager appointed under section 85 of the Code of Civil Procedure. **C** RAMESH CHANDRA DAS *v.* MAHARAJA BIRENDRA KISHAN **100**

——— **s. 91**. *See* ESTOPPEL **946**

——— **s. 92**—Mahant, *whether trustee—Civil Court, whether can remove* mahant—*Worshippers of temple, whether can institute suit.*

The *mahant* of a temple is a trustee, and temple property is trust property within the meaning of section 92 of the Civil Procedure Code.

A Civil Court cannot interfere with the spiritual functions of a *mahant* but it can remove him from the control of and connection with a religious or charitable endowment, and prevent him from acting as *mahant* in future.

The worshippers of a temple are the true beneficiaries of the endowment, and are competent to institute a suit under section 92 of the Civil Procedure Code, with respect to the temple properties. **O** SARABJIT BHARTI *v.* GAURI NATH, 10 O. & A. L. R. 1; 10 O. L. J. 619; (1924) A. I. R. (O.) 261; 27 O. C. 149 **674**

——— **s. 92**, *scope of—Trustee setting up adverse title—Suit, maintainability of—Transfer of Property Act (IV of 1882), ss. 122, 123—Hindu Law—Gift, essentials of—Dedication to deity—Acceptance by donee.*

To make section 92 of the Civil Procedure Code applicable it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant and a suit under that section is maintainable for declaratory relief, where the trustee not only mismanages the trust property but sets up a title adverse to the trust.

Under section 122 of the Transfer of Property Act to constitute a valid gift, there must be a voluntary giving by the donor and an acceptance by the donee. What constitutes acceptance depends upon the circumstances of each case.

In the case of the donee, being incapable of signifying his acceptance by reason of age or of his being an impersonal being recognized by law as capable of being a donee, such as deity, the acceptance required by the section may be done on his behalf by somebody else competent to act as an agent. The acceptance may again be signified by an overt act such as the actual taking possession of the property, or such act by the donee as would in law amount to taking possession of the property where the property is not capable of physical possession. Thus actual delivery of possession is not essential in all cases, for it is only one of the modes of indicating acceptance.

A registered deed of gift cannot take the place of those essentials among which is the complete divesting of the ownership by the donor. Therefore, it must be proved in each case, apart from the registration of the document, that there was a complete divesting of the ownership. A registered deed of gift, as any other such document, may be merely a nominal transaction, without any intention

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on the part of the executant to give effect to the terms falsely or fictitiously set forth in the document.

The Transfer of Property Act lays down general provisions governing gifts and dedications and there is no distinction in principle between the essential ingredients requisite for a valid gift or dedication in Hindu Law and those laid down by the Act.

The essential ingredient that constitutes gift of moveable or immoveable propert in the Hindu Law whether in favour of a deity or a human being is the *Sankalp* and the *Samarpan* whereby the property is given completely away and the owner completely divests himself of the ownership in it. **Pat** DEO SARAN BHARTHI *v.* DEOKI BHARTHI, 5 P. L. T. 305; 3 Pat. 842; (1924) A. I. R. (Pat.) 657 **980**

——— **ss. 94, 151, O. XXXIX, r. 2.** *See* MADRAS DISTRICT MUNICIPALITIES ACT, s. 303 (2) (*b*) **664**

——— **s. 100**—*Second appeal—Finding of fact.*

A finding of fact cannot be interfered with in second appeal unless it can be shown that there is no evidence to support it or that it has been influenced by an erroneous view of the law. **C** HARIRAM MAHATA *v.* MAHESH CHANDRA MAHATA **290**

——— **s. 100**—*Second appeal—Misconception of evidence—High Court, whether will interfere.*

A finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it. **A** SUBEDAR *v.* DUBEY JAGAT NARAIN, 22 A. L. J. 739 **25**

——— **ss. 100, 115.** *See* OUDH RENT ACT, ss. 119, 135 **327**

——— **s. 100 (2)**—Ex parte *decision—Second appeal, maintainability of.*

A second appeal against an *ex parte* decision is maintainable under section 100 (2), Civil Procedure Code, even though there are other remedies open to the appellant.

When a case is decided *ex parte*, the remedy open to the party affected by the decision is threefold; first, he may apply for restoration of the case; secondly, he may apply for a review of judgment, and thirdly, he may appeal from the decree. **C** KALI PROSANNO CHAKRAVARTY *v.* NAJABULLA JAMADAR **14**

——— **s. 109 (a)**—*'Final order,' what is—Order remanding case for trial on remaining issues, whether 'final order.'*

In determining the question whether an order is a 'final order' within the meaning of section 109 (*a*) of the Civil Procedure Code, regard must be had to the immediate effect on the suit sought to be appealed against and not to the effect which a decision in favour of the applicant would have, if the proposed appeal to the Privy Council were successful.

An order is a 'final order' within the meaning of section 109 (*a*) of the Civil Procedure Code only if it decides, or has the effect of deciding a cardinal issue in the suit, that is an issue going to the foundation of the suit, and thus disposes

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of the rights of the parties in the litigation, it being permissible for this purpose to examine not only the order but also the circumstances of the case with a view to ascertaining the effect of the order on the suit.

An order made by the High Court reversing the decree of the Trial Court dismissing the suit on a preliminary point, and remanding the case for trial on the remaining issues, is not a 'final order' within the meaning of section 109 (*a*) of the Civil Procedure Code. **L** SULTAN SINGH *v.* MURLI DHAR, 6 L. L. J. 240; 5 L. 329; (1924) A. I. R. (L.) 571 **366**

——— **s. 115.** *See* ARBITRATION **403**

——— **s. 115.** *See* BENGAL TENANCY ACT, s. 173 (3) **708**

——— **s. 115.** *See* LIMITATION ACT, s. 5 **617**

——— **s. 115**—*Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 107—Court Fees Act (VII of 1870), s. 7 (iv), (v)—Interlocutory order when can be revised—Order demanding improper Court-fee—High Court, whether will interfere in revision—Case decided, meaning of—Order to pay* ad valorem *Court-fee—Court, whether can review its own order—Payment of additional fee, whether operates as estoppel.*

The principle is that ordinarily an interlocutory order is not capable of revision, particularly when there is another remedy available to the injured party but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party an interlocutory order may be revised under section 115 of the Civil Procedure Code read with section 15 of the Charter Act. (Section 107 of the Government of India Act).

An order demanding an improper Court-fee involving jurisdiction of the Court to try or not to try the suit, though an interlocutory order fulfils the test referred to above and will attract the revisional jurisdiction of the Court under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, the decision of matters relating to Court-fees will be decision of a "case" within the meaning of the word in section 115 of the Code.

The Court has a right to determine an issue rightly or wrongly and a wrong decision in itself will not attract the revisional jurisdiction of this Court: if on account of its wrong decision the Court refuses to exercise a jurisdiction vested in by law or exercise a jurisdiction not vested in law, the revisional jurisdiction of the High Court will come in. Thus if the Court wrongly decides the issue as to Court-fee holding that the suit comes under a particular clause of the Court Fees Act and asks the plaintiff to pay additional Court-fee before his suit can be entertained and the real issues can be tried, the Court refuses to try the case and exercise its jurisdiction unless the proper Court-fee is paid. Such an order will be capable of revision.

Plaintiffs sued to recover possession of the estate of one *C* upon the deed of his widow *K* on the ground that they were the nearest reversionary heirs of *C*. They paid Court-fee on ten times the Government revenue under section 7, clause (v) of the Court Fees Act, but the Court ordered payment of *ad valorem* Court-fees under clause (iv) on Rs. 5,200 the valuation put by the plaintiffs. The additional Court-fee was paid. Subsequently the Court assessed the value of the properties at Rs. 19,060 and fixing the value of the suit at that sum ordered the plaintiffs to pay the deficit Court-fee within 3 weeks. The plaintiffs thereupon put in an application for review of this order but the Court rejected this application. The plaintiffs filed a petition of revision in the High Court :

Held (1) that, the fact that the plaintiffs paid a small sum demanded by the Court in the first instance did not preclude them from disputing the subsequent decision of the Court demanding a very high sum on the ground that *ad valorem* Court-fee was payable under section 7 clause (iv) of the Act ;

(2) that the Court was competent to review its order and was wrong in holding that the application for review was not maintainable so long as the first order demanding *ad valorem* Court-fee was not sought to be reviewed;

(3) that the High Court could interfere in revision with the order demanding additional Court-fees;

(4) that, however, the suit fell under s. 7, clause (iv) and not clause (v) of the Court Fees Act, and *ad valorem* Court-fees were payable. **Pat** MANI LAL *v.* DURGA PRASAD, 5 P. L. T. 425; (1924) Pat 254; 3 Pat. 930 **667**

——— **s. 115**—*Interlocutory order—Determination of case—Revision.*

No revision will lie against an interlocutory order which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined thereafter. **O** DHARAM NARAIN *v.* UNAO COMMERCIAL BANK, 10 O & A. L. R. 835 **612**

——— **s. 115**—*Railways Act (IX of 1890), s. 77—Suit against railway for damages for loss of goods—Notice, absence of—Court holding notice not necessary—Revision, whether lies.*

Where a Court has jurisdiction to determine a question and it determines that question, it cannot be said to have acted illegally or with material irregularity, in the exercise of its jurisdiction, within the meaning of section 115 of the Civil Procedure Code merely because it has come to an erroneous decision. Where, in a suit against a Railway Company, for damages for loss of goods, a Court erroneously holds that notice under section 77 of the Railways Act was unnecessary on the facts of the case, it cannot be said that it assumes jurisdiction which had not been vested in it by law, and the decision is not, therefore, open to revision under section 115 of the Civil Procedure Code. **C** EAST INDIAN RY. Co. *v.* KANAILAL, 23 C. W. N. 292; (1924) A. I. R. (C.) 493 **205**

——— **s. 115**—Res judicata *pleaded—Court refusing to try the plea before entering into merits—Revision.*

If a Court refuses to try the plea of *res judicata* before entering into the merits of the case the matter does not fall within the purview of section 115, Civil Procedure Code, inasmuch as no case is decided and no question of jurisdiction is involved in the action of the Court. **O** GAJADHAR LAL *v.* REOTI RAMMAN **628**

——— **s. 115**—*Revision—Decree of first Court reversed on new point without sufficient materials—Material irregularity.*

A Court acts with material irregularity, within the meaning of section 115, Civil Procedure Code, when it reverses the judgment of the first Court on a new question which was not raised by the parties and for which there were not sufficient materials before the Court. **M** NARANO MAHAPATRO *v.* RAMACHANDRA MARDARAJA DEO GARU **724**

——— **s. 115**—*Revision—Jurisdiction, exercise of, by Trial Court, interference with—Oudh Civil Courts Act (XIII of 1879), s. 17—Suit for possession of house by partition—Subject-matter of suit—Valuation.*

Under section 115 of the Civil Procedure Code the High Court is not confined to an enquiry as to the jurisdiction exercised by the lower Appellate Court above. The section gives the High Court power to enquire whether the Court of first instance has failed to exercise jurisdiction or not.

Plaintiff sued for possession of half share in a house either by partition or by a decree for joint possession. The defendant had purchased the house for Rs. 215 at Court auction sale, and the suit was valued by the plaintiffs at Rs. 300 for the purposes of jurisdiction. Defendant contended that he had pulled down the house purchased by him and had built a *pucca* house of considerable value on the land and that if any decree for possession was passed in favour of the plaintiff, compensation must be given to the defendant. It was discovered that the value of the house built by the defendant was over Rs. 2,000 :

Held, (1) that the house built by the defendant was not part of the subject-matter of the suit within the meaning of section 17 of the Oudh Civil Courts Act, but that the subject-matter of the suit was the value of a half share in the house as it stood at the time of the defendant's purchase ;

(2) that, therefore, the suit had not been undervalued by the plaintiff. **O** ABDULLA *v.* MAHAMMAD NAZIR, 10 O. & A. L. R 19 **694**

——— **ss. 115, 148, 151**—*Appeal accepted subject to payment of costs within certain period—Default in payment—Extension of time—Power of Court—Revision.*

Section 148 of the Civil Procedure Code applies only to the case of an act to be done by a party under the provisions of the Code itself.

Where an appeal is accepted subject to the condition that the appellant should pay to the respondent a certain sum of money by way of costs within a certain period and the condition is not complied with, the Court has no power either under section 148 or under section 151 of the Civil Procedure Code to extend the time limited in the order for payment of the money.

The High Court should not exercise its powers of revision under section 115 of the Civil Procedure Code except in aid of justice. **Pat** HAMIDUR RAHMAN *v.* SHAHANAND DAS **575**

——— **s. 115, O. VI, r. 17**—*Plaint, amendment of —Variation of original cause of action—Refusal to allow amendment—Material irregularity—Revision.*

A plaintiff sued to set aside a sale alleging that defendants took advantage of his youth and defrauded him. He then applied to amplify and amend the plaint by stating that he was a minor on the date of the sale. The amendment was disallowed as not coming under O. VI, r. 17 of the Civil Procedure Code on revision to the High Court :

Held, (1) that the amendment was not such a variation of the original cause of action as to preclude permission to amend under O. VI, r. 17 of the Civil Procedure Code;

(2) that the refusal by the Court to exercise its lawful power so as to deprive the plaintiff of what appeared to be a vital plea amounted to material irregularity and would justify interference in revision under section 115 of the Civil Procedure Code.

There is no objection to amendments which amplify and develop the original cause of action, so long as they do not vary it. **M** SOMASUNDARA BHATTAR *v.* MUTHU THEVAR **278**

——— **s. 115, O. IX, r. 8**—*Absence of plaintiff—Dismissal of suit—Revision—Procedure.*

If on the date of the hearing of a suit, the plaintiff does not appear and his Pleader has no instructions to conduct the suit, then there is no reason for the Court to raise issues or, if they have been already raised, to find on them. The suit must be dismissed under O. IX, r. 8 of the Civil Procedure Code. In such a case the aggrieved party can apply for a review of the order or apply for an order to set aside the order of dismissal. The fact that the Court erroneously finds on the issues and rejects the claim does not entitle the aggrieved party to move the High Court in revision. **B** PANDURANG VEDURAM *v.* MOHAN CHHATRABHUJ, (1923) A. I. R. (B.) 395 **178**

——— **s. 115, O. XI, rr. 14, 15**—*Documents produced by one party with request not to allow inspection without hearing objections—Right of other party to claim inspection—Jurisdiction of Court—Procedure.*

The privilege of inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted, and it is to be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.

When a party has produced in Court under O. XI, r. 14, Civil Procedure Code, documents in his possession but has urged that inspection should not be allowed before hearing his objections, the

Court has no right to ignore that protest and the other party has no legal right to inspect all documents relating to all issues and to all stages of the trial of the suit, *i. e.*, the mere production by one party does not give an immediate and indefeasible right of inspection to the other.

Interference in revision by the High Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good. But the revisional powers must be exercised where the lower Court has not properly understood certain provisions of law and the result of its order may be wholly unnecessary and may cause irrepairable damage to a party's interests. **M** RAMACHARI *v.* KRISHNAMACHARI, 47 M. L. J. 460; 20 L. W. 533; (1924) M. W. N. 863 **604**

——— **s. 115, O. XLVII, r. 4**—*Review, order refusing to grant—Revision, whether lies.*

No revision lies against an order of a lower Court refusing to grant a review of its decision. **B** LAKSHMAN MARUTI JADHAR *v.* MARUTI LAKSHMAN TELI, 26 Bom. L. R. 284; (1924) A. I. R. (B.) 344 **267**

——— **s. 122, O. IX, r. 13.** *See* LIMITATION ACT, s. 5 **877**

——— **s. 141, O. XXI, r. 90**—*Sale in execution —Application for setting aside sale, dismissal of —Order, whether appealable.*

An appeal lies against an order dismissing for default an application under O. XXI, r. 90, Civil Procedure Code, for setting aside an execution sale. **C** DEBENDRA NARAIN SINGHA *v.* NARENDRA NARAIN SINGHA **678**

——— **s. 144**—*Execution of decree—Sale of properties belonging to judgment-debtor—Decree set aside on appeal—Restitution—Commission paid to auctioneer, whether can be deducted—Interest, whether can be allowed.*

Where properties belonging to a judgment-debtor are sold in execution of a decree and the decree is subsequently set aside on appeal, the judgment-debtor is entitled to recover from the decree-holder under section 144 of the Civil Procedure Code the full amount of consideration paid by the auction-purchaser for the properties *plus* interest on the amount for the period during which the money remained in the hands of the decree-holder. The latter is not entitled to deduct from the sale price the amount of commission paid to the auctioneer. **L** RALYA SINGH *v.* TUNIA MAL, 6 L. L. J. 142; (1924) A. I. R. (L.) 486 **316**

——— **s. 145**—*Execution of decree—Arrest of judgment-debtor—Surety for appearance of judgment-debtor—Default—Decree, whether can be executed against surety.*

A judgment-debtor was arrested in execution of a decree and brought before the Court. Respondent offered to stand surety for him and on his executing a surety-bond, the judgment-debtor was released. By the terms of the surety-bond the surety undertook that the judgment-debtor would continue to appear in Court till the final decision of the case and that if he made default, the surety and his property would be liable for the amount of

the decree. The judgment-debtor failed to appear in Court on one hearing and the decree-holder applied for execution of the decree by attachment of the surety's property:

Held, that the surety had become liable for the decretal amount under section 145 (c) of the Civil Procedure Code, and that the decree could be realised by attachment of his property. L SHIV DAYAL RAM DITTA MAL *v.* MUHAMMAD KHAN, 6 L. L. J. 203; (1924) A. I. R. (L.) 490 700

——— **s. 145, O. XXI, r. 40**—*Arrest of judgment-debtor—Release on furnishing security—Surety, liability of, extent of—Court, whether can go behind terms of bond.*

A judgment-debtor was arrested in execution of a decree pending an appeal against that decree and was brought before the Executing Court, which passed an order that he should be released provided he filed a security bond with two sureties for a certain sum. A bond signed by two sureties was accordingly filed in Court and the judgment-debtor was released. After the dismissal of the appeal, the decree-holder applied for execution of the decree against the sureties, but it was discovered that the only undertaking given by them in the surety-bond was to produce the judgment-debtor in Court after the dismissal of his appeal; and that if they failed to produce him, they would be liable to pay the decretal amount:

Held, that it was not open to the decree-holder or the Court to go behind the terms of the bond and that the sureties could not be held liable for anything more than what they had undertaken in the bond. A THAKUR MAHIPAL SINGH *v.* ATHAL SINGH 446

——— **s. 146, O. XXI, r. 16**—*Execution of decree—Purchaser of portion of properties covered by decree, position of—Order in execution—Purchaser, whether can appeal.*

A person who is not a party to a proceeding in the lower Court cannot appeal from the decree or order passed, unless he can prove that he has such a right under the provisions of the Civil Procedure Code.

A purchaser of property which has been directed by a decree to be given into the possession of the decree-holder cannot rely on the provisions of section 146 of the Civil Procedure Code. He is expressly excluded, from applying for execution of the decree unless he can also prove that he is an assignee of the decree. Nor can such a purchaser appeal from an order passed on the application of the decree-holder. B VITHAL *v.* MAHADEV, 26 Bom. L. R. 333; (1924) A. I. R. (B.) 423 249

——— **s. 149**—*Appeal—Court-fees not paid in full*—Bona fide *mistake—Time, whether can be extended.*

An appeal when filed was not properly stamped and the prescribed period of limitation for filing the same expired long before the deficiency in Court-fees was made up. But it was found that the full Court-fees was not paid in the first instance on account of a *bona fide* mistake, and the deficiency was made up as soon as it was brought to the notice of the appellant:

Held, that the appellant was entitled to the benefit of section 149 of the Civil Procedure Code

and that the time should be extended. L MOTI RAM *v.* BHANU RAM, (1923) A. I. R. (L.) 629 251

——— **s. 151**. *See* SUITS, VALUATION OF 183

——— **ss. 151, 152**, *scope of—Amendment of judgment—Accidental mistake—Fraud—Inherent power.*

An amendment of a judgment cannot be allowed under section 152 of the Civil Procedure Code merely on the ground of mistake. The error must be a natural consequence of an accidental slip or omission. Where the error is due to a deliberate wrong statement in the plaint, the section cannot be invoked for the purpose of correcting it, unless third parties have acquired rights under the erroneous judgment in the interval.

Under section 151 of the Civil Procedure Code however, the Court can correct the judgment even if the mistake was due to fraud and was not accidental, as under that section it has the inherent power to act *ex debito justitiæ* and to that real and substantial justice for the administration of which alone it exists. O SHEO DARSHAN SINGH *v.* MATA DIN SINGH, 10 O. & A. L. R. 448 833

——— **ss. 151, 152, O. XX, r. 6**—*Decree, amendment of—Decree not in conformity with judgment—Court, duty of—Inherent jurisdiction of Court.*

When it is discovered that a decree does not agree with the judgment it is the duty of the Court to amend the decree so as to bring it into conformity with the judgment.

The power of the Court to amend the decree is not confined to the provisions of O. XX, r. 6 or to section 152 of the Civil Procedure Code for it is a matter within the inherent jurisdiction of the Court and it may be exercised under section 151 of the case which does not restrict the illimitable inherent jurisdiction of the Court.

The word "may" in section 152 of the Civil Procedure Code does not make it discretionary with the Court to order the correction but merely enlarges the power of the Court by proving that such correction can be done 'at any time.'

The only exception to the general rule as to correction of decree is that the Court will refuse to make the amendment where it offends against the principles of equity. C CHANDRA KUMAR MUKHOPADHYA *v.* SUDHANSU BADANI DIN, 28 C. W. N. 873 55

——— **s. 151, O. VIII**—*Inherent power, exercise of—Court, whether can introduce new forms of procedure—Counter-claims.*

The Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the law.

Order VIII of the Civil Procedure Code provides for dealing with set-off but makes no provisions for counter-claims. C GOUR CHANDRA GOSWAMI *v.* THE CHAIRMAN OF THE COMMISSIONER, NABADWIP MUNICIPALITY, (1922) A. I. R. (C.) 1 192

——— **s. 151, O. IX, r. 9**—*Suit dismissed for default—Restoration, application for—Second default—Application, whether can be restored—Court, inherent power of.*

There is no rule in the Code of Civil Procedure that enables the Court to restore an application made

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nnder O. IX, r. 9 of the Code which has been dismissed for want of prosecution.

Nor can the Court make such an order in the exercise of its inherent powers under section 151 of the Code. **B** MANKE *v.* WALWEKAR, (1923) A. I. R. (B.) 386 **182**

——— **s. 151, O. XXI, r. 89**—*Execution of decree—Sale—Arrangement between parties—Sale, whether can be set aside—Inherent power of Court.*

The law cannot make express provision against all cases that may possibly arise and there is, therefore, always an inherent jurisdiction in Courts of law to make orders *ex debitio justitiæ* so that real and substantial justice may be done, to do which alone all Courts exist. Where, before an auction sale is confirmed the judgment-debtor and the auction-purchaser arrive at an arrangement where by the decree-holder is paid off and the parties agree in applying to the Court that the sale should be set aside, the Court has inherent jurisdiction to set aside the sale under section 151 of the Civil Procedure Code, notwithstanding that the procedure prescribed in r. 89 of O. XXI of the Code has not been complied with. **O** KUBER SINGH *v* BACHO RAM, 9 O. & A. L. R. 983; 27 O. C. 89 **444**

——— **s. 151, O. XLI, r. 23**—*Suit not decided on preliminary point—Remand by Appellate Court—Appeal—Inherent powers of remand.*

A remand under the inherent powers of the Court can only be made where the justice of the case requires it.

The mere fact that an order of remand contravenes the provisions of O. XLI, r. 23 of the Civil Procedure Code does not mean that it is made under the inherent powers of the Court and to say that there is no right of appeal in such a case would be to refuse an appeal in every case in which the order of remand is erroneous. **C** SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR, (1923) A. I. R. (C.) 279 **172**

——— **O. I, r. 8**—*Representative suit, maintainability of—Some of several representatives not joining in suit—Fresh leave, if necessary—Notice, service of—Duty of Court.*

Where fifteen villagers brought a suit on behalf of themselves and for all the villagers, for a declaration of a customary right and took the necessary leave under O. I, r. 8, Civil Procedure Code, but subsequently it transpired that three of the plaintiffs had neither signed nor verified the plaint:

Held, that the remaining twelve persons should have obtained fresh permission and the suit was not maintainable.

The wording of O. I, r. 8 of the Code of the Civil Procedure shows that it is the duty of the Court to cause service of the notice of the institution of the representative suit, or the publication of the advertisement on being moved for the purpose. The Court is not relieved of the necessity of doing its duty or to treat the matter as a mere matter of formality. **C** ABDUL HAKIM *v.* ABDUL GANI **26**

——— **O. I, r. 9, O. XXXIV, r. 1**—*Parties to suit—Omission to join some of several parties—Suit, maintainability of.*

All persons whose rights and interest may be adjudicated upon and determined in the suit ought

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to be added as parties under O. I, r. 9 read with O. XXXIV, r. 1 of the Civil Procedure Code, but failure to add one or two persons should not have the effect of defeating the suit if the Court in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. **Pat** PARMESHWAR PANDEY *v.* RAJKESHORE NARAYAN SINGH, 3 Pat. 829; 5 P L. T. 646 **34**

——— **O. II, r. 2**, *scope of—"Cause of action," meaning of—Different properties—Different acts of ouster—Separate suits, whether barred—Limitation Act (IX of 1908), s. 14—Plaint returned for want of jurisdiction—Exclusion of time occupied.*

A cause of action refers entirely to grounds set forth in the plaint and has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

A cause of action must be antecedent to the institution of the suit. If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred under O. II, r. 2 of the Civil Procedure Code.

Order II, r. 2 of the Civil Procedure Code will have no application where properties are different and plaintiff's rights are infringed at different times by different acts of ouster, because the object of this rule is to give effect to the maxim *interest reipublicæ ut sit finis litium.*

Where a Court returns a plaint for want of jurisdiction the time occupied in that Court counts towards limitation and saves it under section 14 of the Limitation Act. **N** VENKAT BHAT *v.* YAMUNA **286**

——— **O. II, r. 2**—*Single cause of action—Defendant claiming on different grounds—Separate suits, whether maintainable.*

A plaintiff cannot bring separate suits for recovery of different portions of property when his cause of action is one and the same. It is immaterial for him whether the defendant wants to justify his right to continue in possession of the different portions of the property on different grounds. The defence or the nature of it is immaterial for the purpose of finding out what is the cause of action of the plaintiff. **A** DARBARI LAL *v.* GOBIND SARAN, 22 A. L. J. 753 **31**

——— **O. II, r. 2**—*Suit for possession—Recovery of purchase-money from vendor—Alternative claim—Procedure.*

Where in a suit for recovery of joint possession on declaration of title by purchase and for partition an alternative prayer for recovery of the purchase-money from his vendors was made by the plaintiff, but no issue was struck on the point and the evidence did not afford proof of the precise amounts paid by him to his vendors :

Held, that the proper course was to reserve liberty to the plaintiff to institute a separate suit for restitution against his vendor. **C** LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

——— **O. VI, rr. 4, 5, O. VII, r. 11**—*Suit for damages for wrongful dismissal—Particulars of*

defence—Rejection of plaint—Cause of action, absence of—Duty of Court.

The power conferred by O. VII, r. 11 of the Civil Procedure Code should be exercised with great circumspection and only if the Court is satisfied that even if the plaintiff proves all the allegations of fact he sets forth in the plaint, he would still not be entitled to any relief whatever.

The rule does not justify the rejection of a plaint in part. Where the *onus* of establishing a positive or negative allegation lies upon the plaintiff the Court will order the defendant to give particulars of his traverse of that allegation.

In a suit to recover damages for wrongful dismissal of the plaintiff by the directors of the defendant Company in the alleged exercise by them of the powers conferred on them by the agreement of service entered into by the plaintiff, the plaintiff cannot call upon the defendant for a statement of particulars of the reasons why the directors considered the plaintiff unsuitable, or adduce evidence to show that these reasons were wrong or insufficient and cannot ask the Court to substitute itself for the directors to decide how far these reasons were good, bad or indifferent. All that he can ask the Court in cases of this character is whether the action of the directors was an honest and *bona fide* exercise of their powers under the agreement. **S** COLLINS *v.* CHARLES BOOTH & CO., LTD., 17 S. L. R. 9 **958**

——— **O. VI, r. 17**—Ex parte *proceedings—Amendment of plaint—Notice to defaulting defendant—Interlocutory orders—Revision—General rule.*

If a party does not appear after being duly summoned, he is not entitled to any fresh notice during the pendency of the suit and has no right to impeach an order of amendment of plaint passed *ex parte* against him.

It is not usual to interfere in revision in the case of interlocutory orders against which though no appeal may lie, their correctness can be challenged in an appeal against the final decree in the suit. **N** BANOOBI *v.* YAKUBKHAN **375**

——— **O. VII, r. 11**—*Charitable Endowments Act (VI of 1890), s. 14—Suit to recover money from endowment—Treasurer, whether can be sued—Suit against Secretary, whether competent.*

Where the administration of a charitable endowment is in the hands of a Committee, a suit to recover a sum of money from the endowment cannot be brought against the treasurer of charitable endowments, by virtue of the provisions of section 14 of the Charitable Endowments Act. The suit must be filed against the Committee. A suit filed against the Secretary of the Committee as such will also be incompetent unless under the scheme of management the Secretary has been empowered to sue or be sued as representing the Committee. **O** AJODHIA NATH *v.* CITY MAGISTRATE OF LUCKNOW, 26 O. C. 333; (1924) A. I. R. (O.) 128 **495**

——— **O. VIII, r. 2**—*Limitation, plea of—Omission to state facts—General plea, effect of—Limitation Act (IX of 1908), Sch. I, Art. 89—Failure to render accounts—Refusal to render accounts.*

The plea of limitation is a plea in bar of the suit and unless the necessary facts are stated by the defendant in the written statement to raise a substantive defence of limitation, a general statement that the suit is barred by limitation means that on the face of the plaint the suit is so barred.

The question whether the failure of an agent to render accounts amounts to a refusal within the meaning of Article 89 of Schedule I to the Limitation Act depends upon the circumstances of each case.

The "putting off" of the rendering of accounts by an agent is equivalent to postponement and postponement implies an admission that the account is due and will be rendered. **Pat** HASAN IMAM *v.* DEBI PRASAD SINGH, 5 P. L. T. 303; (1924) Pat. 189; 3 Pat. 546; (1924) A. I. R. (Pat.) 664 **955**

——— **O. IX, r. 8**—*Vakil's absence, whether constitutes default.*

When a Vakil represents a party, the right of audience is, for the time being, vested in him and if he is absent there is default. **A** SAKALRAJ DUBE *v.* JADURANI **950**

——— **O. IX, rr. 8, 9**—*Dismissal of suit for default—Fresh suit, whether barred—'Cause of action,' meaning of—Minor plaintiff—Guardian ad litem, change of, effect of.*

The term 'cause of action' means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in the other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

Defendant obtained a decree on a mortgage executed by a Hindu. The minor sons of the latter brought a suit for partition of the family properties free from the mortgage on the ground that the mortgage was not for necessity, but was executed for immoral purposes personal to the mortgagor. The suit was dismissed under O. IX, r. 8 of the Civil Procedure Code. Defendant then applied for sale of the mortgaged property in execution of his decree. The sons of the mortgagor then brought the present suit for an injunction restraining the defendant from selling the property in execution of his decree. The suit was based on the same allegations on which the previous suit was based:

Held, that the second suit was barred under O. IX, r. 9 of the Civil Procedure Code, as the cause of action in both suits was the same.

The provisions of O. IX, r. 9 of the Civil Procedure Code cannot be nullified in the case of minor plaintiffs by the simple process of changing guardians *ad litem* from time to time, and alleging their knowledge at various times. **S** VISHINDAS *v.* NARUMAL, 17 S. L. R 41 **985**

——— **O. IX, r. 9**—*Dismissal of suit for default—Restoration against some defendants only—Restoration against others beyond time by Court, validity of.*

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On a suit being dismissed for default against two defendants the plaintiff made an application for restoration against one of the two defendants which was granted. Subsequently the Court on its own initiative and after the limitation for restoration had expired, restored the suit against the other defendant also:

Held, that the order was *ultra vires*. O SHAMSHAD *v.* MAHABUB KHAN, 10 O. & A. L. R. 696; 11 O L. J. 573 **75**

——— **O. IX, rr. 9, 13**—*Absence of party*—Ex parte *proceedings*—*Appearance of party*—*Application to set aside* ex parte *proceedings*—*Procedure.*

Where a party is absent when a suit is called on for hearing but he appears in Court before the Court has risen for the day, then the Court should listen to his application for having his suit restored. If the opponent has left the Court then the opponent should have notice, but if the opponent is present in Court, then it is the duty of the Judge to dispose of the application at once. The mere fact that a party or his Pleader has arrived in Court after the proper hour when the suit has been disposed of *ex parte*, is no reason whatever why the suit should not be restored to the board and the case heard on its merits, the Court imposing such conditions on the defaulting party as might meet the justice of the case. B SORABJI RUSTOMJI PARSI *v.* RAMJI LAL DEVJIBHAI PARDESHI, 26 Bom. L. R. 321; (1924) A. I. R. (B.) 392 **237**

——— **O. IX, r. 13, O. XXI, r. 50, O. XXXI, rr. 1, 3, 6.** *See* LIMITATION ACT, SCH. I, ART. 164 **773**

——— **O. XI, r. 18**—*Inspection of documents not mentioned in pleadings or affidavit of documents—Procedure—Counter-affidavit, whether conclusive.*

Under O. XI, r. 18 of the Civil Procedure Code, when a party applies to inspect documents which are not in the pleadings or in a previous affidavit of documents, and makes an affidavit for that purpose, the Court ought not to make an order for inspection without giving the other side an opportunity of replying on affidavit. If the latter reply on affidavit that the documents of which inspection is sought are not in their power or possession, that affidavit is conclusive and the Court cannot go behind it, unless there is something like an answer in cross-examination or some other documentary evidence showing conclusively, that the documents are in the power or possession of the party. A KEDAR NATH DURGA PRASAD *v.* BISHWANATH LAKSHMI CHAND, 22 A. L. J. 299; 46 A. 417; (1924) A. I. R. (A.) 510 **787**

——— **O. XXI, r. 2, O. XXIII, r. 4**—*Adjustment of decree, meaning of—Execution Court, whether can amend decree.*

Order XXI, r. 2 of the Civil Procedure Code only contemplates satisfaction of the decree in whole or in part or an adjustment thereof which may amount to a payment of whole or part of the decree. The word 'adjustment' in the rule signifies some kind of satisfaction or payment of the decree.

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No order of amendment of a decree can be passed under r. 2 of O. XXI of the Civil Procedure Code. The provisions of O. XXIII, r. 4 of the Civil Procedure Code relating to adjustment of suits do not apply to proceedings in execution of a decree. O NAWAB HAIDER MIRZA *v.* PANDIT KAILASH NARAIN DAR, 9 O. & A. L. R. 889 **454**

——— **O. XXI, r. 11 (2)**—*Execution application by person other than decree-holder—Verification—Procedure.*

It is not necessary that an application for execution made by a person other than the decree-holder under O. XXI, r. 11 (2) of the Civil Procedure Code should be verified after the application for permission has been made nor is it necessary that the verification should be made in the presence of the Court. All that is necessary is that the Court should be satisfied that the person who signed the verified application is acquainted with the facts of the case. C KHARARIA *v.* OMED SHEIKH, 28 C. W. N. 687; (1924) A. I. R. (C.) 811 **313**

——— **O. XXI, r. 16**—*Assignment of decree—Application by assignee—Procedure.*

When an application is made to the Court by an assignee decree-holder under O. XXI, r. 16 of the Civil Procedure Code it must be made to the Court as the Court which passed the decree and not as the Court which is executing the decree so that proof can be given of any uncertified payments. B GANPAYA NARNAPPA *v.* KRISHNAPPA ANNAYA HEDGE, 26 Bom. L. R. 491; (1924) A. I. R. (B.) 394 **422**

——— **O. XXI, r. 16**—*Bengal Tenancy Act (VIII of 1885), s. 148—Assignment of decree, what amounts to—Rent decree—Assignment of property, whether operates as assignment of decree.*

An assignment of a certain property with all its back and future rents does not operate as an assignment of a decree for arrears of rent obtained by the assignor, within the meaning of O. XXI, r. 16 of the Civil Procedure Code.

The provisions of section 148 of the Bengal Tenancy Act impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as a rent decree. C MATHURAPORE ZEMINDARY COMPANY, LIMITED *v.* BHASARAM MONDAL, 28 C. W. N 626; 39 C. L. J. 373; 51 C. 703; (1924) A. I. R. (C.) 661 **881**

——— **O. XXI, r. 16**—*Execution of decree—Decree obtained by trustee—Trust, failure of—Owner of properties—Owner, whether can execute decree—Assignment, whether necessary—Rent decree—Owner, whether can execute decree as rent decree.*

One *M* executed a deed of trust in respect of certain properties and conveyed the properties to a trustee. He also assigned to the trustee his right to recover arrears of rent of the properties. The trustee brought suits against the tenants of the trust properties for rent and obtained decrees for rent in respect of period prior and subsequent to the execution of the deed of trust. It was then

discovered that the object of the trust could not be carried out and steps were taken to obtain a declaration that the trust was invalid. *M* again obtained possession of the properties and sought to execute the rent decrees obtained by the trustee:

Held, (1) that the trust having failed, the properties and their accessories, *viz.*, the rents and profits including the decrees in question must be held to have reverted to the original owner who was competent to execute the decrees without any express assignment from the trustee;

(2) that the decrees having been obtained by the trustee as landlord could be executed as rent decrees by *M* who was now the landlord of the properties. **Pat** GOBIND SINGH *v.* GOPAL SARAN SINGH, 4 P. L. T. 731; 2 P. L. R. 27; (1924) A. I. R. (Pat.) 343 **652**

——— **O. XXI, rr. 46, 89**—*Simple hypothecation bond—Attachment—Sale—"Moveable property"—"Immoveable property"—Setting aside of sale—General Clauses Act (X of 1897), s. 3 (25)—"Benefits to arise out of land"—Security under simple mortgage.*

A simple hypothecation bond is "moveable property," not only for the purposes of attachment but also for the purposes of sale and O. XXI, r. 89 has no application. In other words, the bond is "moveable property" for all three purposes, attachment, sale and setting aside the sale under O. XXI, r. 89.

A simple mortgage-bond carries with it two rights; a right to a decree for money and to a decree for sale. The latter gives the mortgagee a right to be recouped from the sale-proceeds but gives absolutely no right of any sort to or in the land. He has not even a right to all the sale-proceeds but to only so much as may be necessary to meet his debt. In other words, a debt due on a simple mortgage is a debt though it is secured on land; the security is merely collateral. In short, a simple hypothecation bond does not create "an interest in immoveable property."

In the absence of a clear intention to the contrary, what is held to be 'moveable property' at the time of the attachment may reasonably be considered to continue to be 'moveable' at the time of the sale. Even assuming that a simple hypothecation bond creates an interest in 'immoveable property' and as such is 'immoveable property' itself, there is a clear indication of the intention of the Legislature that for the purposes of the Code of Civil Procedure it should be treated as 'moveable property.'

In the definition of "immoveable property," in section 3 (25), General Clauses Act, the expression "benefits to arise out of land" was never intended to cover such a matter as the security held by the mortgagee under a simple mortgage-bond. **A** LAL UMRAO SINGH *v.* LAL SINGH, 22 A. L. J. 840 **890**

——— **O. XXI, r. 53 (1) (b).** *See* LIMITATION ACT, s. 15 **239**

——— **O. XXI, r. 57, O. XXXVIII, rr. 1, 7, 9**—*Attachment before judgment—Dismissal of execution application—Attachment, whether terminates—Transfer after dismissal of execution application, validity of.*

An attachment made before judgment does not come to an end on the dismissal of an execution application. The attachment enures for the benefit of the plaintiff decree-holder till his remedy becomes absolutely barred; and a transfer of the attached property even though made after the dismissal of an execution application, is void as against him.

Order XXI, r. 57 of the Civil Procedure Code does not apply to attachments before judgment and is confined to attachments in execution of decree. **A** BHOREY AKHEY RAM *v.* BASANT LAL, 22 A. L. J. 823 **106**

——— **O. XXI, rr. 58, 60**—*Attachment of property in possession of mortgagee—Removal of attachment—Equity of redemption, attachment of, whether can be allowed to continue.*

If property in the possession of a usufructuary mortgagee is attached, under O. XXI, r. 54, Civil Procedure Code, by the holder of a money decree against the mortgagor and the mortgagee applies for removal of the attachment under O. XXI, r. 58, Civil Procedure Code, the Court has no alternative but to release the attachment.

But if it can be inferred that the intention of the decree-holder was not to attach the property itself but the equity of redemption, the attachment may be allowed to continue upon the equity of redemption. **C** MAHARAJ BAHADUR SINGH *v.* NOSHARAN BIBI **428**

——— **O. XXI, r. 63.** *See* LIMITATION ACT, SCH. I, ART. 11 **992**

——— **O. XXI, r. 63**—*Claim petition—Petition not pressed—Dismissal of petition—Order, if against claimant—Proper order, form of.*

A claim petition under O. XXI, r. 63 of the Civil Procedure Code was withdrawn and the Court endorsed on the petition, "not pressed, dismissed":

Held, that the order was not one under O. XXI, r. 63 and the claimant was not bound to bring a suit within a year under the procedure laid down under the Code.

In the case of the withdrawal of a petition, it is a mistake to endorse on it that it is dismissed. The proper endorsement to make is that it is withdrawn. **M** GADE LAKSHMINARASAMMA *v.* NAVUGOTLA PYDANNA **233**

——— **O. XXI, rr. 63, 103.** *See* ESTOPPEL **994**

——— **O. XXI, r. 66**—*Sale proclamation—Plan of property, whether necessary.*

A sale proclamation is not necessarily vitiated by the fact that no plan of the house proposed to be sold was attached thereto as such a plan is not prescribed by law. **O** NARINDAR BIKRAMJIT SINGH *v.* SUKHKHAN LAL, 10 O. & A. L. R. 934 **667**

——— **O. XXI, r. 89.** *See* BENGAL TENANCY ACT, s. 170 (3) **823**

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——— O. XXI, r. 90. *See* LIMITATION ACT, s. 15 761

——— O. XXI, r. 90--*Execution of decree—Rent decree—Sale of tenure—Auction-purchaser, whether liable for antecedent arrears of rent—Sale-proclamation implying such liability—Irregularity—Sale, whether can be set aside.*

Where a tenure is sold in execution of a decree for rent, the landlord cannot sue the auction-purchaser for any rent which accrued before the date of his auction-purchaser, and the only person liable to pay that rent is the tenant judgment-debtor.

Where a tenure is being sold in execution of a decree for rent, any statement in the sale-proclamation implying that the auction-purchaser would be liable to pay off antecedent arrears of rent is wrong, and the judgment-debtor is entitled to have the sale set aside in such a case, on proof of substantial injury. **Pat** SAIYED MUHAMMAD JAWAD HUSAIN *v.* MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH, 2 P. L. T. 248 223

——— O. XXI, r. 90—*Execution of decree—Sale, application to set aside—Auction-purchaser, whether necessary party.*

The auction-purchaser is a necessary party to an application to set aside a sale held in execution of a decree, and the application is not maintainable where he is not impleaded as a party. **B** BAPUJI *v.* JANARDHAN, (1924) A. I. R. (B.) 120 648

——— O. XXI, rr. 90, 92—*Application to set aside sale—Notice to opposite party, object of—Formal notice, whether necessary—Rules of procedure, object of.*

The object of r. 92 of O. XXI, Civil Procedure Code, is to give due notice of the application for setting aside a sale to all parties concerned and give them an opportunity of contesting it so that no order may be passed to the prejudice of any party behind his back. This object will be equally achieved if the party has otherwise notice of the application.

Rules of procedure are not made for the purpose of hindering justice. **C** CHARAN CHANDRA GHOSH *v.* RAI BEHARI LAL MITRA 931

——— O. XXII, *applicability of—Revisions, abatement of.*

The theory of abatement is inapplicable to revision applications, and the provisions of O. XXII, Civil Procedure Code, do not apply to such applications. **S** BAKSHO *v.* PIARO 456

——— O. XXII, rr. 3, 5--*Applicant found to be minor—Application rejected--Merits—Remedy--Appeal--Suit--Revision—Proper course where applicant found to be minor.*

A Court cannot be said to act irregularly, if on finding, that the person, applying in his own name to be brought on record as the legal representative of a deceased plaintiff, is a minor, it rejects his application. But the mere discovery of his minority is no reason

(*i*) for not considering his plea that he is the rightful representative, and

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(*ii*) for adding, without determining the question on its merits, after giving him notice, another person as the legal representative.

There is no statutory right of appeal against an order under O. XXII, r. 3, Civil Procedure Code.

The remedy of the person, whose application to be brought on record as the legal representative of a deceased plaintiff, is dismissed is not by way of appeal or suit but by revision.

Where the applicant is found to be a minor the proper course is not to reject his application but to appoint a guardian *ad litem*.

Obiter:—If the Court decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed. **M** RUKMANI AMMAL *v.* VEERASAMI IYENGAR, 47 M. L. J. 370; (1924) M. W. N. 763 942

——— O. XXII, rr. 3, 9--*Death of plaintiff—Abatement—Application to bring legal representatives on record, whether can be treated as one to set aside abatement—Procedure.*

Where an application to bring the representatives of a deceased party on the record is made after the suit has abated, the application should be treated as one to set aside the abatement under O. XXII, r. 9 of the Civil Procedure Code and should be disposed of as such. **B** VIJAYA SINGH *v.* SHIVAJIRAO, 26 Bom. L. R. 378; (1924) A. I. R. (B.) 416 761

——— O. XXII, r. 4--*Death of defendant—Legal representatives, all, whether must be brought on record.*

Where a defendant dies during the pendency of a suit, it is sufficient for the plaintiff to put one of the heirs of the deceased on the record at his legal representative, who will then represent the estate of the deceased for the purposes of the suit. If the other heirs of the deceased wish to be represented in the suit they can apply to be substituted in his place. **B** JEHRABI SADULLA KHAN MOKASI *v.* BISMILLABAI SADRUDDIN, 26 Bom. L. R. 375; (1924) A. I. R. (B.) 420 758

——— O. XXII, rr. 4, 9--*Appeal—Death of respondent--Abatement—Delay in making application—Ignorance of death.*

Delay in making an application for bringing the legal representatives of a deceased respondent on the record may be excused where the deceased had no stationary residence and the appellants did not become aware of his death till after the expiry of the period of limitation prescribed for making an application for substitution. **L** JOWALA RAM *v.* HARI KISHEN SINGH, 5 L. 70; (1924) A. I. R. (L.) 429 690

——— O. XXII, rr. 4, 9--*Appeal—Death of respondent--Abatement—Delay in making application for substitution—Sufficient cause—Decree in favour of respondents jointly—Abatement in toto.*

The mere fact that the parties to an appeal are living at long distances from each other is not a sufficient reason for excusing gross delay on the part of the appellants in making an application

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to bring on the record the representatives of a deceased respondent and to set aside the abatement of the appeal.

Where a decree has been passed in favour of several respondents jointly and one of them dies during the pendency of the appeal and his legal represenatives are not brought on the record within the time allowed by law, the appeal abates against all the respondents and not merely against the deceased respondent. **L** MUNSHI RAM *v.* RADHA KISHEN, 6 L. L. J. 192; (1924) A. I. R. (L.) 461 **694**

——— **O. XXII, rr. 4, 9, O. XXXIV, r. 5**—*Preliminary mortgage-decree—Judgment-debtor, death of, before decree—Legal representative not brought on record—Abatement—Application for final decree—Second application to set aside abatement—Order dismissing first application, appeal against—Abatement set aside—Order, legality of—Jurisdiction—Appeal, second, whether maintainable—Revision.*

A preliminary mortgage-decree was passed on 27th November 1918. That morning, before the decree was passed, the judgment-debtor died. The plaintiff came to know of it soon after, but no steps were taken to bring the legal representatives of the deceased on the record till 27th August 1920 when plaintiff filed an application under O. XXXIV, r. 5 of the Civil Procedure Code wherein he set out the fact that the judgment-debtor had died, entered his widow as defendant and asked for a final decree to be passed. The widow contended that the preliminary decree having been passed after the judgment-debtor's death was a nullity and that in the absence of any petition to bring the legal representatives of the deceased on the record the suit had abated. Nearly seven months thereafter, the plaintiff filed another application asking that the delay in bringing the legal representatives of the deceased on the record be excused and that a final decree may be passed. The Court of first instance dismissed both petitions by two separate orders. An appeal was filed only against the order on the first petition and the Appellate Court treating the first application as one to set aside the abatement, excused the delay in filing it, allowed it and directed the suit to be proceeded with. On appeal:

Held, (1) that the judgment-debtor having died before the decree, the decree was a nullity and no legal representative having been brought on the record within the time prescribed by law, the suit had abated;

(2) that the order of the lower Appellate Court in setting aside the abatement was without jurisdiction, first, because it had before it no prayer to set aside the abatement and no substantial motion under O. XXII, r. 9 of the Civil Procedure Code and secondly, because it had no jurisdiction to revise the order on the second application which was not properly before it;

(3) that the order of the lower Appellate Court though technically one under O. XXII, r. 9 of the Civil Procedure Code and consequently not appealable under that order, was passed without jurisdiction and was, therefore, appealable, or at least open to revision on the ground that it was without jurisdiction.

Where it is necessary, in order to do substantial justice, to brush aside technicalities, the Court will not be too scrupulous in enforcing them; but when there are no merits in favour of the party invoking the aid of the Court and the merits are on the other side, the Court will not goout of its way to clear from the former's path technical obstacles. **M** SESHAMMA *v.* YEERANKI PEDA VENKATA RAO, 34 M. L. T. 196; 19 L. W. 608; 47 M. L. J. 235; (1924) M. W. N. 633; (1924) A. I. R. (M.) 713 **397**

——— **O. XXII, r. 10**—*Application by alleged assignee to be made party to appeal—Assignment denied by assignor and appellant—Duty of Appellate Court to inquire into genuineness of assignment.*

An application, by an alleged assignee of property—the subject-matter of an appeal—to be made a party to the appeal, cannot be rejected on the ground that the assignor and the appellant deny the assignment. It is the duty of the Court to enquire into the genuineness of the alleged assignment and to decide the assignee's application according to the result of that inquiry. **O** RAM LAL *v.* BHOOP **631**

——— **O. XXII, r. 10**—*Party, addition of—Court, discretion of—Suit, when to be deemed as pending.*

An applicant who invokes the aid of r. 10 of O. XXII of the Civil Procedure Code to be added as a party to the suit is not entitled, as a matter of right, to an order in his favour, regardless of delay or laches. The matter is within the discretion of the Court, and such discretion should be exercised in a judicial manner.

A suit must be deemed to be pending so long as it is possible to make an order therein relating to the subject-matter of the litigation; that is, so long as the final decree has not been drawn up and signed. **C** LAKSHAN CHUNDER DEY *v.* NIKUNJAMONI DASSI, 27 C. W. N. 755; (1924) A. I. R. (C.) 183 **538**

——— **O. XXIII, r. 3**—*Compromise, decree in accordance with—Test for determining whether compromise lawful—Appeal, compromise during pendency of—Compromise enhancing amount payable, effect of.*

It is incumbent on a Court to pass a decree in accordance with a compromise, only if the compromise is lawful, that is to say, enforceable in law, and one test for determining this is, whether the parties were competent to enter into the compromise in order to achieve the purpose they had in view.

Where during the pendency of an appeal, the parties effect a compromise, and the effect of the compromise is to enhance the amount payable under the decree appealed against, a decree ought not to be passed in terms of the compromise. **C** MALCHAND BOID *v.* OSMAN ALI MANDAL, 38 C. L. J. 272; (1924) A. I. R. (C.) 159 **307**

——— **O. XXIII, r. 3, O. XLIII, r. 1 (m)**—*Compromise of suit—Compromise, whether can be*

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accepted in part—Order refusing to record compromise followed by decree—Appeal, whether lies.

Under O. XXIII, r. 3, Civil Procedure Code, a Court is bound to record a compromise and to pass a decree in accordance therewith so far as it relates to the suit if it is proved to its satisfaction that a suit has been adjusted wholly or in part by a lawful agreement or compromise. Under O. XLIII, r. 1 (*m*), Civil Procedure Code, an appeal is competent from an order under r. 3 of O. XXIII, recording or refusing to record an agreement, compromise or satisfaction. The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such order.

A compromise should either be accepted as a whole or rejected altogether. It cannot be accepted in part and rejected in part.

Where all the terms of a compromise are not proved to the satisfaction of the Court the compromise cannot be recorded under O. XXIII, r. 3 of the Civil Procedure Code. **L** MEGH RAJ *v.* TULSI RAM, 6 L. L. J. 187; (1924) A. I. R. (L.) 466 **696**

——— **O. XXVI, r. 9**—*Local inspection—Judgment, whether can be founded on inspection—Record of inspection, whether necessary.*

Though the Civil Procedure Code empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of such inspection the foundation of its judgment which must be based upon evidence adduced by the parties. It does not entitle the Judge to put his view obtained by means of such inspection in place of evidence.

There is nothing, however, in the Code to make it obligatory on the Court when holding a local investigation to leave a note of the same on the record and no such provision should be read into it. **C** RAJ CHANDRA BANIK *v.* ISWAR CHANDRA BANIK **292**

——— **O. XXIX, r. 1**—*Injunction—Plaintiff out of possession—Injunction when can be granted—Irreparable injury, meaning of.*

When the plaintiff is out of possession of the property in suit, the Court will refuse to interfere by granting an injunction against the defendant, unless there is fraud or collusion or unless the act perpetrated or threatened is so injurious as to cause irreparable loss.

Irreparable injury means injury which would be a material one and which is not adequately reparable by damages. **L** SEWARAM SINGH *v.* MAYA DEVI **727**

——— **O. XXXII, rr. 2, 4**—*Minor appointed as next friend for other minors—Proceedings against such minors, effect of.*

A minor is incompetent to act as the next friend of other minors and proceedings taken against minors under the guardianship of a minor are null and void and must be set aside. **O** GUR CHARAN *v.* FASIHUDDIN **602**

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——— **O. XXXII, rr. 3, 5**—*Minor defendant—Guardian* ad litem, *appointment of—Notice to person in charge of minors, absence of, effect of—Prejudice to minor, proof of.*

No irregularity by way of an omission to send a notice as required by O. XXXII, r. 3 of the Civil Procedure Code, can operate to render void the presumed representation of minor defendants in a suit, unless such omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof.

The question as to whether the omission has in fact prejudiced the defence will depend on the further question whether the minors had a good defence and whether the omission to obey the rules and the appointment of a Court guardian, had the effect of shutting out that defence. **M** KIDAMBI RITUMALACHARYULU *v.* AMISETTI VENKIAH, 46 M. L. J. 363; 34 M. L. T. 202; (1924) M. W. N. 362; 19 L. W. 678; (1924) A. I. R. (M.) 763 **541**

——— **O. XXXIII, r. 1**—*Suit* in forma pauperis *by minor—Pauperism, proof of—Next friend, pauperism of, whether must be proved—Property possessed by parents of plaintiff, effect of.*

The rule of English practice which prevents a minor from instituting a suit *in forma pauperis* through his next friend, unless he gives proof not only that he himself is a pauper, but that the next friend is also a pauper cannot be deduced from the provisions of the Civil Procedure Code. Under the Civil Procedure Code when a minor is seeking to file a suit *in forma pauperis* it is only necessary for him to show that he himself has no means. The mere fact that his parents were possessed of certain property would not be sufficient to show that the minor is not a pauper, unless it could be shown that the property actually came into his possession. **B** NEMICHAND *v.* KENALCHAND, 26 Bom. L. R. 380; (1924) A. I. R. (B.) 440 **748**

——— **O. XXXIV, r. 1**—*Mortgage suit—Party claiming title paramount, whether can be impleaded.*

A mortgage suit cannot be so framed as to draw into controversy the title of a third party who is in no way connected with the mortgage sued on and sets up a title paramount to the mortgagor and the mortgagee. **R** MAUNG SAN MYAING *v.* U PON GYAW, 2 R. 106; (1924) A. I. R. (R.) 240 **753**

——— **O. XXXIV, rr. 4, 5**—*Mortgage suit—Arbitration—Award directing sale of mortgaged property—Preliminary and final decrees—Procedure.*

A decree under O. XXXIV, r. 5 of the Civil Procedure Code cannot be asked for unless a preliminary decree under O. XXXIV, r. 4 has been passed by the Court.

An arbitrator passing an award is in no way bound by the provisions of O. XXXIV, r. 4 of the Civil Procedure Code.

Where a mortgage suit is referred to arbitration and the arbitrator makes an award for a sum of money and directs that it should be realised by sale of the mortgaged property and a decree is

passed in terms of the award, the decree is enforceable as one passed by a competent Court and it is not open to the Executing Court dealing with the matter to say that the decree cannot be executed unless the procedure indicated in O. XXXIV, r. 5 of the Civil Procedure Code has been complied with. **Pat** NRIPENDRANATH CHATTERJEE *v.* JHUMAK MANDAR, 4 P. L. T. 694; 2 P. L. R. 9; 3 Pat. 221; (1924) A. I. R. (Pat.) 263 **588**

——— **O. XXXIV, rr. 7 (c), 8 (4)**—*Redemption decree—Parties taking no steps in pursuance of decree—Mortgagor dispossessing mortgagee forcibly—Mortgagee suing for possession—Parties entitled to be restored to their position on passing of decree—Duties and rights of mortgagor and mortgagee—Limitation Act (IX of 1908), Sch. I, Art. 181, when applicable.*

If after the passing of a redemption decree in the terms of O. XXXIV, r. 7 of the Civil Procedure Code, neither the mortgagor pays the amount of the mortgage money within the period fixed by the decree, nor does the mortgagee apply for sale on the expiry of the said period, and then the mortgagor dispossesses the mortgagee forcibly; on the latter's suit for possession the parties are entitled to be restored to the same position in which they were on the passing of the redemption decree, and it is open to them to work out the decree in terms of its directions, if there is no legal bar to this.

A mortgagor can save the sale of the mortgaged property at any time before the sale is confirmed, inasmuch as a payment by him is not barred either by the lapse of the period prescribed in the redemption decree or by Article 181 of the Limitation Act.

The expiry of period fixed by decree, without payment of the decretal amount, gives to the mortgagee a right to apply to the Court under sub-r. (4), r. 8 of O. XXXIV for a decree that the mortgaged property be sold. It does not take away the mortgagor's right to redeem, which subsists in his favour even after sale under r. 89 of O. XXI of the Code of Civil Procedure.

Article 181 would only apply to an application where it is required by law to be made. The mortgagor is not required by any rule of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of the mortgage. It is the mortgagee who is required by law to make an application, under O. XXXIV, r. 8 (4), for obtaining a decree for the sale of the mortgaged property. **O** MOHAMMAD BAQAR KHAN *v.* JAGAT NARAIN LAL, 10 O. & A. L. R. 1149 **706**

——— **O. XXXIV, r. 9.** *See* COURT FEES ACT, 1870, s. 7 (ix) **1021**

——— **O. XLI, r. 10**, *application of—Original Side appeal—Security from appellant—High Court, jurisdiction of.*

Order XLI, r. 10 of the Civil Procedure Code is applicable to an appeal from the judgment of a Judge sitting on the Original Side of the High Court, in the absence of any rule framed by the Court in the exercise of the power to regulate its own procedure in its Original Civil Jurisdiction. **C** *In re* AVIS MARY KATHLEEN GOULDING, 28 C. W. N. 676; 51 C. 695; (1924) A. I. R. (C.) 781 **275**

——— **O. XLI, r. 25**—*Failure to frame issue—Suit, when should be remanded.*

A suit should not be remanded because a certain issue was not framed unless there appears a reasonable chance that a decision of that issue will affect the final result of the suit. **O** GANGA *v.* PANCHAM, 10 O. & A. L. R. 725 **591**

——— **O. XLI, r. 27**—*Additional evidence—Failure to record reasons—Rebutting evidence.*

The failure of an Appellate Court to record reasons for admitting additional evidence vitiates the procedure.

If additional evidence is admitted in appeal, an opportunity to produce rebutting evidence should also be given to the other side. **L** RAMZAN *v* NABI BUX, 6 L. L. J. 234; (1924) A. I. R. (L.) 638 **530**

——— **O. XLI, r. 27**—*Appeal second—Additional evidence, whether can be taken.*

Rule 27 of O. XLI of the Civil Procedure Code does not authorise an Appellate Court to allow the production of additional evidence in second appeal. **L** WALI MUHAMMAD *v.* MUHAMMAD BAKHSH, 5 L. 84; (1924) A. I. R. (L.) 444 **998**

——— **O. XLIV, r. 1, proviso**—*Appeal by pauper, dismissal of—Procedure.*

The proviso to r. 1 of O. XLIV of the Civil Procedure Code does not come into play unless it should be found that the applicant is a pauper. **L** VIDYA WANTI *v.* JAI DAYAL KAPUR, 6 L. L. J. 205; (1924) A. I. R. (L.) 536 **649**

——— **O. XLVII, r. 3,** *scope of—Application for review—Dismissal for default—Order refusing to restore application—Appeal, whether lies.*

Order XLVII, r. 3 of the Civil Procedure Code does not extend the right of the party who goes for a review. It merely defines the method by which the form shall be adopted and ascertained.

No appeal lies against an order refusing to restore an application for review. **A** GIRDHARI LAL *v.* ZORAWAR SINGH **649**

——— **App. D. Form 6.** *See* TRANSFER OF PROPERTY ACT, S. 74 **283**

——— **Sch. II, para. 1**—*Arbitration—Defendant who admits claim, whether interested.*

A person who admits the plaintiff's claim unconditionally without reference to the liability of his co-defendants and absents himself from subsequent proceedings, is not interested in the suit within the meaning of para. 1 of Schedule II to the Civil Procedure Code, and is not a necessary party to a reference to arbitration as between the plaintiff and the other defendants. **O** BRIJ RAJ KUAR *v.* RAM NATH, 9 O. & A. L. R. 773 **821**

——— **para. 3**, *scope of—Arbitration proceedings—Court, control of—Court's functions,*

Civil Procedure Code—1908—concld.

whether can be delegated—Misconduct, whether can be enquired into—Reference, whether can be recalled.

Under the Second Schedule of the Civil Procedure Code the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed.

It is very much better that no interference should take place with the arbitration proceedings during the period limited to the arbitrators.

The limit of time is the condition or the form of the Court's control over the arbitrators, and the Court is not authorised either to abandon control or to substitute any other form of control.

It is necessary that the Court should inform its own limit upon the arbitrators.

It is not competent to the Court to delegate to the arbitrators its own function of control as to time.

Matters in dispute between the parties were referred to the arbitrators under the Second Schedule to the Code. The order provided that the arbitrators should make their award in writing within six months from the date on which an office-copy of the order of reference be served on them or within such further time as they may allow themselves by endorsement of the said office-copy order. The arbitrators held many sittings during the course of two years, but nothing was decided. The plaintiff then applied that the reference should be recalled or superseded:

Held, that the order of the Court allowing the arbitrators to extend the time fixed for filing the award did not comply with the provisions of clause (3) of the Second Schedule to the Code and was consequently bad in law;

(2) that by consenting to the order of reference the plaintiff was not estopped from making the application and the reference must be superseded. **C** ROBINDRA *v.* JOGENDRA, 27 C. W. N. 420; (1923) A. I. R. (C.) 410 **459**

——— **Sch. II, para. 12** (b)—*Award, rectification of—Palpable mistake—Jurisdiction of Court.*

A Court has no power to rectify or correct the award on the ground that the arbitrator has taken a wrong view of the evidence which was palpable or apparent on the face of the evidence, unless the award is imperfect in form or the obvious error is of such a character that it can be set right without affecting the decision of the arbitrator.

A Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator. **C** MAHENDRA NATH KUNDU *v.* SURESH CHANDRA PRAMANIK **10**

——— **para. 15**—*Arbitration—Award based on compromise, validity of.*

An award passed by arbitrators in a pending suit, which merely embodies a compromise of the parties themselves before the arbitrators is a perfectly valid award.

Such a proceeding is as much an adjudication of the case as is a decree of Court founded on a compromise. **M** LEKKALA RAMU NAIDU *v.* VETCHALAPU NAYANAPPA, 19 L. W. 562; (1924) M. W. N. 356 **571**

Companies Act (VII of 1913), s. 79—*Company—Meeting of share-holders—Irregularities—Interference by Court—Right of share-holder to speak at meeting—Adjournment of meeting—Articles of Association, construction of.*

Irregularities in the procedure at a meeting of share-holders of a company are not a matter for the interference of a Court, but for a majority of the share-holders to deal with. A Court will interfere with the proceedings of the meeting only if the rights of the share-holders are infringed or if a case of fraud or *ultra vires* action is made out.

A share-holder is not entitled to apeak as much as he pleases at a meeting of share-holders, but has a right to be heard in reasonable terms for a reasonable time.

Where the articles of Association of a Company empower the Chairman to adjourn a meeting with the consent of the meeting, the Chairman has a discretion to adjourn, and he can exercise that discretion only with the consent of the meeting but even if the meeting desires an adjournment the Chairman is not bound to adjourn. **B** PARSHURAM *v.* TATA INDUSTRIAL BANK, LTD., 25 Bom. L. R. 1083; 47 B. 915; (1924) A. I. R. (B.) 102 **75**

——— **s. 89.** *See* NEGOTIABLE INSTRUMENTS ACT, ss. 9, 118 **741**

——— **s. 207 (ix)**—*Liquidation, voluntary—Removal of liquidators—Power of Court—"Cause shown," meaning of.*

Under section 207 (ix) of the Companies Act, the Court has power in the voluntary winding up of a Company on cause shown to remove a liquidator. The jurisdiction of the Court is not confined to cases where there is personal unfitness in the liquidator. The cause shown is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidators are appointed. Fair play to the liquidators themselves is not to be left out of sight but the measure of due cause is the substantial and real interest of the liquidation. **B** KAIKHUSHRU NUSSERWANJI CHANDABHOY *v.* TATA INDUSTRIAL BANK, LIMITED, 26 Bom. L. R. 237; (1924) A. I. R. (B.) 339; 48 B. 471 **515**

Compromise of suit—*Agreement to be bound by statement of third party—Admission by nominee of party—Evidence Act (I of 1872), ss. 20, 31.*

The plaintiff and the defendant in a suit signed a written statement which said "it has been settled between the parties that *G.* shall hear our whole affair and that we shall accept any statement that he may make before the Court." *G.* made a statement on oath against the plaintiff and the Court dismissed the suit. The plaintiff urged in appeal that the statement of *G.* was not binding and that the Court should have decided the case on the merits:

Held, (1) that the agreement operated as an adjustment of the suit and was binding on the parties;

(2) that at any rate the statement of *G.* must be taken to be an admission made in the suit by a nominee of a party thereto, which was as effectual and conclusive as an admission made by the party himself in his written or oral pleadings. **A** HIMANCHAL SINGH *v.* JATWAR SINGH, (1924) A. I. R. (A.) 570 **16**

Consideration, amount of, left blank—Rectification of deed—Sale-deed—Agreement of repurchase—Evidence of amount, admissibility of. *See* SPECIFIC RELIEF ACT, s. 31 759

Construction of document—*Building contract—Builder contracting to allow rebate to owner on scheduled rates of materials supplied—Dispute between parties—Building not completed—Owner, whether entitled to rebate.*

The defendant contracted to buiid a house for the plaintiff within one year. The plaintiff undertook to advance small sums of money to the defendant and the latter agreed to allow a rebate or deduction of 10 per cent. in favour of the plaintiff on the scheduled rates of articles to be supplied by him. If the work was done honestly and well it was left to the kindness of the plaintiff to allow something to the defendant from this commission. As the work commenced the plaintiff began to order changes in the construction almost doubling the size of the building. Disputes arose between the parties, the plaintiff declined to make further advances and the work was stopped. Thereupon the plaintiff brought a suit to recover his commission. It was found that the work done was well worth the full scheduled rates:

Held, (1) that the arrangement by way of rebate or 10 per cent. commission in favour of plaintiff was an arrangement that was only exigible and became crystallised when the work was completed;

(2) that *a fortiori* this deduction was never agreed to in respect of the additions ordered in the original building;

(3) that as the work was not completed and the defendant was in no way to blame and there was no injustice done to the plaintiff the latter was not entitled to recover anything. **P C** SAHU RAM KUMAR *v.* MUHAMMAD YAKUB, (1924) A. I. R. (P. C.) 123; 26 Bom. L R. 631; (1924) M. W. N. 431; 34 M. L. T. 102; 20 L. W. 82; 47 M. L. J. 180 203

——— *Deed of gift—Gift with conditions—Disposition, nature of.*

Where in the primary clause of a deed of gift these words followed the gift "and all rights appertaining thereto with the following condition":

Held, (1) that these words fundamentally affected the construction of the deed as a whole;

(2) that so construed the deed did not confer *maliki* rights without conditions, nor did it confer on the donee these rights of property and alienation which a bare disposition in favour of a person denominated as *malik* would have involved. **P C** ASHRAFI SINGH *v.* BIDYA PRASAD, (1924) A. I. R. (P. C.) 191; 26 Bom. L. R. 736; 20 L. W. 425; 47 M. L. J. 585; (1924) M. W. N. 819 826

——— *Gift in favour of wife—Gift over to another—Nature of interest created.*

A person executed a deed of gift in favour of his wife in order that she "may enjoy his self-acquired property." Provision was made for payment of a small sum to a temple for performing *pooja* and the remainder was to be utilised for her maintenance. There was a final clause in the following terms:—

"After your lifetime, you shall leave the said property and documents relating thereto to my brother's daughter. That lady shall also do what is done by you. The rest of my heirs shall have no right, title or interest in the property:

Held, that there was a clear gift over to *R.* absolutely on the termination of the life-interest of the wife. **M** RATHNASABHAPATHY CHETTY *v.* LAKSHMA AMMAL, 20 L. W. 243; (1924) M. W. N. 598 618

——— Mortgage possessory—Special agreement prohibiting sale—Mortgagee deprived of possession *See* BOMBAY REGULATION, CL. 15 (3) 39

——— *Precedents, value of—Pre-emption*—Wajib-ul-arz, *entry in, construction of.*

The *wajib-ul-arz* of a village contained the following clause:—

"If one of the co-sharers desires to make a mortgage, or a mortgage by conditional sale, or an out-and-out sale, he must do so on the same adequate price as may be offered by other parties, in the first instance to a near co-sharer in the same *patti*, next to other co-sharers in the *patti*, if they will not take, then to a near co-sharer in another *patti:* next to any co-sharer in the *mahal*, and finally to a stranger:"

Held, that the clause conferred no right of pre-emption on the occasion of the foreclosure of a mortgage by conditional sale apart from the right conferred on the occasion of the creation of the mortgage itself.

Any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language, and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied, an appellant, or a respondent, relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns, can do nothing more than ask the Court to take into consideration the general principles which have been applied by other Hon'ble Judges in similar cases and to derive from them whatever assistance it can towards arriving at a correct conclusion. **A** ALKHU RAI *v.* LACHHMAN UPADHIA, 22 A. L. J. 137; 46 A. 274; (1924) A. I. R. (A.) 324 550

——— *Sale of goods—Deposit as security—Breach by purchaser—Forfeiture of deposit.*

Plaintiff agreed to purchase 2,000 bags of cotton seed from defendant to be delivered at the defendant's factory within one month. Plaintiff agreed to pay for the goods and remove them within one month, failing which he undertook to make good the loss which the defendant might suffer and cancel the contract. The contract also contained the following clause:

"In respect of this contract a total sum of Rs. 1,025 has been deposited for profit or loss, and the said deposit amount should, after the completion of the contract, be returned to us."

Plaintiff failed to carry out the contract:

Held, that the sum of Rs. 1,025 was meant to be security for any loss that the defendant might suffer on plaintiff's failing to take delivery of the goods and was not intended as security for the

performance of the contract; so as to entitle the defendant to forfeit the sum in case of non-performance. B SHRICHAND *v.* P. E. BOYCE, (1924) A. I. R. (B.) 62 **720**

——— *Subject-matter and surrounding circumstances to be considered.*

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. **P C** SUBHADRAYAMMA *v.* VENKATAPATI, (1924) A. I. R. (P. C.) 162; 47 M. L. J. 93; 26 Bom. L. R. 786; 20 L. W. 298; (1924) M. W. N. 607; 29 C. W. N. 57 **807**

Contract Act (IX of 1872), s. 7—*Proposal, when converted into promise—Acceptance subsequent to refusal, whether creates contract—Servant, dismissal of—Sufficient notice, what is.*

To convert a proposal into a promise, the acceptance must be unqualified and without condition. When once a proposal has been refused no subsequent acceptance can convert the proposal into a promise so as to create a contract.

The rule of one month's notice which applies to menials, does not apply to the case of a school-master. The rule as to yearly hirings extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and each case must be considered by itself and in each case it must be decided what notice would be reasonable.

In the case of a school-master, especially when he was intending to leave his profession and join another, a notice of three months would be reasonable. **Pat** NIROD CHANDRA ROY *v.* RAJA KIRTYA NANDA SINGH, (1924) A. I. R. (Pat.) 24 **308**

——— **s. 11.** *See* INDIAN MAJORITY ACT, s. 2 **914**

——— **ss. 11, 65.** *See* COURT OF WARDS ACT, ss. 8, 9, 15, 26 **800**

——— **s. 13** —*Champerty, whether illegal—Money lent to finance suit for recovery of property—Suit, compromise of—Lender, whether can recover money lent—Breach of contract, effect of.*

A party to a contract cannot put an end to it simply by committing a breach of it.

In India, champerty or maintenance is not illegal.

There is no distinction, and can be no distinction on this point between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour.

Defendants entered into a contract with the predecessor-in-title of the plaintiff the Raja of Tuni whereby it was agreed that the Raja would lend money to the defendants in order to finance his suit for the recovery of an expectancy. The material provisions of this contract were (1) that the suit would not be compromised without the consent of the Raja, (2) that if the Counsel conducting the case advised a compromise it would be entered into, and (3) that out of the moveable and immoveable properties obtained by such compromise the defendant would repay the principal money advanced together with interest at one per cent. per mensem and that out of the properties that remained after making this payment defendant would execute and give the Raja a proper sale-deed and place in his possession three-thirty seconds of a share.

The Rajah died and the suit was compromised after his death. His widow then brought a suit claiming that the money due to the Raja should be a charge upon the amount received by the defendant under the compromise:

Held, (1) that the contract entered into by the defendant, was an agreement to assign to the Rajah part of the fruits that he may acquire in an action at law, and was, therefore, perfectly legal;

(2) that the words used in this contract were wide enough to cover every conceivable kind of property;

(3) that the main purpose and object of the contract was to finance a suit brought to establish title to an existing thing, *i.e.*, an estate;

(4) that the stipulation with regard to the consent of the Rajah must be deemed to contain a term to the effect that the consent should be given when possible and that the giving of the consent by the Rajah to a compromise accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it. **P. C.** SUBHADRAYAMMA *v.* VENKATAPATI, (1924) A. I. R. (P. C.) 162; 47 M. L. J. 93; 26 Bom. L. R. 786; 20 L. W. 298; (1924) M. W. N. 607; 29 C. W. N. 57 **807**

——— **s. 13**—*Consent — Signing of document —Document signed by blind man—Misrepresentation of contents of document* — Non-est factum, *plea of*—Bona fide *purchaser for value, position of.*

The mere signing of a document does not necessarily imply consent. Thus if a blind man, or a man who cannot read, has a written contract falsely read over to him, the reader misreading to such an extent that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing it, then the plea of *non-est factum* is available to him and the signature so obtained is of no force.

The rule does not apply to a man who can read but who forbears to read the document. But the question is important only when it is raised between two innocent parties, for unless the document is wholly void, as it would be if the plea of *non-est factum* succeeds, an innocent party giving consideration cannot be deprived of an interest which he has taken under the deed; but where the question arises between a party deceiving and a party deceived it is immaterial whether the deed is void or voidable; and, even if the party deceived fails in his plea of *non-est factum*, that is to say, that there was no consent on his part within the meaning of the term as

defined in the Contract Act, it is still open to him to prove that there was a mis-representation and to ask the Court to relieve him from the consequences of the transaction. **Pat** HEM SINGH *v.* BHAGWAT SINGH **67**

——— **s. 16 (3)**—*Undue influence — Money borrowed—Urgent need—Unconscionable bargain —Equity and good conscience—Mortgage—Clog on redemption—Redemption impossible—Transfer of Property Act (IV of 1882), s. 60, object of—Contract—Particular covenant, relief against—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 114, application of.*

If a mortgagor agrees to receive a less amount than that for which he agrees to execute a mortgage the transaction is perfectly valid.

The mere fact that the borrower has urgent need of money does not place the lender in a position to dominate the will of the borrower.

Under section 16 (3) of the Contract Act the burden of proving the absence of undue influence can lie on a defendant only in the event of the plaintiff discharging the initial onus of satisfying the Court that the defendant directly or indirectly was in a position to dominate the will of the plaintiff.

The maxim "once a mortgage always a mortgage" is one of equity and is not displaced by anything contained in the Transfer of Property Act.

If the substance of a transaction is a mortgage and nothing more than a mortgage it must not be made irredeemable and any covenant which clogs the equity of redemption is void.

Such of the rules of English Law as are not either technical in their origin or peculiar to the customs, traditions and habits of the people of England are invariably followed in India as rules of justice, equity and good conscience.

The object of section 60 of the Transfer of Property Act is to legalise the equitable right to redeem and permit redemption even when the right is expressly abandoned or even postponed by the contract of mortgage which is the subject-matter of a suit for redemption.

The question as to when a mortgagor is entitled to redeem must be answered with reference to the terms of the contract of mortgage as a whole, other relevant circumstances, and the rules of law and equity, applicable to the particular case.

When a suit is brought under a contract but one of its terms is challenged as being void in law the three years' rule of limitation does not apply.

Plaintiff sued to redeem a usufructuary mortgage executed by him in favour of the defendant. The deed provided, *inter alia*, that the balance of the realization by the mortgagee after deduction of the Government revenue was to be appropriated for the interest, the deficiency to be paid year by year by the mortgagor and in the event of default the mortgagee to be entitled to compound interest at the contractual rate. It further provided that the mortgagor shall have no right of redemption for 50 years after which period redemption would take place in payment of principal, interest and compound interest due. It appeared that the net profits of the mortgaged property were about Rs. 275 and the interest amounted to Rs. 720 thus leaving a deficit of Rs. 445 payable by the mortgagor to the mortgagee every year:

Held, (1) that the combined effect of the covenant postponing redemption for 50 years and other covenants and the circumstances entailing a perpetual deficiency of profits to the extent of Rs. 445 a year was to render the mortgage in question irredeemable;

(2) that the covenant was repugnant to or inconsistent with the contractual right to redeem;

(3) that the plaintiff was entitled to redeem it at any time consistent with the usufructuary nature of the mortgage in suit on payment of what was due to the mortgagee on the date of redemption. **O** BALBHADRA PRASAD *v.* DANPAT DAYAL, 9 O. & A. L. R. 707; 10 O. L. J. 447; 27 O. C. 4; (1924) A. I. R. (O.) 193 **213**

——— **s. 23**—*Immoral consideration — Money paid to husband for divorcing his wife—Custom — Burden of proof—Erroneous finding of fact—Second appeal.*

A creditor, who knows that the object of his debtor in taking the loan advanced by him is to utilize the money for payment of compensation to a husband, who is willing to divorce his wife, in case his marriage expenses are paid back to him, is not disentitled from recovering it by suit from his debtor.

There is a presumption of lawfulness of every consideration; and as the law presumes against illegality, the burden of establishing illegality as a fact lies on the person who asserts it.

As the custom of reimbursing the late husband's relations for the expenses of a woman's first marriage is so well-known, in order to prove that a contract, to compensate the husband, with expenses of his marriage upon his assenting to divorce his wife, is immoral or opposed to public policy, and, therefore, unlawful, it must be established that there is no such custom of compensating the husband.

However erroneous or grossly improper a finding of fact may be, it is unassailable in second appeal, provided it is supported by proper evidence. **N** NARAYAN *v.* LAXMAN **885**

——— **ss. 23, 26, 27**—*Public policy, agreement opposed to—Agreement to live among particular community, whether can be enforced.*

Sections 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all the instances of agreements which are contrary to public policy.

An agreement by which a man binds himself to associate for the whole of his life only with a certain body of his fellow-men and to abstain completely from associating with another body is opposed to public policy and ought not to be enforced.

In consideration of the marriage of defendant No. 2 to a girl belonging to the community of the plaintiffs, the defendants, father and son, agreed to live among the community of the plaint-

iffs and agreed to pay a fine of Rs. 5, if they ever left it:

Held, that the agreement was one opposed to public policy and no penalty could be claimed for its breach. O LAL KHAN *v.* KIMMAN KHAN, 10 O. & A. L. R. 111; 27 O. C. 100; 11 O. L. J. 408 **560**

——— **ss. 23, 28**—*Policy of insurance—Condition of forfeiture on failure to sue within certain time, legality of.*

A provision in a policy of insurance that all benefit thereunder shall be forfeited if a suit is not commenced within a certain time, which falls short of the time allowed by law for the institution of such a suit, does not infringe the provisions of either section 23 or section 28 of the Contract Act.

Section 28 of the Contract Act aims only at covenants not to sue at any time, or for a limited time and is not aimed at a provision extinguishing the right to sue in certain events. C GIRIDHARILAL HANUMANBUX *v.* EAGLE STAR, ETC., 27 C. W. N. 955; (1924) A. I. R. (C.) 186 **637**

——— **ss. 23, 30**—*Contract by way of wagering, nature of—Betting losses—Defaulter reported to R. C. T. C.*—Hundi *in consideration of withdrawing report—Suit on* hundi, *whether maintainable.*

Where at the desire of the promisor the promisee promises to do or to abstain from doing something [Contract Act, section 2 (*d*)], the sum of money which the promisor reciprocally promises to pay whatever it may be and however it may be determined, is a good consideration for the promise of the promisee.

A contract by way of wagering and gaming is void and not illegal.

Defendant having failed to pay the sum of Rs. 8,500 which he owed to the plaintiffs on account of horse races was reported by the latter to the Royal Calcutta Turf Club who threatened to proceed against him if he did not settle his accounts. Defendant, therefore, executed a *hundi* in favour of the plaintiffs for Rs. 8,500 in consideration of the latter withdrawing his name from the R. C. T. C. Plaintiffs then sued to recover the amount:

Held, (1) that the consideration for the *hundi* in suit was a legal consideration and plaintiff was entitled to recover;

(2) that there was nothing illegal in the agreement made by the plaintiffs and the suit was maintainable. C LEICESTER & Co. *v.* MULICK, 27 C. W. N. 442; (1923) A. I. R. (C.) 445 **498**

——— **s. 28**. *See* ARBITRATION ACT, s. 4 **523**

——— **ss. 56, 65**—*Transfer prohibited by law—Suit for refund of consideration—Performance of contract rendered impossible.*

If the object of an agreement is to evade the statutory prohibition of the transfer of occupancy land, the contract is void *ab initio* and no suit lies to recover money paid under the unlawful agreement.

If a party by his conduct renders the performance of the contract impossible, he is not

entitled to recover anything by way of damages from the other party. N NARSINGH *v.* NARAYAN, **949**

——— **s. 65**—*Agreement discovered to be void—Restoration of benefit—Discovery, date of—Limitation, commencement of—Hindu Law—Joint family—Mortgage by adult members, acted upon for several years, declared void, effect of.*

If an agreement is void *ab initio* the discovery that it is so, within the meaning of section 65 of the Contract Act, must be held to have been made at the date of the agreement, because the parties must be presumed to have known the law. But the special circumstances of a case may enable the Court to say that the discovery was later than the date of the agreement itself.

A mortgage executed by the adult members of a joint Hindu family was acted upon for several years, the mortgagee being put in possession of the mortgaged property. It was then held to be void for want of legal necessity:

Held, that for the purposes of section 65 of the Contract Act the mortgage was discovered to be void only when the decision of the Court was pronounced. O RAM NATH *v.* DAMODAR PRASAD, 9 O. & A. L. R. 1066 **855**

——— **s. 70**—*Bill of lading—Carriage of goods from Liverpool to Cochin—Clause exempting ship-owners from liability in case of "restraint of rulers"—Freight paid in advance by shippers—Steamer commandeered by Government at Bombay—Goods forwarded to Cochin by Master of ship—Consignee taking delivery on payment of charges—Suit for refund against ship-owners—Right of Master to act for cargo-owners.*

The defendant steamship Company undertook with the plaintiff to carry certain goods from Liverpool to Cochin and received the advance freight therefor in England. There was a provision in the bill of lading for termination of voyage in case of "restraint of rulers", and for non-liability of the Company for any loss or damage thereby. The goods were put on board one of defendant's steamers and duly arrived at Bombay Harbour but there the steamer was commandeered by the Government of India for the use of transport. In consequence all the cargo was discharged in the port and notice given to the consignee. There was some correspondence between the defendant's agents at Bombay and the plaintiff on a dispute as to who should bear the charges for transhipment between Bombay and Cochin. Finally the goods were transhipped by the defendant Company from Bombay to Cochin. The plaintiff took delivery of the goods and paid the charges. In a suit by the plaintiff against the defendant Company for refund of the sum so paid:

Held, that (1) The "restraint of rulers" being one of the excepted causes, the master of the ship was entitled, on the steamer being commandeered, to land the goods at Bombay and the ship-owner's responsibility ceased as soon as notice was given to the shippers, that even though the voyage had not been completed, the company was not bound

to refund any portion of the advance freight paid or carry the goods to Cochin at their expense ;

(2) The "law of the flag" which governed the contract of the bill of lading, meant in this case the English Law, at any rate till the contract came to an end by the goods being landed in Bombay;

(3) The defendant Company having intended throughout to hold the consignee responsible for the charges from Bombay to Cochin and never having intended to act gratuitously and the plaintiff never having repudiated the Company's action in sending the goods to Cochin, the Company could not be held to have acted voluntarily or gratuitously;

(4) In any case, under section 70 of the Contract Act, the defendants, being carriers, were bound to make arrangements for the disposal of the cargo that, therefore, they must be held to have acted lawfully in sending the goods from Bombay to Cochin and that the plaintiff having enjoyed the benefit was bound to pay the charges. **M** CLAN LINE STEAMSHIP CO. LTD. *v.* SRINIVASA PAI, 20 L. W. 378 **892**

——— **s. 73.** *See* TRANSFER OF PROPERTY ACT, s. 76 **63**

——— **s. 73**—*Relief against penalty, doctrine of, whether applies to compromise decrees embodying contracts between parties.*

The doctrine of "relieving against penalty" applies to decrees.

As the adoption of a contract by a Court amounts to an adoption by it with all its legal incidents, the considerations, which would arise if a mere contract were in question, would equally apply to the enforcement of a decree embodying the contract. A Court is, therefore, entitled to relieve against a penalty on breach of a condition in a compromise decree containing the contract between parties. **M** JAYA RAO *v.* VENKATANARAYANA CHETTY **925**

——— **s. 74.** *See* TRANSFER OF PROPERTY ACT, s. 100 **297**

——— **ss. 78, 80, 82, 92, 95**—*Goods ascertained—Test—Lien.*

Section 78 of the Contract Act applies only to ascertained goods.

If under the terms of an agreement the defendants, who are brokers and not actual growers of *bidi* leaves have to deliever them after selecting and counting them from the stocks in hand or from the stocks with the actual growers, goods to be delivered are not ascertained goods and section 78 has no application.

Lien is the right of the seller to retain goods and in order that it may exist, it is necessary that goods should remain in the seller's possession, that the price should be wholly or partially unpaid and that a contrary intention should not appear from the contract. **N** KARIM *v.* DOMA **639**

——— **ss. 99, 102**—*Sale of goods—Stoppage in transit—Assignment of document of title to third persons—Good faith and valuable consideration.*

Where a seller has stopped goods in transit but the buyer has in the meantime assigned the document of title to the goods to a third person, the latter, in order to defeat the seller's right of stoppage must prove that when the document of title to the goods was assigned to him he was acting in good faith and that he gave valuable consideration for the goods. **C** RASH BHARI *v.* NARAIN DAS, 27 C. W. N. 231; (1923) A. I. R. (C.) 182; 50 C. 39) **485**

——— **s. 129**—*Guarantee, continuing, what is—Amount payable by instalments.*

A guarantee in order to be continuing must refer to a series of transactions of which, when the guarantee is given, some are unknown and indefinite or not certain to come into existence. The fact that the amount guaranteed is payable by instalments does not make the guarantee a continuing one within the meaning of section 129 of the Contract Act. **N** KANTICHAND *v.* UDAYABHANSHA **349**

——— **ss. 151, 152, 168.** *See* RAILWAYS ACT, s. 72 **279**

——— **s. 251**—*Partnership—Partner, whether can release cause of action—Fraud, absence of.*

Per *Kincaid, J. C.* and *Aston, A. J. C.* (*Kennedy, A. J. C.* dissenting):—In the absence of fraud one partner may release a cause of action in which he and his partners are plaintiffs.

Per *Aston, A. J. C.*—As a rule it is necessary for carrying on the business of a partnership in India, that a managing partner should have power to release causes of action even after suit whether he has signed the plaint or not and a Court will not set aside a release given by one partner unless fraud can be clearly established.

Per *Kennedy, A. J. C.*—It is not possible to lay down a rule which will generally empower all partners to bind the other members of the partnership by a compromise or a rule to prohibit all partners from so binding their fellow partners. The question is in each case whether the act done by the partner is one which is usual or necessary for the business of the partnership. **S** MANGALSEN *v.* BHAGWANDAS PARMANAND **583**

——— **s. 253**—*Partnership—Death of partner—Partnership continued—Accounts of old partnership, suit for—Limitation.*

When a partner dies, the partnership comes to an end under the Contract Act. But if the remaining partners continue the business then for the purpose of ascertaining what share those remaining partners brought into the new partnership, an account may have to be taken of the old partnership and there will be no question of limitation in such a case for the account of the old partnership is taken not for the purpose of enforcing any claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. **M** ABDUL JAFFAR SAHIB *v* VENUGOPAL CHETTIAR, 46 M. L. J. 503; (1924) A. I. R. (M.) 708 **378**

Contribution—*Partition suit—Costs by one defendant—Other defendants, liability of.*

Where in a partition suit all the defendants equally contest the suit and are directed to pay the plaintiff's costs and the costs are paid by one defendant he is entitled to contribution from his other

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co-defendants unless facts can be proved which would be considered sufficient to defeat the equity. The fact that a common defence was raised by all the defendants in the partition suit would not be sufficient to defeat the right of contribution. **B** KESHAVA VITHAL OLTIKAR *v.* HARI RAMKRISHNA OLTIKAR, 26 Bom. L. R. 218; 48 B. 351; (1924) A. I. R. (B.) 318 **526**

Co-sharers, *rights of—Exclusive use by one co-sharer, whether amounts to ouster—Disagreement between co-sharers—Remedy—Co-sharer, powers of, in Bengal—Question excluded by plaintiff and not decided by Court—Appellate Court, decision by, at request of defendant*—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

Where lands are held in common by co-sharers each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any *jote* right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them.

Even if the Midnapur Company purchased any *jote* rights in lands, held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all co-sharers and the *jote* rights so purchased would by the purchase be extinguished.

In Bengal a co-sharer has no more power to confer a right of occupancy on a *raiyat* than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman.

Plaintiff sued for partition of certain lands in which he and the defendant were co-sharers and for a declaration that the defendant had no *jote* rights in any of the lands of which he sought partition. In an earlier suit between the predecessors-in-title of the parties, the question of the defendants' right was also in issue but the then plaintiff had excluded it by the statement of his Pleader and the first Court had, therefore, expressly stated that it could not decide it. The defendant had thereupon urged in appeal that the Court was wrong in not deciding it and had asked the Appellate Court expressly to decide it and the Court had done so:

Held, that in so far as the Court decided the point raised it must be assumed to have also decided that the then defendants' objection that the point should be tried was a good one and that the issue

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was one which did arise in the suit, and that the matter was, therefore, *res judicata*. **P. C.** MIDNAPUR ZAMINDARY CO. *v.* NARESH NARAYAN ROY, (1924) A. I. R. (P. C.) 144; 26 Bom. L. R. 651; 47 M. L. J. 23; 51 C 631; 35 M. L. T. 169; (1924) M. W. N. 726; 29 C. W. N. 34; 20 L. W. 770 **827**

Costs, order as to—Stay of execution proceedings—Refusal to set aside order—Appeal, whether maintainable. *See* CIVIL PROCEDURE CODE, ss. 20, 47 **39**

——— *in the cause, meaning of—Interlocutory order—Decree in favour of one party—Costs, award of.*

The words "costs in the cause" in an order made in an interlocutory proceeding do not mean that the costs would inevitably follow the event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs.

Where, however, an order has been made in an interlocutory proceeding that costs will be costs in the cause, and a decree is passed in favour of one side or the other for costs, then those costs must be taken as being included in the final order unless the Judge expressly excludes them. **B** JIVABAI PITAMBERDAS *v.* TEJA SAMA, 26 Bom. L. R. 282; (1924) A. I. R. (B.) 398 **263**

Court-fee, *amount of, how determined—Declaration and consequential relief—Duty of Court.*

The question of Court-fee must be decided on the plaint; and though it is open to the Court in the case of a suit for a declaration to say that the plaintiff has really asked for a consequential relief, though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper Court-fee as in such a suit the plaintiff is entitled to have the case made by him in the plaint tried by the Court, although he takes the risk that if it is subsequently found that he could have asked for a consequential relief, his suit is liable to be dismissed. **Pat** NARAYAN SINGH *v.* DILDAR ALI KHAN, 3 Pat 915 **544**

——— *Crown—Crown debts.*

The Court-fees form a Crown debt and the Crown is entitled to precedence in payment of this debt over all creditors. **M** COLLECTOR OF KRISHNA *v.* GAJJALA **935**

Court Fees Act (VII of 1870), s. 7 (iv) (a), (x) (a)—*Agreement to sell immoveable property—Suit for execution and registration of sale-deed, nature of—Specific performance—Court-fee payable.*

There may be a suit for specific performance of a contract without any prayer for possession.

Plaintiff agreed to purchase a shop from the defendant for a certain price. A sale-deed was executed but it was not registered and the defendant subsequently sold the shop to a third person. Plaintiff sued the defendant for the return of the sale-deed, or, in the alternative, for execution of a fresh sale-deed and, for registration of the deed,

He did not ask for possession of the shop as he alleged that he was in possession of it:

Held, that the plaintiff's cause of action was the defendant's refusal to carry out the agreement of sale, and the suit was, therefore, one for specific performance of a contract and fell within section 7 (x) (*a*) of the Court Fees Act, Court-fees being payable on the amount of the consideration. **L** FAKIR CHAND *v.* RAM DATT, 5 L. 75; (1924) A. I. R. (L.) 439 **953**

——— **s. 7 (iv) (c), Sch. II, Art. 17 (iii)**—*Declaration, suit for—Redundant relief, prayer for, effect of—Court-fee payable.*

Where a mere declaration is sufficient to give the plaintiff full relief a further declaration will be deemed to be redundant, and the fact that the plaintiff has asked for a redundant relief will not alter the nature and scope of the suit and convert the suit into one for a declaration and consequential relief for purposes of Court-fees.

Plaintiff obtained a personal decree against defendant No. 1. In execution of the decree plaintiff discovered that defendant's share in certain joint family property had been diminished by means of certain fictitious and collusive transactions. Plaintiff thereupon brought a suit for a declaration that those transactions were void and of no effect and asked for a further declaration that he was entitled to realise his decree from the estate of defendants Nos. 1 to 6, defendants Nos. 2 to 6 being the other members of defendant's family:

Held, (1) that the first declaration was sufficient to give full relief to the plaintiff and the prayer for the second declaration was a mere surplusage;

(2) that the suit fell within the purview of Article 17 (*iii*) of Schedule II to the Court Fees Act and was not a suit for a declaration with consequential relief within the meaning of section 7 (iv) (c) of the Act. **Pat** MAHABIR PRASAD *v.* SHYAM BEHARI SINGH, 3 Pat. 795 **655**

——— **7 (iv) (c), Sch. II, Art. 17 (iii)**—*Suit for declaration and consequential relief—Appeal—Relief limited to declaration—Court-fee payable.*

Where in an appeal arising out of a suit for a declaration and consequential relief, the relief sought is limited to the declaration, the appeal falls under Article 17 of Schedule II to the Court Fees Act and Court-fees are payable accordingly.

Where in a declaratory suit consequential relief is sought it is the value of the consequential relief that determines the duty to be levied upon the plaint. **Pat** NEKO TEWARI *v.* KISHUN PRASAD PANDEY, 2 P. L. R. 193; 3 Pat. 610; (1924) A. I. R. (Pat.) 582 **563**

——— **s. 7 (iv) (e)**—*Suit for declaration and injunction, valuation of—Arbitration and award—Suit to set aside award, maintainability of—Agreement to refer submission not signed, effect of—Suit for declaration, effect of, on arbitration—Awards, several, whether can be made on one submission—Construction of contract—Dispute arising out of contract.*

Though a party dissatisfied with a private award may wait till his adversary seeks to enforce it by the summary process prescribed by the Indian Arbitration Act, and then contest it by finding such objections as are allowed by the law, that remedy is not his sole remedy and does not take away the remedy open to him under the provisions of section 9, Civil Procedure Code, of bringing an action to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation.

In a suit for a declaration and for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purposes of Court-fees, and the value for the purposes of jurisdiction is the same.

Plaintiff brought a suit for a declaration that there was no valid and binding contract between him and the defendant for the purchase of certain goods, and, in the alternative, that the contract, if any, was void, as having been induced by fraud, and that the parties had not agreed to refer their disputes to arbitration, and for an injunction restraining the defendant from enforcing the contract or submitting disputes arising out of the alleged contract to arbitration:

Held, (1) that the suit was maintainable;

(2) that the suit fell within the purview of section 7 (iv) (*e*) of the Court Fees Act, and the plaintiff was entitled to value his claim for the purposes of Court-fees and pay Court-fees accordingly.

The general rule of construction of a written contract is that the language of the instrument is to be understood in its ordinary and natural meaning, but at the same time, the whole of the contract must be considered in order to ascertain the meaning of any particular part thereof.

If parties have agreed in writing to submit their differences to arbitration, the submission need not be signed.

The failure of a party to a contract to pay a sum of money claimed by the other party under the contract, constitutes a matter in difference between the parties arising out of the contract.

The filing of a suit for a declaration that the plaintiff is not bound by a submission to arbitration does not *ipso facto* render the arbitrators *functi officio* and their award void.

A submission to arbitration is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. There may be as many awards on one submission as there are disputes arising out of the contract. **S** TAYABALLY ABDUL HUSSAIN *v.* JAMES FINLAY AND CO. 17 S. L. R. 15; (1924) A. I. R. (S) 105 **969**

——— **s. 7 (iv), (v)**. *See* CIVIL PROCEDURE CODE, s. 115 **667**

——— **ss. 7 (v) (a), (d), 12**—*Claim for possession of* khudkasht *lands lying within* malkiat *shares—Possession of* malkiat *shares also claimed—Separate Court-fees payable for* malkiat *and* khudkasht.

The claim for possession of *malkiat* does not include a claim for possession of the *khudkasht*. Therefore, where possession of *khudkasht* lands is claimed and in addition is also claimed possession

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of the *malkiat* shares within which the *khudkasht* lands lie, separate Court-fees should be paid on the market value of the *khudkasht* lands.

The claim in respect only of *khudkasht* lands falls under section 7 (v) (*d*) of the Court Fees Act and not under section 7 (v) (*a*) of that Act. **Pat** RAGHUBANS NARAYAN SINGH *v.* KHUB LAL SINGH **439**

——— **s. 7 (ix)**—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 9—Redemption suit—Surplus profits, claim to recover—Court-fee payable.*

Under section 7 (ix) of the Court Fees Act the amount of Court-fee payable in respect of a suit for redemption is to be calculated on the principal sum secured by the mortgage.

Where in a suit for redemption the mortgagor claims a certain sum as surplus mesne profits, he is not bound to pay Court-fee upon the surplus amount claimed in addition to the Court-fee payable on the principal amount secured by the mortgage. **A** CHIDDU SINGH *v.* JHANJHAN RAI, (1923) A. I. R. (A.) 261 **1021**

——— **s. 14, Sch. I, Arts. 4, 5**—*Review, application for—Presentation, what amounts to—Presentation to Stamp Reporter—Application presented on 90th day—Delay in signing decree—Refund of half fees*

The presentation of an application for review of judgment to the Stamp Reporter is a presentation within the meaning of Articles 4 and 5 of Schedule I to the Court Fees Act.

When a decree of which review was sought was not signed till more than six weeks after the date of the judgment and the application for review was presented on the 90th day after the date of the judgment:

Held, that this was a fit case in which a certificate ought to issue under section 14 of the Court Fees Act, and that the applicant ought not to be deprived of the benefit of Article 5 of Schedule I to the Act. **C** NOWRANG SINGH *v.* JANARDAN, 39 C. L. J. 344 **794**

——— **Sch. II, Art. 17**. *See* SPECIFIC RELIEF ACT, s. 42 **589**

Custom—Alienation—*Grazing rights.*

Where a tract of *shamilat* land in a village has been allotted to certain specified families for the purpose of grazing their cattle and cutting grass and wood, their right to do so amounts to an easement and no member can alienate his right, if by doing so he would be introducing a foreign element in the class of persons to whom the right was specifically restricted. **L** KIRPA *v.* GULABA, 5 L. L. J. 546; (1924) A. I. R. (L.) 223 **503**

——— *Widow, mortgage by—Necessity—Marriage of daughter—Amount of expenditure.*

It is a well recognized custom that a daughter should be given some jewellery on the occasion of her marriage, and it is also necessary that the guests who come to the bride's house on that occasion should be properly feasted and entertained

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A mortgage of her husband's estate, therefore, made by a widow to raise money for these purposes is justified on the ground of necessity.

What would be reasonable expenditure for the marriage of a daughter if the father were alive, would be reasonable on the part of his widow after his death if the circumstances of the estate remain the same. **L** MUNSHI *v.* GHANAYA, 6 L. L. J. 133; (1924) A. I. R. (L.) 500 **332**

——— **Ancestral property**—*Burden of proof—Presumption—Appeal, second—Finding of fact based on no evidence, whether binding.*

A finding as to the ancestral nature of certain property based on mere conjectures and presumptions is liable to be set aside in second appeal.

The mere fact that the ancestor of the plaintiffs and of the last male holder of the property, who were brothers, were at one time in possession of lands in the *patti* in which the land in dispute is situate, is not sufficient on which to base a finding that their father was in possession of the land in dispute. **L** BASANTI *v.* KABUL SINGH, 6 L. L. J. 127; (1924) A. I. R. (L.) 465 **329**

——— **Hindu Law**—*Adoption—Boy invested with sacred thread, whether can be adopted—*Kashmiri *Brahmins of Amritsar—Adverse possession—Female members of family allowed to occupy family house.*

Among *Kashmiri* Brahmins of Amritsar the adoption of a boy, seventeen years of age, who has been invested with the sacred thread is valid by custom.

Where female members of the family of a deceased Hindu are permitted to occupy the family house by the heir of the deceased their possession cannot be regarded as adverse to the heir. **P C** DURGA DEVI *v.* SHAMBHU NATH, 22 A. L. J. 394; (1924) A. I. R. (P. C.) 113; 46 M. L. J. 661; 26 Bom. L. R. 557; 5 L. 200; (1924) M. W. N. 434; 20 L. W. 216 **965**

——— **Pre-emption** — Wajib-ul-arz *entry—Internal evidence against custom, effect of—Custom of pre-emption recorded in* Wajib-ul-arz *—Presumption—Rebuttal.*

There can be no pre-emption where the pre-emption clause in the *wajib-ul-arz* furnishes internal evidence negativing the custom of pre-emption.

The ordinary presumption raised by an entry in a *wajib-ul-arz* regarding the custom of pre-emption is not rebutted by the fact that hundred years ago the village was owned by a single proprietor and that even to-day it is only the descendants of that proprietor who are co-sharers in the village. **A** BENI MADHO TEWARI *v.* RAM SUNDER TEWARI, 22 A. L. J. 785 **902**

——— **(Punjab)** — *Inheritance — Property inherited from maternal grandfather—Ancestral property.*

Land inherited by a person from his maternal grandfather is, by the custom of the Punjab, regarded as ancestral property *qua* the former's son.

The doctrine of *stare decisis* is a statutary principle to be applied to the law relating to pro-

perty and the Courts would be reluctant to overrule a decision, upon which many persons have acted, unless they are convinced that it is clearly wrong. **L** ATTAR KAUR *v.* NIKKOO, 6 L. L. J. 216; 5 L. 356; (1924) A. I. R. (L.) 538 **534**

——— (**Punjab**)—*Partition of estate—Collateral succession*—Pagwand *and* Chundawand—*Presumption.*

Where a person governed by customary law, having different wives, makes a division of the property among the members of his complex family, with the result of creating a number of single families, then the portion of property succeeded to by the children of each wife becomes a separate entity and the rules of succession to it are the rules of succession to the owner of it and not to the ancestral owner to whom prior to distribution the whole property belonged. When the smaller entity thus formed is succeeded to, the *Pagwand* system may still apply but it applies within the smaller family only and not within the range of the original entire family. In short, when a separate entity, created by division or partition, comes into being the full range of the succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family, and it may quite well be assumed that within that simple family, the generally prevailing system of *Pagwand* was not abandoned. **P C** NABI BAKSH *v.* AHMAD KHAN, (1924) A. I. R. (P. C.) 117; (1924) M. W. N. 425; 34 M. L. T. 106; 5 L. 278; 20 L. W. 599 **158**

——— **Succession**—Ala maliks, *when entitled to rights of reversion—Construction of document, meaning of—Question of fact or law—Evidence misunderstood—Second appeal.*

It is only in cases where the *ala maliks*, originally the sole proprietors of the soil of a village have called in outsiders and settled them on some or all of the lands that the *ala maliks* are entitled to the right of reversion on the death of the *adna maliks.*

The expression 'construction' as applied to a document includes two things: First, the meaning of the words; and secondly, their legal effect. The meaning of the words is in all cases a question of fact. The effect of the words is a question of law.

Unless there is a question of the legal effect of a document which may be treated as a document of title or embodies a contract or is the foundation of a suit, a second appeal does not lie.

A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court. **L** DAL SINGH *v.* PLUIMAN, (1923) A. I. R. (L.) 626 **264**

——— **Wajib-ul-arz**, *entry in, construction of—Grove-holder, right of, to sell trees—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Interpretation of words—High Court, interference by.*

The *wajib-ul-arz* of a village provided that a grove-holder could fell any tree and appropriate the timber to his own use and was entitled to plant new trees in place of those he might fell. It was also provided that at the time of sale the proprietor of the land was entitled to receive one quarter of the sale price in virtue of his proprietary rights. A grove-holder sold two standing trees in the grove and the vendee cut and removed the timber. On a claim by the landlord to recover one-quarter of the sale price of the trees:

Held, that the trees not having been cut and removed by the grove-holder the landlord was entitled to succeed under the terms of the *wajib-ul-arz.*

The High Court would decline to interfere in revision in a case where there is a mere question of the interpretation of particular words in a document and the circumstances are such that the words are susceptible of more than one interpretation. **A** KRISHNA DATT DUBE *v.* BRIJ LAL, (1923) A. I. R. (A.) 269 **313**

Decree, *absolute—Auction sale.*

The decree absolute for foreclosure is closely akin to an auction sale. **O** BADRI NATH *v.* RADHABALLARAJJI IDOL **622**

———, amendment of—Decree not in accordance with judgment—Court, duty of—Inherent jurisdiction of Court. *See* CIVIL PROCEDURE CODE, ss. 151, 152, O. XX, R. 6 **55**

——— *ex parte* against agriculturist—Execution of decree—Instalments, whether can be allowed. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 15B **162**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15 B—*Decree ex parte against agriculturist—Execution of decree—Instalments, whether can be allowed.*

Where a decree is passed *ex parte* it is open to the judgment-debtor, in execution proceedings, to show that he was an agriculturist at the date of the decree and to ask for instalments under section 15B of the Dekkhan Agriculturists' Relief Act. **B** RUDRAPPA SANVIRAPPA MENSINKAI *v.* CHANBASAPPA MALLAPPA BHUSAD, 26 Bom. L. R. 153; (1924) A. I. R. (B.) 305 **162**

——— **s. 15D**—*Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage by member of joint family—Sale of equity of redemption—Suit to redeem mortgage, maintainability of—Limitation.*

A suit under section 15D of the Dekkhan Agriculturists' Relief Act will only lie on the presumption that there is a mortgage in existence by an agriculturist, and an issue whether or not the mortgage is in existence cannot be entertained in such a suit.

J. and *K.*, two brothers, formed a joint Hindu family. In 1868 *J.* mortgaged certain property belonging to the family and shortly afterwards sold the equity of redemption of the property to the mortgagee, who sold the property to the predecessor-in-interest of the defendant in 1873. In 1914 plaintiff purchased the share of *K.* in the property from *K*'s successors-in-interest and thereafter brought a suit to redeem the mortgage

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under the provisions of the Dekkhan Agriculturists' Relief Act:

Held, (1) that the share of *K.* in the property having been sold by his brother *J.* in 1873, the former could challenge the sale within twelve years of his coming to know of it;

(2) that *K.*'s lack of knowledge of the sale could not be presumed at this distance of time, and the sale could not, therefore, now be challenged by the plaintiff who claimed under *K.*;

(3) that the predecessor of the defendants having purchased the whole property and not merely the mortgagee rights from the mortgagee in 1873, the suit was barred by Article 134 of Schedule I to the Limitation Act;

(4) that, in any case, as the existence of the mortgage was in dispute, a suit under section 15 D of the Agriculturists' Relief Act was not maintainable. **B** KRISHNAJI SONJI GAWDE *v.* SADANAND MAHADEV THAKUR, 26 Bom. L. R 341; (1924) A. I. R. (B.) 417 **763**

——— **ss. 57, 59, 63A** —*Registration Act (XVI of 1908), ss. 32, 35, 58 to 61—Document executed by agriculturist—Registration—Procedure.*

Section 57 of the Dekkhan Agriculturists' Relief Act does not require the party in whose favour a document is executed to appear at the time of execution before the Registrar, and his absence does not, therefore, invalidate the registration. Section 63A of the Dekkhan Agriculturists' Relief Act provides that after the Sub-Registrar has followed the procedure prescribed for a village Registrar, he shall then register the instrument according to the provisions of the Registration Act. This means that he shall register the document as directed in sections 58 to 61 of the Registration Act, but all the necessary preliminaries have to be taken under sections 57 and 59 of the Dekkhan Agriculturists' Relief Act; whereas in the case of any other document, which has to be registered under the Registration Act, the prior formalities required are prescribed by sections 32 and 35 of that Act. **B** SHRIPATHI LAXMAN KSHIRSAGAR *v.* BALVANTRAO KRISHNA CHITNIS, 26 Bom. L. R. 149; (1924) A. I. R. (B.) 345 **274**

Divorce Act (IV of 1869), s. 10—*Divorce—Petition by wife—Adultery and cruelty—Husband living with another woman—Wife required to live under orders of mistress.*

A Kachin Christian who was married to another Kachin Christian, reverted to Animism and began to live with a Shan woman. He refused to let his Christian wife live with him except as a lesser wife under the orders of the Shan woman as chief wife. The Christian wife could not bear this indignity and left him. The husband continued to live with the Shan woman and the Christian wife sued him for divorce:

Held, that the petitioner was entitled to a divorce on the ground of adultery coupled with legal cruelty. In considering the question of cruelty the Court will take into consideration the husband's general conduct towards the wife and if this be of a character tending to degrade her, and subjecting her to a course of annoyance and

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indignity injurious to her health, will feel itself at liberty to hold the cruelty proved. **R** NANG MUN *v.* LABYA NAW, 3 Bur. L. J. 9; 2 R. 199; (1924) A. I. R. (R.) 262 **179**

Easement—*User from time immemorial, plea of—Pleadings—New plea in appeal—Easement—Immemorial user.*

Plaintiff sued to restrain the defendants from taking water from a certain *kul* which he claimed to be the exclusive property of himself and his brother having been constructed by his grandfather. Defendants disputed the plaintiff's right of exclusive ownership and alleged that they had been taking water from this *kul* from time immemorial. The first Court having decreed the suit, on appeal the District Judge came to the conclusion that the defendants had acquired an easement to irrigate their lands from the *kul* and dismissed the suit. Plaintiff appealed to the High Court:

Held, (1) that the plea of user from time immemorial did not amount to plea of easement;

(2) that the defendants could not put forward a new plea in appeal. **L** MANSA RAM *v.* KALU RAM, (1923) A. I. R. (L.) 605 **197**

Easements Act (V of 1882), ss. 5, 13 (f)—*Continuous easement—Easement to flow rain water and bath room water.*

The right of flowing rain water through a masonry drain is a continuous easement within the meaning of section 5 of the Easements Act and, therefore, falls under section 13 (*f*). But the right of flowing the bath room or latrine water through a masonry drain is a discontinuous easement within the meaning of section 5, and, therefore, does not fall under section 13 (*f*) of the Act. **A** SAJID-UD-NISSA BIBI *v.* HIDAYAT HUSAIN, 22 A. L. J. 425 **896**

Estoppel—*Attestation of document, effect of—Civil Procedure Code (Act V of 1908), O. XXI, rr. 63, 103—Execution of decree—Claim proceedings—Order, finality of—Defendant, whether can question order.*

Mere attestation by a person does not necessarily import knowledge of the contents of the document attested, but there may arise circumstances from which an inference may be deducible that the attesting witness was aware of the nature of the document, he or she was attesting.

The question whether attestation of a document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case.

No actual verbal representation is necessary to give rise to an estoppel. It is quite enough that the conduct of a party leads another to act in the belief that he asserts no claim to the property. The principle on which the doctrine of estoppel rests is that it would be most inequitable and unjust to a person that if another by a representation made or *conduct amounting to representation* has induced him to act as he would otherwise not have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to

Estoppel—concld.

the loss and injury of the person who acted on it.

If *A*, with the knowledge of the recital in a sale-deed that the land thereby conveyed belongs to *B* and is in *B*'s enjoyment as owner, attests the sale-deed executed by *B* in favour of a third person, he is estopped from setting up thereafter his title to the land.

Where the summary order contemplated by O. XXI, rr. 63 and 103 of the Civil Procedure Code is not set aside in a regular suit brought within a year, it becomes conclusive and binding on all persons who were parties to it, and also on their successors-in-title, and they are thereafter precluded from asserting their rights contrary to the order, even as defendants. **S** AZIZALLAH KHAN *v.* GHULAM HUSSEIN, 17 S. L. R. 63; (1924) A. I. R. (S.) 97 **994**

——— Inadmissible statement—Consent of parties, effect of—Finding based on inadmissible evidence—Second appeal—Conduct of parties. *See* EVIDENCE **235**

——— Landlord and tenant—Payment of rent. *See* EVIDENCE ACT, s. 116 **22**

———, *plea of—Provincial Insolvency Act (V of 1920), s. 28—Adjudication order passed—Debt incurred subsequently—Suit to recover, whether barred—Civil Procedure Code (Act V of 1908), s. 91.*

A plea of estoppel is a plea of mixed fact and law and has to be urged in the Trial Court. It cannot, therefore, be entertained for the first time in revision.

A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. But the jurisdiction of a Civil Court to entertain a suit in respect of such a debt or liability is not barred by the Provincial Insolvency Act, so as to oust the jurisdiction which vests in a Civil Court, to try all suits of a civil nature under section 9 of the Civil Procedure Code. **N** HIRALAL *v.* TULSIRAM **946**

——— Tenancy, origin of, unknown—Nature of tenancy, proof of—Permanency of tenancy—Permanent structures erected by tenant. *See* LANDLORD AND TENANT **580**

Evidence—*Inadmissible statement—Consent of parties, effect of—Finding based on inadmissible evidence—Second appeal—Estoppel—Conduct of parties.*

Statements which are not admissible in evidence cannot be rendered admissible by consent of parties.

A finding based on evidence which is legally inadmissible can be challenged in second appeal.

Plaintiffs sued for possession of their share of their collateral *W's* estate alleging that the defendant *S* was only a step-son and, therefore, not entitled to succeed to the property. It appeared that in a previous suit brought on the death of another collateral, both the plaintiffs and *S* were also parties and no objection was taken by them that *S* was not the son of *W*, in fact *S* was appointed by the plaintiffs and other collaterals as their *Mukhtar* to conduct the case;

Evidence—concld.

Held, that under the circumstances they were even by their conduct estopped from challenging the paternity of *S*. **L** SUNDAR SINGH *v.* SHAM SINGH, (1923) A. I. R. (L.) 630 **235**

——— *Statement of age of witnesses in head of deposition, whether evidence.*

Courts should not rely upon the statements of the ages of witnesses at the head of depositions which do not furnish any evidence on the subject. **C** LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

Evidence Act (I of 1872), ss. 20, 31. *See* COMPROMISE OF SUIT **16**

——— **s. 32**—*Statement contained in plaint in previous suit, admissibility of—Plaintiff not examined.*

Where a landlord is alive and no effective attempt is made to examine him, a statement made in a plaint filed by him in a previous rent suit is not admissible in evidence. The plaint would be admissible only in proof of the fact that the landlord did sue on the allegations contained in the plaint. **C** LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

——— **s. 63 (5)**—*"Seen it," interpretation of—Interpretation of Statutes.*

Under sub-section 5 of section 63, only a witness who has himself seen a document is entitled to give evidence of it.

The words "seen it" in section 63 (5), Evidence Act, allow a person to give an oral account of the contents, when he has merely seen the document; and obviously once he has seen the document, his capacity to give the contents may result, not from what he saw, but from what he was told at the time when he saw it. The fact that the witness has seen it makes his oral account admissible. The important question whether his account is credible is a question of fact for the Trial Court.

One is from time to time compelled to imply or read into the language of an ambiguous section something which is not actually there, but as a general rule, the safest course is to hold fast to the exact language in its ordinary interpretation, if it is capable of bearing it. **A** MEHI LAL *v.* RAMJI DAS, 22 A. L. J. 864; 10 O. & A. L. R. 1058 **939**

——— **s. 90**—*Deed of grant—Proof of execution—Possession of grantee for generations—Requisite authority—Burden of proof.*

The application of section 90 of the Evidence Act does not justify the inference that a deed of grant which is established to be genuine was in fact executed by a person possessed of requisite authority. It is, however, not necessary for the grantee of the document or his successor-in-interest to establish by direct evidence that the executant had the requisite authority. It may, in the case of a grant which has been in operation for a long series of years, be impossible to adduce direct evidence of authority, in which case it would be

open to the Court to draw an inference from all the surrounding circumstances of the case.

Where a rent-free grantee of land and his successors-in-interest, from generation to generation, have been in possession for more than seventy years, the burden is upon the landlord who sues to recover possession of the land to prove that he is entitled to do so and where no evidence is forthcoming from his side it is open to the Courts to draw the inference that the grant must have been made by persons who possessed the requisite authority. **C** TARAKESHWAR PAL *v.* CHANDRA GHOSH MANDAL, 27 C. W. N. 964; (1924) A. I. R. (C.) 236 **628**

——— **s. 90**—*Registration Act (XVI of 1908), ss. 58, 60—Document more than thirty years old—Registration endorsement—Execution—Presumption.*

In the case of a document more than thirty years old the registration endorsement is evidence under section 60 of the Registration Act that proper proceedings were taken under section 58 of the Act and that the person purporting to execute the document admitted the execution thereof before the Sub-Registrar, from which it may be presumed that the person who purported to sign the document on behalf of the executant did so under the authority of the executant. **O** BHIM SHANKAR DATT *v.* MANI RAM, 9 O. & A. L. R. 893; 10 O. L. J. 643; (1924) A. I. R. (O.) 265 **457**

——— **s. 91**—*Receipt for payment of money—Oral evidence, whether admissible.*

A receipt acknowledging payment of money is not a contract, grant or disposition of property within the meaning of section 91 of the Evidence Act.

Therefore, where a receipt is found to be suspicious or is unregistered, oral evidence as to its contents is admissible. **O** SARDAR SINGH *v.* IQBAL NARAIN, 10 O. & A. L. R. 727 **57**

——— **s. 91,** *scope of—Disposition of property—Deed not produced—Oral evidence of transaction, whether barred.*

All that section 91 provides is that when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or disposition of property, except the document itself. This, however, refers only to the method of proof of the terms of contract, grant or disposition of property; it does not exclude other proof of the transaction itself. **Pat** MAKHDUMAN *v.* SAIYAD ALTAF HUSSAIN, (1922) A. I. R. (Pat.) 222 **187**

——— **ss. 92, proviso 1, 93.** *See* SPECIFIC RELIEF ACT, s. 31 **759**

——— **s. 93**—*Patent ambiguity in mortgage-deed—Secondary evidence, whether admissible—Mortgage for 82 years—Only one particular day fixed for redemption—Mortgagor debarred from redeeming with borrowed money—Clog on equity of redemption.*

Where a deed is ungrammatical and cannot be read literally so as to give any clear meaning

without adding to or removing some words from it, there is a patent ambiguity in the deed and under section 93 of the Evidence Act no evidence can be given to supply the defect.

Where the term of a mortgage was 82 years and even at the end of that term only one day was allowed for redemption and unless the money was paid on that particular day the mortgage was to become a sale and it was further covenanted that the mortgagor could not redeem the mortgage with borrowed money:

Held, that the conditions amounted to a clog on the equity of redemption and were, therefore, unenforceable. **A** RAM GANESH RAI *v.* RUP NARAIN RAI **944**

——— **ss. 101, 110**—*Burden of proof, when material—Appeal, second—Finding of fact based on evidence, whether binding.*

The question of *onus* of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Court to come to a conclusion. Where, however, evidence is adduced by both the parties, the question of the burden of proof becomes immaterial and the Court has to determine the question on the evidence before it.

A finding of the first Appellate Court on a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding, **L** NIHAL CHAND *v.* GURDITTA MAL, (1923) A. I. R. (L.) 641; 5 L. L. J. 451 **170**

——— **s. 116**—*Landlord and tenant—Payment of rent—Estoppel—English Law.*

Mere payment of rent to plaintiff by defendant not made under circumstances which would establish a relationship of landlord and tenant as between the parties would not entitle the plaintiff to a decree for rent nor would it estop the defendant from disproving the plaintiff's title.

According to English Law, if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took. For example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a Will, the tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *prima facie* evidence. It is, like all *prima facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can. **C** ABDUL RAJJAK SIKDUR *v.* PROMADA SUNDARI DEVI **22**

Execution of decree—Application, dismissal of —Revival, application for—Minor applicant—Extension of time—Death of decree-holder, whether default. *See* LIMITATION ACT, s. 6, SCH. I, ART. 181 **775**

——— *Arbitration—Award, decree based on—Arbitrator, whether entitled to receive payments of money on behalf of Court.*

An arbitrator is appointed to arbitrate on matters in dispute, make his award and file it in Court. He is not such an officer of the Court as is authorised to receive on behalf of the Court deposits of money made by the parties in pursuance of the decree made on the award. Such a payment does not, therefore, amount to a payment into Court so as to satisfy the decree. **R** U PO SAN *v.* MA NGWE HNIT, 3 Bur. L. J. 6; (1924) A. I. R. (R.) 263 **238**

——— *Decree against mortgagor's property—Amount deposited by mortgagee—Deposit, whether enures to benefit of all interested parties—Mortgage satisfied—Mortgagee, right of, to withdraw deposit.*

A Muhammadan widow professing to act for herself and her minor children transferred certain property. The transaction was, however, challenged by the children by a suit and a decree was passed which provided that on their paying their share of the purchase-money within a certain time, they would be entitled to recover possession, but if they failed to do so, their suit would stand dismissed. Shortly before the expiry of the time a mortgagee from one of the children paid the sum in Court to save the property. Subsequently his mortgage having been discharged, the mortgagee applied for a return of his deposit. The application was opposed by a transferee of the mortgaged property :

Held, (1) that the mortgagee had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless;

(2) that the benefit of the deposit enured to all parties having an interest in the condition of the decree being satisfied and the mortgagee could not be allowed to withdraw the deposit without giving the transferee an opportunity of paying the money, such payment being treated as within the period allowed by the decree. **P C** MAHOMED RAHIMTULLA *v.* ESMAIL ALLARAKHIA, 26 Bom. L. R. 549; 46 M. L. J. 567; (1924) A. I. R. (P. C.) 133; (1924) M. W. N. 422; 34 M. L. T. 99; 10 O. & A. L. R. 753; 48 B. 404; 22 A. L. J. 931 **411**

——— *Decree against son for debt due by father—Personal property of son, whether liable.*

Plaintiff brought a suit against the defendant for recovery of money due on a hand-note executed by the defendant's father and obtained a decree. He then took out execution and attached certain lands belonging to the judgment-debtor :

Held, that the judgment-debtor under the decree merely represented the estate of his deceased father and that execution could, therefore, proceed against the estate alone and the personal property of the judgment-debtor was not liable for attachment in execution. **O** KUNWAR JANG BAHADUR *v.* LALA GUR PRASAD, 10 O. & A. L. R. 672; 11 O. L. J. 554 **600**

Execution of decree—concld.

——— Decree for rent against tenant—Sale in execution of first decree subject to liability for the second—Execution of second decree, whether can proceed. *See* LANDLORD AND TENANT **377**

——— Foreign decree—Decree against person in *absentem*, validity of—Transfer to British Court—Judgment-debtor, failure of, to object—Sale in execution—Suit to set aside sale. *See* FOREIGN DECREE **754**

——— *Mortgage suit—Preliminary decree, whether can be executed—Execution Court, duty of—Property of judgment-debtor under Court of Wards—Manager not made party, effect of.*

A preliminary decree in a mortgage suit is not capable of execution.

It is the duty of the Execution Court to see that the parties to the execution are properly before the Court.

When the property of the judgment-debtor is under the Court of Wards and the Manager of the Court of Wards is not made a party to the Execution, the ward is not properly before the Court. **Pat** SIDHESWARI PRASAD *v.* DULHIN RADHA DULARI KUAR **716**

——— Notice of attachment, absence of, effect of—Sale, whether void. *See* CIVIL PROCEDURE CODE, s. 47, O. XXI, RR. 22, 90 **92**

——— Sale, application to set aside—Auction-purchaser, whether necessary party. *See* CIVIL PROCEDURE CODE, O. XXI, R. 90 **648**

Ex parte decree, *suit to set aside, maintainability of—Jurisdiction of Court to entertain suit, whether can be questioned.*

When a suit is brought and the Court has to make up its mind as to whether it is within its pecuniary jurisdiction, all that it can rely on is the valuation of the subject-matter which is given in the plaint.

It is open to a defendant when he appears to answer the suit, to raise the plea that the suit has not been properly valued and to show, if he can, that the Court in which the suit has been brought has no jurisdiction to try it. But if no such plea is taken by defendant when he has had the opportunity of raising it, it cannot be said that the Court has acted without jurisdiction.

A decree cannot be set aside by a separate suit brought for the purpose, except on the basis of fraud or of something akin to fraud.

Where a decree is passed *ex parte* against a defendant after due service of summons, a suit to set aside the decree on the ground that the suit was undervalued and the Court which passed the decree had no jurisdiction to entertain the suit, is not maintainable. **A** KHUDAJIATUL KUBRA *v.* AMINA KHATUN, 22 A. L. J. 122; 46 A. 250; (1924) A. I. R. (A.) 388 **413**

Foreign decree—*Decree against person in absentem, validity of—Transfer to British Court—Execution of decree—Judgment-debtor, failure of, to object—Sale in execution—Suit to set aside sale, maintainability of.*

Foreign decree—concld.

A decree passed by a Foreign Court against a person *in absentem* is a nullity. Where, however, such a decree is transferred to a British Court for execution, and the judgment-debtor appears in the course of the execution proceedings and takes no objection to the jurisdiction of the Foreign Court or the validity of the decree and allows his property to be sold in execution proceedings, he must be deemed to have submitted to the jurisdiction of the Foreign Court, and cannot subsequently be allowed to file a suit to set aside the sale on the ground that the whole proceeding was null and void as against him. **B** MALHAR NARAYAN PRABHU *v.* VISHNU SONU GANADA, 26 Bom. L. R. 392; (1924) A. I. R. (B.) 351 **754**

Forest lands—*Ownership, presumption as to—Licensee—Long possession, whether creates title—Government order excluding trees from* patta *—Suit to set aside order—Limitatian Act (IX of 1908), Sch. I, Art. 120.*

There is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government.

A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiscence.

In 1903 the Government officials marked off the land in suit and issued to the plaintiff as the *karnavan* of his *Tarwad* a rough *patta* showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objections to the exclusion from the rough *patta* of the lands in suit. His objections were definitely rejected in 1905. In 1911 he sued to set aside that order and to obtain a declaration of the right:

Held, that the suit was governed by Art. 120 of the Limitation Act and having been brought more than 6 years from the date of the order sought to be set aside was time-barred. **P C** KODOTH AMBU NAIR *v.* SECRETARY OF STATE FOR INDIA, (1924) A. I. R. (P. C.) 150; 26 Bom. L. R. 639; 47 M. L. J. 35; 20 L. W. 49; 35 M. L. T. 128; (1924) M. W. N. 572; 47 M. 572 **835**

Fraud by decree-holder, effect of—Execution of decree—Sale, application to set aside—Limitation. *See* LIMITATION ACT, s. 18 **761**

———, proof of—Knowledge of plaintiff—Suit barred by time—Burden of proof. *See* LIMITATION ACT, s. 18 **590**

Full Bench, *reference to—Referring Judges agreed—Reference, whether competent.*

Where the Judges of a Division Bench are agreed as to a point there is no necessity to refer it to a Full Bench, merely in order to have an important point clearly defined. **M** KADIRVELUSWAMY NAICKER *v.* EASTERN DEVELOPMENT CORPORATION LTD., 46 M. L. J. 261; (1924) M. W. N. 346; 47 M. 411; (1924) A. I. R. (M.) 530 **163**

General Clauses Act (IX of 1897), s. 3 (25). *See* CIVIL PROCEDURE CODE, O. XXI, RR. 46, 89 **890**

——— **s. 24.** *See* PROVINCIAL INSOLVENCY ACT, s. 75 (2) **858**

Ghatwalli tenure, *incidents of—Service of personal nature, absence of, effect of—Inalienability, incident of—Custom—Kharagdiha Ghatwalli tenure, whether alienable.*

Where the only duty cast upon the grantee of a tenure is to appoint Police patrols and to pay for them, and there is no duty or service of a personal nature imposed, the tenure cannot be described as a service tenure and Ghatwalli in its nature.

Where no other service is imposed than the payment of rent or revenue, the tenure cannot be called a service tenure.

A Ghatwalli tenure may be alienable by custom.

The incident of inalienability ceases to attach to a Ghatwalli tenure if the Government releases or abolishes the services in some effective and lawful manner.

Ghatwalli tenures in Kharagdhi are alienable by custom. **Pat** NARAYAN SINGH *v.* DILDAR ALI KHAN, 3 Pat. 915 **544**

Gift in favour of wife—Gift over to another—Nature of interest created. *See* CONSTRUCTION OF DOCUMENT **618**

Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 32 (2). *See* CIVIL PROCEDURE CODE, s. 79 (1) **531**

——— **s. 107.** *See* CIVIL PROCEDURE CODE, s. 115 **667**

Grant—*Maintenance—Life-estate or absolute estate—Power of alienation given to grantee, effect of—Transfer of Property Act (IV of 1882), s. 10—Restraint on alienation—Absolute restraint void.*

Where the object of a grant is maintenance or *guzara* the *prima facie* import of the grant is that it is for the life of the grantee in spite of the words "for ever" or "in perpetuity."

But if the grantee has been given the right of alienation, the intention is to confer an absolute estate.

Where by the terms of a grant the grantee is restricted to sell or mortgage the property in the first instance to the nearest relatives and in the event of their refusal to other *pattidars*, and not to a stranger the restriction of alienation is absolute and, therefore, void both in law and equity. **O** TEJA SINGH *v.* MOTI SINGH, 10 O. & A. L. R. 1004 **918**

Guardian and minor—*Promissory note taken by guardian—Suit by minor, whether competent.*

A minor is not entitled to institute a suit on a promissory note taken by his guardian. If the guardian fails to bring the suit, the minor can on his coming of age sue him for negligence. **B** VISHNU NARAYAN DEO *v.* KESHAV GAJANAR PATBHARE, 26 Bom. L. R. 426; (1924) A. I. R. (B.) 468 **474**

Guardian and ward—*Conveyance of ward's property—Guardian acting on his own behalf—Ratification—Transfer, setting aside of.*

Where a guardian expressly executes a conveyance of the ward's property in his own right, the conveyance passes no title and can be avoided by the ward at any time. The principle that, where there is a doubt as to whether in making a conveyance the guardian has acted for himself or his ward, the executant may be deemed to have acted lawfully within the scope and in exercise of his authority, is inapplicable to such a case. Nor can any question of ratification arise in such a case, there being no unauthorised act done by the guardian on behalf of the ward which could be ratified. **C** ANANDA KUMAR DAS GUPTA *v.* DWARKA NATH MANDAL, 27 C. W. N. 1029; (1924) A. I. R. (C.) 152 **1017**

Guardians and Wards Act (VIII of 1890), ss. 19, 25—*Father, whether can be appointed guardian of minor son—Custody of minor, recovery of—Procedure.*

Under section 19 of the Guardians and Wards Act, a District Judge has no jurisdiction to appoint a father as the guardian of his infant son. The father is the natural guardian of the son.

The remedy of a father to obtain the custody of his infant son is by means of a regular suit and not by application under section 25 of the Guardians and Wards Act. **O** CHANDRA KUAR *v.* CHOTEY LAL, 9 O. & A. L. R. 913 **330**

——— **s. 25**—*Guardianship of son—Father, position of—Custody of child.*

An order appointing a father guardian of his child under the Guardians and Wards Act is wholly *ultra vires.*

The fact that a child has never been in the actual custody of his father who is also not a certificated guardian cannot prevent the application of section 25 of the Guardians and Wards Act and deprive him of his right to the custody of the child. **O** CHHOTEY LAL *v.* CHANDRA KUNWAR, 10 O. & A. L. R. 758; 11 O. L. J. 537 **71**

——— **ss. 31, 48**—*Permission to sell minor's property—Improper permission—Sale, validity of.*

A sanction given by the District Judge for the sale of a minor's property has no special sanctity in itself, but is open to attack on the ground not only that it was given as the result of fraud but that it was otherwise improper and did not comply with every requirement of sub-section (2) of section 31 of the Guardians and Wards Act.

A guardian applied to the District Judge for permission to sell the minor's property to pay off certain debts. The Judge thereupon passed an order simply granting permission "to sell a portion of the property to defray debts of Rs. 6,700." The sale however effected by the guardian was for Rs. 1,800 and included some debts that were not binding on the minor:

Held, that the order did not comply with the mandatory provisions of section 31 (2) of the Guardians and Wards Act and the sale was not binding on the minor. **O** RAMADHIN SINGH *v.* RAM SUMER SINGH, 10 O. & A. L. R. 420 **679**

Guardians and Wards Act—concld.

——— **ss. 34 (c), (d), 35, 36, 45, 47**—*Object of Act—Power to investigate accounts filed by guardian—Court, whether can order payment of balance due—Disciplinary action, whether inconsistent with remedy by suit—Order refusing to take action—Appeal—Revision.*

The Guardians and Wards Act must be construed with due regard to the object intended to be allowed by the legislation. That object is the protection of the helpless minor and the control of the guardian charged with looking after his estate.

Under section 34 (*c*) and (*d*) of the Act the Court has jurisdiction to investigate the accounts exhibited by the guardian, to amend them by striking out objectionable items and to direct the guardian to pay the balance due on a true and just account.

If the guardian fails to pay the balance found by the Court on a correct account, he becomes contumacious and can be dealt with under section 45 of the Act.

The disciplinary action taken under section 45 of the Guardians and Wards Act is not inconsistent with and does not bar the minor's remedy by suit provided by sections 35 and 36 of the Act.

An order refusing to take action under section 45 of the Guardians and Wards Act is not appealable.

Certain accounts filed by the guardian having come up for consideration the District Judge held that the amount alleged to have been spent by the guardian upon certain repairs to property was not justified and ought to be made good, but no formal order to that effect was made. Sometime after the minor again put in an application objecting to various acts of the guardian including the failure to refund the above-mentioned amount and the District Judge took the view that no action could be taken under section 45 of the Guardians and Wards Act, as the amount was not a sum in the hands of the guardian. The wards appealed to the High Court:

Held, (1) that the order was not appealable;

(2) but that the Judge had failed to exercise a jurisdiction which was vested in him and the High Court could interfere in revision. **A** SITA RAM *v.* GOBINDI, 22 A. L. J. 585; 47 A. 458; (1924) A. I. R. (A.) 593 **592**

Hindu Law—Adoption—*Adopted son older than adoptive father, effect of.*

The adoption of a boy who is older than the adoptive father is contrary to the recognised notions of Hindus as to adoptions, and to the fundamental idea of an adopted son.

But the consideration that the adopted boy should not be older than his adoptive father, cannot be treated as having the force of a prohibitive rule of Hindu Law. Such an adoption, therefore, is not invalid under the Hindu Law. **B** BALABAI TUKARAM BABAR *v.* MAHADU KRISHNA BABAR, 26 Bom. L. R. 222; 48 B. 387; (1924) A. I. R. (B.) 349 **529**

——— Datta Homa *ceremony, necessity of—Adoption not challenged for long time—Presumption.*

Hindu Law—contd.

The performance of the *Datta Homa* ceremony is not necessary where the adoptive father and the son to be adopted belong to the same *gotra*.

Where there is an initial probability that an adoption is likely to have been validly made and the conduct of the parties cognisant of the facts has been at last consistent with such an hypothesis, there is sufficient material to justify a presumption that the adoption was valid, even though direct evidence to prove that the necessary preliminaries had been performed is, owing to the lapse of time, not available.

Where an adoption has not been challenged for nearly half a century, it is permissible to presume that the *Datta Homa* ceremony, if it was necessary, must have been performed. **A** CHHOTEY LAL *v.* CHANDRA BHAN, (1923) A. I. R. (A.) 176; 45 A. 59 **1041**

——— **Adoption**—*Grandson succeeding grandfather---Grandson, death of—Succession opening to grandmother—Grandmother, whether can adopt.*

Under the Hindu Law if a grandson succeeds directly to his grandfather and dies leaving his grandmother as his sole heir, the latter can adopt a son to her deceased husband. **B** NABAR GOVIND NAVATHE *v.* BALVANT HARI NAVATHE, 26 Bom. L. R. 528; (1924) A. I. R. (B.) 437; 48 B. 559 **435**

——————— *Mother succeeding son, whether can adopt.*

A Hindu mother, who succeeds to the estate of her son is entitled to make an adoption, where the son has died without leaving any other nearer heir, even though he may have attained the age of ceremonial competence and may have been married before his death. **B** ANGIRBAI GULABRAO POWAR *v.* PANDURANG BALKRISHNA POWAR, 26 Bom. L. R. 326; 48 B. 492; (1924) A. I. R. (B.) 441 **185**

———————, *power to make--Disqualification —Leprosy.*

Under the Hindu Law, leprosy, in order to deprive a person of the power of making an adoption, must be of a nature to cause deformity and unfitness for social intercourse. **P C** RAMABAI *v.* HARNABAI, 26 Bom. L. R. 308; 22 A. L. J. 384; 46 M. L. J. 537; (1924) M. W. N. 357; (1924) A. I. R. (P. C.) 125; 20 L. W. 8; 48 B. 363; 10 O. & A. L. R. 829 **193**

——— **Adverse possession**—Female members of family allowed to occupy family house. *See* CUSTOM—HINDU LAW **965**

——— **Alienation** *by widow—Decree, whether alienation—Suit to challenge collusive decree based on sham transaction—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Art. 125.*

In some cases decrees of Court to which a limited owner is a party may amount to alienations. The test to be applied in order to determine whether a widow's action in submitting to a decree amounted to an alienation is to see whether she materially contributed by her action to the transfer.

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A suit by the reversioner of a deceased Hindu for a declaration that a decree and sale in execution of it in a suit on a sham mortgage brought collusively against the widow of the deceased with her connivance are not binding on the estate after the lifetime of the widow, is governed by Art. 125 of Schedule I to Limitation Act, and limitation commences to run from the date of the decree or of the sale and not from the date of the sham mortgage, which the reversioner is not bound to get set aside.

A sham transaction means a transaction which has no legal effect either upon the parties who enter into it or upon the estate which they represent. Such a transaction need not be set aside by a reversioner, but can be ignored. **M** POOCHAMMAL *v.* SOUNDRAMMAL, 19 L. W. 564; (1924) M. W. N. 322; (1924) A. I. R. (M.) 617 **554**

——— **Alienation**—*Necessity—Interest — Transfer of Property Act (IV of 1882), s. 61—Mortgage-decree, form of—Consolidated decree for several mortgages.*

When a contract entered into by a head member of a Hindu joint family is sought to be enforced against the other member on the ground of necessity it must be shown not only that there was necessity to borrow the principal sum but also for the rate of interest agreed upon.

In the absence of a contract to that effect the consolidation of mortgages is illegal, and where a suit is based on several mortgages the amount due under them cannot be consolidated in the decree. **Pat** PARMESHWAR PANDEY *v.* RAJKESHORE PRASAD NARAYAN SINGH, 3 Pat. 829; 5 P. L. T. 646 **34**

——— **Gift** *by widow to daughter as dowry, validity of.*

A gift by a Hindu widow of a reasonable portion of the estate of her deceased husband in favour of her daughter on the occasion of the latter's marriage for purposes of dowry is valid in law and binding on the reversioners.

A gift of less than one-quarter of the husband's estate is a gift of a reasonable portion within the meaning of the above rule. **L** JOWALA RAM *v.* HARI KISHEN SINGH, 5 L. 70; (1924) A. I. R. (L.) 429 **690**

———————, essentials of. *See* CIVIL PROCEDURE CODE, s. 92 **980**

——— **Grant** *for excavating tank—Grant in perpetuity*—Putra poutradikrame, *meaning of.*

According to Hindu religious notions a grant of land for digging a tank is supremely meritorious, and where the terms of the grant are explicit that the grantee is to hold from generation to generation *putra poutradikrame* there can be no doubt that the grant was made in perpetuity and was not of a temporary character or resumable by the landlord, and that the interest created was transferable. **C** TARAKESWAR PAL *v.* CHANDRA GHOSH MANDAL, 27 C. W. N. 964; (1924) A. I. R. (C.) 236 **628**

——— **Guardianship**—*Mother—Paternal uncle —Alienation by uncle, whether binds share of minor.*

A paternal uncle may be the natural guardian of his minor nephew under Hindu Law, but he is not the natural guardian in the presence of the minor's mother and has no power to bind the minor's share in joint property by an alienation. **L** HARDWARI *v.* CHUNI LAL, 6 L. L. J. 182; (1924) A. I. R. (L.) 533 **735**

——— **Inheritance,** *exclusion from—Dumbness, whether must be congenital—Widow—Maintenance, assessment of, principles governing—Settlement, deed of, whether can be set aside at instance of person entitled to maintenance.*

It is not necessary according to Hindu Law that dumbness must be congenital in order to disqualify a person from sharing in the inheritance.

The principle which should govern the Court in fixing the maintenance of a Hindu widow is first to look to the mode of life of the family during her husband's lifetime and the amount fixed must be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime, then to see what the husband's estate is and also to see how far that estate is sufficient to supply her with maintenance on this scale, without injustice to other members of the family who also have their rights to maintenance out of the estate, like hers.

A deed of settlement executed by a Hindu widow cannot be set aside at the instance of a person who has only a right of maintenance out of the estate. **B** BAI PRATAPGAVRI *v.* MULSHANKAR, 26 Bom. L. R. 269; (1924) A. I. R. (B.) 353 **173**

——— *Mitakshara Law—Property inherited from maternal grandfather, nature of—Adopted son, whether has right of survivorship.*

According to the Mitakshara Law, property which descends on a daughter's son from his maternal grandfather is ancestral property in his hands liable to the incidents of survivorship as between him and his son, whether natural or adopted. **M** AVARARALA VENKATA SESHAMMA *v.* AVARARALA APPA RAO, 20 L. W. 181 **79**

——— **Joint family**—*Alienation by father—Necessity, proof of—Bulk of consideration for necessity—Rule applicable.*

In cases where a Hindu father has sold ancestral property for the discharge of his debts, if the application of the bulk of the sale-proceeds is satisfactorily accounted for the fact that a small part is not accounted for will not invalidate the sale.

Each case must, however, be dealt with on its merits in order to decide whether the amounts of which legal necessity has not been proved is, with regard to the whole consideration, what may be described as a trifling sum.

A sum of Rs. 500 out of a total consideration of Rs. 3,500 cannot be described as a trifling sum within the meaning of the above rule. **A** NATHU RAM *v.* KANHAIYA LAL **226**

——— *Compromise decree against father whether binding on sons—Necessity.*

A compromise decree obtained against a Hindu father is no better than a transfer made by the

father, and the mere existence of such a decree cannot deprive the sons of their rights in the joint family property. It must be shown that the obligation incurred under the decree was incurred for legal necessity or for payment of antecedent debts. **O** RAM DAYAL *v.* NIMAR SINGH, 26 O. C. 355; (1924) A. I. R. (O.) 133; 11 O. L. J. 360 **492**

——— **Joint family**—Presumption of jointness—Conduct of parties when no evidence as to nucleus of joint funds—Hindu ladies' exclusion, when to be inferred. *See* PLEADINGS **432**

——— Contract by manager—Decree, whether can be passed against minor. *See* SPECIFIC PERFORMANCE **658**

——— *Conversion of co-parcener to alien faith, effect of—Adverse possession—Partition, suit for—Property in possession of mortgagee or female, whether must be included.*

The conversion of a Hindu co-parcener to an alien faith has the effect of separating the co-parcener *ipso facto* from the co-parcenary.

The position of the separated co-parcener, however, of family property, becomes that of a tenant-in-common from the moment of his conversion, and is not adverse to the other co-parcenars.

In a suit for partition property in possession of a mortgagee or of a female who has a right of residence need not be included. **L** JAMNA BAI *v.* GONDA RAM, 6 L. L. J. 84; (1924) A. I. R. (L.) 479 **519**

——— *Co-parcener engaged in business—Family business—Presumption.*

Although a person carrying on business may be a co-parcener in a Hindu joint family, it does not necessarily follow that all his co-parceners are his partners in that business, unless it is shown that the business was set up with the help of family funds.

There is no presumption that a business carried on by one co-parcener in a Hindu joint family is a family business. **S** MOTHARAM DOWLATRAM *v.* PAHLAJRAI GOPALDAS **141**

——— *Debt incurred by father—Son's share, liability of—Insolvency of father—Official Assignee, whether can proceed against son's share—Immorality or illegality.*

The share of a son in joint family property governed by the Mitakshara Law can be made liable even during the father's lifetime for the father's debts not tainted with illegality or immorality.

On the insolvency of the father, the Official Assignee who stands in his shoes, can claim to have recourse to the joint family property including the son's undivided shares therein. **M** BALUSWAMY AYYAR, *In re*, 19 L. W. 86; 46 M. L. J 86; (1924) M. W. N. 94; 47 M. 87; (1924) A. I. R. (M.) 411 **108**

——— *Decree against manager—Co parceners, whether bound.*

The interests of persons who are not parties to a decree either by name or by implication cannot be attached in execution of such decree.

Where a decree is passed against a person who happens to be the manager of a Hindu joint

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family, without stating whether he is sued in a representative capacity or not, the property belonging to the family cannot be seized in execution of the decree. **B** NAMDEV TUKARAM GIRME *v.* VISHNU CHINTAMAN DUNAKHE, 26 Bom. L. R. 497; (1924) A. I. R. (B.) 395 **425**

——— **Joint family**—*Decree for mesne profits against father—Sale of joint family property—Illegality or immorality of debt—Liability of sons.*

Hindu joint family property in the hands of sons is liable to be taken in execution of a decree for a debt incurred by the father alone, provided the same was not illegal or immoral.

A decree for mesne profits obtained against a Hindu father stands on the same footing as any other debt incurred by him and his conduct in defending the suit for mesne profits without success cannot be characterised as illegal or immoral. **O** SHAMBU BHAN SINGH *v.* CHANDRA SHEKHAR BAKHSH SINGH, 10 O. & A. L. R. 912 **17**

——— *Discharge by manager, validity of.*

The managing member of a joint Hindu family can give good receipts on behalf of the family, which will bind the family. **A** BAIJNATH *v.* RAM BILAS **12**

——— *property—Ancestral property sold in decree against grandfather—Immoral purpose—Burden of proof.*

Where ancestral property has been sold in execution of a decree against the grandfather, it is for the grandson to prove that the transfer was for an immoral purpose.

Primarily the burden of proof is on the purchaser but in the case of an auction sale the burden is transferred to the contester. **O** BADRI NATH *v.* RADHABALLARAJJI IDOL **622**

——— Lease of agricultural land granted by father—Suit by son to challenge terms of lease—Ejectment—Declaration, suit for, whether maintainable—Jurisdiction. *See* SPECIFIC RELIEF ACT, s. 42 **399**

——— Mortgage by adult members acted, upon for several years, declared void, effect of. *See* CONTRACT ACT, s. 65 **855**

——— *Pious obligation of sons to pay father's debts, extent of—Liability of father under contract of suretyship—Sons, whether bound to discharge liability.*

The sons of a deceased Hindu who formed a joint family with him and come into his share of the joint estate as survivors and not as heirs, are not liable on any contract that he may have made personally.

The liability of a Hindu son to pay his father's debts arises from his religious duty of discharging the father from the sin of his debts. Therefore if there is no debt actually due from the father at his death there is no sin from which there is a duty cast on the son to discharge him.

Where a Hindu dies before his liability under a contract of suretyship arises, his sons are not bound to discharge his obligation arising under the contract after his death. **N** KANTICHAND *v.* UDAYABHANSHA **349**

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——— **Joint family** *property—Mortgage by grandfather—Foreclosure decree against mortgagor's son—Mortgagee, possession delivered to—Subsequent suit to recover possession by grandsons—Plaintiffs what must prove—Onus—Pious duty of sons, nature of.*

A Hindu grandfather mortgaged ancestral property and the mortgagee having obtained a decree for foreclosure against the sons of the mortgagor entered into possession. The grandsons then sued the mortgagee to recover possession without asking to set aside the foreclosure decree which they treated as a nullity:

Held, that the burden lay on the plaintiffs to prove the illusory character or immorality of the debt contracted by the grandfather and as they made no attempt to do so, their suit must fail.

Per *Dalal, J. C.*—The doctrine of a pious duty is not independent of the legality of the mortgage by the manager of a Hindu family.

Per *Simpson, A. J. C.*—Where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted, for immoral purposes, and that the purchaser had notice that they were so contracted. **O** MAHADEO BAKHSH SINGH *v.* SURAJ BAKHSH SINGH, 10 O. L. J. 252; (1924) A. I. R. (O.) 34 **447**

——— *property——Mortgage by one member—Legal necessity, proof of—Recital in deed, whether sufficient—Creditor, duty of—Proof impossible by lapse of time—Recital, when can be relied on.*

A recital in a mortgage-deed executed by one member of a joint Hindu family is not a substitute for evidence of necessity, and the creditor must prove facts which embody the representations of the alleged needs of the estate, and the motives influencing the immediate loan.

Where proof of the facts justifying legal necessity or representations in respect of such a necessity has become impossible by lapse of time the rental will be sufficient evidence to support the deed provided that there are independent circumstances which are such as could justify a reasonable belief in the truth of the recital. **O** RAM NATH *v.* RAM HARAKH, 10 O. L. J. 245; 9 O. & A. L. R. 857; (1924) A. I. R. (O.) 49 **471**

——— *Sale of ancestral property—Suit to set aside sale—Necessity—Part consideration only for necessity—Procedure.*

In determining whether or not a sale of ancestral property for which only part of the consideration was for necessity, should be set aside or upheld, the point for determination is whether the portion of the consideration which was not taken for legal necessity was such a small part as ought not to be taken into account. **A** JAINARAIN PANDE *v.* BHAGWAN PANDE, 20 A. L. J. 621; (1922) A. I. R. (A.) 321; 44 A. 683 **1006**

——— **Joint family**—*Separation of one member, effect of—Intention of other members—Presumption.*

Under the Hindu Law there is no presumption, when one co-parcener separates from others, that the latter remain united.

Where however the disruption of the share of every member of a joint Hindu family is made incidentally with the sole object of determining the share of the outgoing member, and the intention of the other members is to continue to be joint, a division amongst them does not follow as a necessary corollary of law from the fact of separation of one member only. But there is no presumption of a continuance of jointness either. **O** Mahabir Prasad *v.* Surajpal Singh, 10 O. L. J. 240; 10 O. & A. L. R. 33; (1924) A. I. R. (O.) 46; 27 O. C. 94 **475**

——— *Separation—Unambiguous intention.*

An unambiguous and defined intention on the part of one member of a Hindu joint family to separate himself and to enjoy his share in severalty has the effect of creating a division of his interest which till then he held in jointness. **O** Indar Kuar *v.* Nand Rani Kuar, 10 O. L. J. 657; (1924) A. I. R. (O.) 273 **333**

——— *Son and father—Property, presumption as to.*

There is a presumption that a Hindu and his father are joint in estate but there is no presumption that the joint family which they constitute possesses any property at all. **O** Ram Raj Singh *v.* Avadh Bihari Lal, 10 O. L. J. 235; (1924) A. I. R. (O.) 28 **480**

——— *Time-barred debt—Alienation of family property—Father, power of—Pious obligation of sons.*

A time-barred debt can constitute a valid antecedent debt as consideration for a sale-deed given by a father of a joint Hindu family alienating joint ancestral family property.

Per *Kanhaiya Lal, J.*—Under the Hindu Law it is well recognised that the father has a larger power of disposal over the ancestral and joint family property than an ordinary manager, the reason being that his sons and grandsons are under a pious obligation to discharge his just and lawful debts which may have remained unpaid. Apart from the question of family necessity or common benefit, it is open to the father to pay such a debt by an alienation of the joint family property, though the debt may have become barred by limitation because what can be revived by the father and may be recovered from him by the attachment and sale of the family property, can also be recovered from his sons and grandsons, that is to say, from the joint family estate in their possession.

A promise to pay a barred-debt is in fact neither illegal nor immoral; and a son cannot escape liability merely because the debt, which his father had agreed in writing to pay, was one the payment of which he could have legally avoided.

A debt revived by the father cannot be regarded as an *avyavaharik* debt, or a debt not recognised by law or usage either under the old Hindu Law or under the law now in force.

A Hindu widow is competent to transfer the property, which she has received from her husband, to pay a debt due by him though it may have been barred by limitation, so as to bind the reversionary heirs of her husband.

A debt, which was barred by time and has been revived stands on the same footing as a debt which is not time-barred; and if it is enforceable against the father, it is also enforceable against his sons and grandsons provided it was not taken for an illegal or immoral purpose. An alienation made to pay such a debt is, therefore, valid and can bind the interests of the sons and grandsons of the person making the alienation. **A** Gajadhar *v.* Jagannath, 22 A. L. J. 601; (1924) A. I. R. (A.) 551 **684**

——— **Maintenance**—Avaruddha stree, *married woman, whether can be.*

The connection between a married woman and a man other than her husband would be adulterous according to Hindu Law. Such a woman cannot be an *avaruddha stree*, and does not acquire the right to be maintained out of the estate of her paramour after his death. **B** Anandi Lal Bhagchand Marwadi *v.* Chandra Bai Patil, 26 Bom. L. R. 63; 48 B. 203; (1924) A. I. R. (B.) 311 **536**

——— **Mayukha**—*Regenerate castes—Illegitimate children—Maintenance—Marriage expenses.*

There is no direct prohibition against illegitimate children of Hindus of the regenerate castes governed by the *Mayukha* being entitled to maintenance, nor does the maintenances cease when they come of age. The illegitimate children, however, are not entitled to marriage expenses. **B** Motichand Girdharshet *v.* Chandrabai, 26 Bom. L. R. 488; (1924) A. I. R. (B.) 421 **418**

——— **Mitakshara**—*Father's debts incurred before partition—Son, whether liable.*

Under the *Mitakshara* Law a Hindu son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition (impleading him also) for the father's debts incurred before the partition and not illegal or immoral. **M** Ramachandra Jagannatha Rao *v.* Viswesan, 46 M. L. J. 590; 19 L. W. 691; 47 M. 621; (1924) A. I. R. (M.) 682 **228**

——— *Partition—Step-mother, share of.*

Under the Hindu *Mitakshara* Law, on a partition of joint family property the stepmother is entitled to a share. **B** Hoshanna Devanna Naik *v.* Devanna Benappa Naik, 26 Bom. L. R. 424; 48 B. 468; (1924) A. I. R. (B.) 444 **468**

——— **Partition** *among minors—Legality.*

There is no rule of Hindu Law which prohibits a division of properties by minors amongst themselves, where they are properly represented by guardians in the transaction. **M** Devarajulu Naidu *v.* Kondammal, 20 L. W. 754 **929**

——— **Sudras**—*Ascetics—Disinheritance.*

The Hindu texts applicable to the disinheritance of ascetics do not apply to Sudra ascetics unless some usage or custom to the contrary is proved,

Therefore, a Sudra ascetic can inherit the property of another man and can be succeeded by others on his death. **A** SOBHADDILAL *v.* GOBINDSINGH, 22 A. L. J. 470; 46 A. 616 **579**

——— **Widow,** adverse possession by—Property acquired, nature of. *See* ADVERSE POSSESSION **788**

———, *alienation by—Consent of daughter and daughter's son, effect of—Reversioners remote, whether can challenge alienation.*

The separated brothers of a deceased Hindu have no *locus standi* to question an exchange of land belonging to the deceased effected by his widow, to which the daughter and daughter's son of the deceased have given their consent. The latter are the immediate reversioners of the deceased and in their presence the brothers of the deceased have only a bare possibility of succession. **L** ARJAN *v.* HARI RAM, 6 L. L. J. 93; (1924) A. I. R (L.) 464 **522**

——— *Alienation—Necessity—Consent of reversioners—Deeds, recitals in—Evidential value.*

The circumstance that the only reversioners at the time of an alienation by a Hindu widow gave their unqualified consent to it raises a very strong presumption that the alienation was supported by legal necessity. The presumption is, however, a rebuttable one.

A recital in a deed is admissible as good evidence. **A** DARBARI LAL *v.* GOBIND SARAN, 22 A. L. J. 753 **31**

———, *gift by—Inaction by reversioner—Acquiescence—Waiver—Conduct, evidence of—Procedure.*

A plea of acquiescence by inaction on the part of a reversionary heir must be very clearly made out, if it is relied on as a bar to the enforcement of his rights as such reversioner. Laches to bar a plaintiff's rights must amount to waiver, abandonment or acquiescence and to raise a presumption of any of these, evidence of the conduct must be plain and unambiguous.

Although it is not competent to a Hindu widow to make a gift of the property inherited by her from her husband and the gift is void beyond her lifetime, the interest which the donee gets cannot come to an end with the death of the donee and if the gift be in favour of a daughter the property will be *stridhan* in her hands so as to pass after her death to her personal heirs, subject of course to the condition that the gift must cease to be operative at the death of the donor. **N** NARAYAN *v.* TULSHI **607**

———*Joint gift by two widows—Death of donee and one widow, effect of—Other widow, whether can claim whole or half of gifted property.*

A joint gift by two Hindu widows is operative during the lifetime of either of the two widows in favour of the donee and his heirs, and on the death of one widow and the donee, the other widow is not entitled to recover the whole or a moiety of the subject-matter of the gift from the heirs of the donee. **B** DHANJI NATHA *v.* DHUMA HIRAJI MALI, 26 Bom. L. R. 277; (1924) A. I. R. (B.) 332 **234**

——— **Widow,** *remarriage of—Estate, whether devolves on second husband.*

There is no authority that among any caste of Hindus the property inherited by a widow on the death of her husband can on her death devolve on her second husband whether she has or has not married him in accordance with the custom of her caste. **O** GANGA *v.* PANCHAM, 10 O. & A. L. R. 725 **591**

——— *Remarriage—Succession to daughter by former husband.*

A Hindu widow, who remarries, is entitled to succeed to the estate of her daughter by her former husband who dies after her re-marriage. **B** BHIKU KRISHNA BADHADE *v.* KESHAN RAMJI BADHADE, 26 Bom. L. R. 235; (1924) A. I. R. (B.) 360 **512**

———**'s** *estate—Gift to one of several reversioners—Acceleration—Invalid transfer—Suit by remote reversioner—Daughter or daughter's son alive, effect of.*

A surrender of a widow's estate to be valid must be in favour of the nearest reversioner if there be only one or all the reversioners nearest in degree if there be more than one.

In the case of an invalid transfer by a Hindu widow a suit for declaration must ordinarily be brought by the reversioner nearest in succession at the time.

If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful the next presumable reversioner would be entitled to sue.

In the presence of daughters and a daughter's son, even if the daughter's son be a minor, a remote reversioner is not entitled to sue. **A** BECHU PANDE *v.* DULHMA **4**

——— ———**'s** *income from husband's estate—Stridhanam or accretion—Presumption.*

The general presumption is that the income of a Hindu widow from her husband's estate is an accretion to the corpus and not her *stridhanam*, unless it is shown to have been dealt with by her as her own.

The bare fact that the widow had obtained a decree for arrears of rent is not proof sufficient to rebut the presumption. **M** PAVANI SUBBAMMA *v.* MUNGAMUR VENKATAKRISHNA RAO **290**

——— **Will,** *construction of—Devise in favour of daughters—Daughter having son to take absolutely.*

A Hindu testator directed in his Will that his three daughters should be the owners of his property after his death. The eldest daughter being a childless widow was declared to have an interest only for her life-time. With regard to the other two daughters who were married, the Will stated that "she who has male issues is the owner of my property, that is to say, if they both have male issue then both are owners, and if one of those two has male issue then one is the owner. What I mean to say is only this that finally who has male

issue is the owner of my property since after my death." A son was born to one of the two married daughters, but he died in his infancy;

Held, that the intention of the testator was that if either of the married daughters had male issue, her life-interest would mature into an absolute interest, so that the daughter to whom a son had been born took an absolute interest in the property as soon as her son was born, subject to the life-interest of her two sisters. **B** BAI KAMALA *v.* REVASHANKAR RANCHHOD, 26 Bom. L. R. 249; (1924) A. I. R. (B.) 350 **520**

——— **Will**—*Gift over, conditions and validity of.*

It is competent to a Hindu to make a devise of an absolute estate defeasible on the happening of subsequent event. But the event must happen, if at all, immediately on the close of a life in being at the death of the testator, and the gift over must be in favour of somebody in existence at the death of the testator. It is immaterial whether the property dealt with is ancestral or self-acquired. **L** PREM SINGH *v.* HARDIT SINGH, (1923) A. I. R. (L) 649 **1045**

Inam—Karnam *service* inam—*Enfranchisement, effect of—Resumption and re-grant—Distinction between service and personal* inams—*Prescriptive title against grantee of service* inam, *proof of—Madras Acts IV of 1862, IV of 1866 and VIII of 1869, operation of.*

The enfranchisement of a service *inam* is a clear and unequivocal resumption by Government of the land and the issue of a title-deed amounts to a re-grant which creates a new title in the grantee.

The distinction between the enfranchisement of a service *inam* and that of a personal *inam* is that the latter is a mere release of the service obligation, that is a release by the Crown of its reversionary interests, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement.

No one claiming adversely to an *inam* title-deed can succeed on a prescriptive title unless he proves either that there was no *inam* at all or that Government had no right left in it at the time of the resumption, that is, that his prescription was for more than sixty years at the date of the grant.

Madras Acts IV of 1832 and IV of 1866 are mere legal statements of the evidentiary value of an *inam* title-deed and Madras Act VIII of 1869 merely saves the existing rights of occupancy holders or *kudivaramdars* already on the land. **M** MAUTRIPRAGADA GOWRIKANTAM *v.* MANTIPRAGADA RAMAMURTHY, 46 M. L. J. 482; 34 M. L. T. 234; 19 L. W. 653; (1924) M. W. N. 535; (1924) A. I. R. (M.) 783 **557**

Income Tax Act (VII of 1918), ss. 12, 17, 18—*Income Tax Act (XI of 1922), applicability of Act to proceedings started under Act of 1918—Unregistered firm—Loss incurred by partner, whether to be deducted from total taxable income.*

A notice under section 17 (2) of the Income Tax Act of 1918 was issued to an assessee on 10th June

1921 in respect of the income of the year ending on 15th June 1921. Returns were received on 22nd August 1921 and 23rd March 1922 but were not accepted, and it was recorded on 31st March 1922, the last day on which the Act of 1918 was in force that notice under section 18 (2) of the Act would issue at some future time. A definite order for the issue of this notice was made on 21st April 1922 and from that day onwards proceedings were conducted under the Income Tax Act of 1922:

Held, that the Income Tax Act of 1918 and not that of 1922 was applicable to the proceedings.

Under the Income Tax Act of 1918, if an unregistered firm in which an assessee is a partner incurs a loss, his share of that loss must be deducted from his other income in ascertaining his total taxable income. **N** *In re* ARJUN KHEMJI & Co. **362**

Income Tax Act (XI of 1922), ss. 3, 10 (2) (vii)—*Assessment for 1922-23—Value of discarded machinery, exclusion of.*

For the purposes of the income-tax assessments for the years 1921-22 and 1922-23, the petitioner Company submitted a printed copy of its audited Balance Sheet and Profit and Loss Account for the year ending 30th June 1921 that would form the basis of its final assessment for the year 1921-22 under the Income-Tax Act of 1918, and for the year 1922-23 under section 3 of the Income-Tax Act of 1922. In calculating the profits and gains for the year 1922-23, the Company claimed to deduct a certain sum under section 10 (2) (*vii*) of the Income-Tax Act of 1922 as representing the value of machinery which had been sold as having become obsolete

The Commissioner of Income-Tax was of opinion that the profits and gains for the year ending June 30, 1921, for the purposes of the assessment for 1922-23, should be calculated without making that allowance on the ground that that allowance had already been made in computing the income for the year ending June 30, 1921, when making an adjustment for the financial year 1921-22 of the actual income earned by the Company for that year under the provisions of Act VII of 1918:

Held, (1) that under section 3 of the Income Tax Act of 1922, the assessment for the year 1922-23 must be based on the income, profits and gains of the Company for the previous year, that is to say, the year ending 30th June 1921, and these profits etc. must be calculated according to the provisions of the Act of 1922;

(2) that, therefore, the Company was entitled to make the deduction under section 10 (2) (*vii*) of the Act and the fact that under the previous Income-Tax Act the profits and gains for the then current year formed the basis of the assessment for that year, was irrelevant. **B** *In re* RAJA GOKALDAS MILLS, LTD., 26 Bom. L. R. 312; 48 B. 389; (1924) A. I. R. (B.) 346 **282**

Injunction to restrain institution of proceedings—Fraudulent decree—Remedy. *See* CIVIL PROCEDURE CODE, s. 39, O. XXI, RR. 7, 8, 10, 11 **59**

Insolvency—*Composition between insolvent and creditor — Guarantor for payment—Default in payment — Adjudication annulled — Guarantor, liability of—Jurisdiction of Insolvency Court—Presidency Towns Insolvency Act (III of 1909), s. 30 (2).*

A person who makes himself liable as a guarantor for the payment of a composition in insolvency, does not by so doing render himself subject to the jurisdiction of the Insolvency Court so as to be liable to be dealt with for contempt of Court, if he does not carry out any order made under such jurisdiction.

Upon the execution of a deed of composition between an insolvent and his creditors a person became guarantor for payment of the amounts which the insolvent was to pay and the adjudication was annulled. No payment, however, was made, and, on an application under section 30 (2) of the Presidency Towns Insolvency Act, by one of the creditors, the guarantor was directed to pay, and, on his failure to do so, the Court re-adjudged the debtor insolvent, and allowed time to the guarantor and insolvent to pay. No payment having been made, the order re-adjudging the debtor insolvent was, on the application of a creditor vacated, and the writ of attachment was issued against the guarantor for failure to comply with the order of payment. On appeal by the guarantor:

Held, that the order re-adjudging the debtor insolvent had the effect of putting the composition deed to an end, and of discharging the guarantor from liability thereunder. **C** GOVIND DAS PITY *v.* JARDINE SKINNER & Co., 27 C. W. N. 908; (1924) A. I. R. (C.) 176 **849**

Interest, award of—Surplus mortgage money—Interest by way of damages. *See* TRANSFER OF PROPERTY ACT, s. 76 **63**

Interpretation of Statutes—*Illustrations to sections.*

Where the meaning of a section of a Statute is doubtful a reference to an illustration of the section is justified. But if there is a conflict between the section and its illustration, the illustration must give way to the section. **A** SAJID-UN-NISSA BIBI *v.* HIDAYAT HUSAIN, 22 A. L. J. 425 **896**

——— 'Railway administration,' definition of, scope of Interpretation clause, scope of. *See* CIVIL PROCEDURE CODE, s. 79 (1) **531**

——— "Seen it," interpretation of. *See* EVIDENCE ACT, s. 63 (5) **939**

Judicial Committee Act, 1833 (3 & 4 William IV, C. 41), s. 23—*Privy Council appeal—Death of party—Decree after death, whether nullity—Limitation Act (IX of 1908), Sch. I, Art. 181—Right to implead parties to decree when arises—Application to bring legal representatives on record—Limitation.*

A decree of the Privy Council has full force and effect notwithstanding the death of any of the parties interested therein during the pendency of the appeal.

The right to implead parties to a decree does not arise till the decree is passed. Therefore, an application to bring the legal representative of a deceased judgment-debtor on the record is within time if made within 3 years of the date of the decree, even though the judgment-debtor died

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before the decr was passed. **M** KALYANI PILLAI *v.* THIRUVENKATASWAMI IYENGAR, (1924) M. W. N. 439; 47 M. L. J. 154; 20 L. W. 99; 35 M. L. T. 50: 47 M. 618; (1924) A. I. R. (M.) 695 **85**

Jurisdiction, appellate, how determined—Suit decided unsatisfactorily—Court, inherent power of. *See* SUITS, VALUATION OF **183**

——— Failure to return ornaments borrowed—Suit for recovery of ornaments or price thereof. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 35 (*ii*) **627**

——— Preliminary mortgage-decree—Judgment-debtor, death of, before decree—Legal representative not brought on record—Abatement—Application for final decree—Second application to set aside abatement—Order dismissing first application, appeal against — Abatement set aside—Order, legality of. *See* CIVIL PROCEDURE CODE, O. XXII, RR. 4, 9, O. XXXIV, R. 5 **397**

——— to execute decree—Transfer for execution—Certification, what amounts to—Notification of payment. *See* CIVIL PROCEDURE CODE, s. 41 **752**

———, want of—Objection not taken in Trial Court—Decree, whether can be set aside—Failure of justice, proof of- Revision. *See* CIVIL PROCEDUR CODE, ss. 21, 45 **745**

Jurisdiction of Civil and Revenue Courts—Lease of agricultural land by father—Suit by son to challenge terms of lease—Ejectment—Declaration, suit for, whether maintainable. *See* SPECIFIC RELIEF ACT, s. 42 **399**

——— Mortgage—Redemption—Circular No. C 1123 of 1862, operation of. *See* RES JUDICATA **698**

——— Suit for possession of occupancy holding *See* OUDH RENT ACT, s. 108 (10) **271**

Jurisdiction of Civil Courts, bar to, extent of—Partition, modes of initiation of—Question of title—Procedure. *See* U. P. LAND REVENUE ACT, ss. 111, 112 **781**

Jurisdiction of Court—Award, rectification of—Palpable mistake. *See* CIVIL PROCEDURE CODE SCH. II, PARA. 12 (*b*) **10**

——— Sale purchase by decree-holder—Set-off—Rateable distribution — Receipt of assets. *See* CIVIL PROCEDURE CODE, s. 73, O. XXI, R. 72 (2) **40**

——— to entertain suit, whether can be questioned—*Ex parte* decree, suit to set aside, maintainability of. *See* EX PARTE DECREE **413**

——— to grant injunction — Election petition—Elected candidates, whether can act pending inquiry—Injunction *interim*—Inherent power of Court. *See* MADRAS DISTRICT MUNICIPALITIES ACT, s. 303 (2) (*b*) **664**

Jurisdiction of Presidency Small Cause Court—Suit for damages for trespass, whether cognizable by Small Cause Court. *See* PRESIDENCY SMALL CAUSE COURT ACT, s. 22 **317**

Jurisdiction of Revenue Courts—*Rent suit by recorded co-sharer—Adverse possession, plea of, whether can be entertained.*

There is nothing to prevent a Revenue Court in Oudh from entertaining and deciding a plea of

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adverse possession as against the claim of a recorded co-sharer for recovery of rent.

When such a plea is raised in a rent suit, the Rent Court must frame an issue in that behalf and give its decision thereon. **O** SURJA MAL *v.* MOHAMMAD TAQI 650

Khoti Settlement Act (Bom. I of 1880), s. 9 —*Transfer of permanent tenancy—Consent by managing* Khot, *whether sufficient.*

The managing *Khot* can validly give consent to a transfer of a permanent tenancy under section 9 of the Khoti Settlement Act. **B** IBRAHIM MOHIDIN MHATE *v.* KRISHNAJI LAXMAN BHAGWAT, 26 Bom. L. R 421; (1924) A. I. R. (B.) 459 458

Land Acquisition Act (I of 1894), s. 18— *Award by Collector—Third party claiming title and asking for reference—High Court, whether will stay reference.*

A Land Acquisition Collector made an order directing the payment of compensation in respect of certain property to *A*. *B* set up a title to the property and applied for a reference under section 18 of the Land Acquisition Act, and subsequently brought a suit against *A*. to recover possession of the property: after institution of the suit, *B*. applied for stay of the reference, but this was refused. He then moved the High Court for revision of the order refusing to stay the reference, or in the alternative for an injunction restraining *A*. from proceeding therewith, or in the alternative for transfer of the reference so that it may be heard along with the suit:

Held, that *B*. having chosen his *forum* must abide by the decision of the tribunal to whom the reference was made. **C** SHOSHI MUKHI DEBYA *v.* KESHAB LAL MUKHERJI, 27 C. W. N. 809; (1924) A. I. R. (C.) 212 598

Landlord and tenant—*Decrees for rent against tenant—Sale in execution of first decree subject to liability for the second—Execution of second decree, whether can proceed.*

After a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it cannot ordinarily be again sold in execution of any other decree for rent due by the same tenant, except in cases where the Execution Court allows the holding to be sold subject to a liability to satisfy another outstanding decree.

The landlord obtained a rent decree against the tenant for a certain number of years; subsequently he obtained another decree for another period of years. In execution of the first decree he brought the holding to sale and it was sold subject to a liability to satisfy the other decree. He then instituted another execution case for the realisation of the second decree and asked for the attachment of other property of the tenant:

Held, that the judgment-debtor should have objected at the outset to the irregular sale and not having done so, the decree-holder could not be estopped from proceeding with the execution. **P** JUGAL KISHORE NARAYAN SINGH *v.* BHATU MODI, 1923) Pat. 205; 1 P. L. R. 311; 4 P. L. T. 640; 1923) A. I. R. (Pat.) 517; 2 Pat. 720 377

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———— *Forfeiture—Notice—Acceptance of rent—Waiver.*

Acceptance by the landlord of rent due after forfeiture from the lessee operates as a waiver of the notice of forfeiture, notwithstanding the protest of the landlord that such acceptance is without prejudice to his right to insist upon the forfeiture. **C** BENGAL-NAGPUR RY. CO., LTD. *v.* FIRM BAL MUKUNDA BISESWAR LALL, (1923) A. I. R. (C.) 663 200

———— Holding over, what constitutes. *See* TRANSFER OF PROPAERTY ACT, s. 116 507

———— Holding over, what constitutes—Consent of landlord, absence of—Dispossession of tenant—Possession, suit for, by dispossessed tenant, whether lies. *See* TRANSFER OF PROPERTY ACT, s. 116 568

———— *Lease, invalid renewal of, effect of—Devaswom—Notice to quit by one of two Uralans, validity of—Suit filed by one Uralan without consulting others, maintainability of.*

An invalid renewal of an existing lease does not operate to extinguish the rights and obligations under the prior tenancy until it has been surrendered or otherwise legally put an end to.

A notice to quit by one only of two Uralans of a Malabar Devaswom is invalid.

Per *Ramesam, J.*—The principle that in any transaction which creates or destroys rights in the trust estate all the Uralans must be consulted is inapplicable to suits provided that in a suit by one Uralan the other Uralans are made parties. **M** CHETTIYOTAN KANNAN KUTTY *v.* ELAYA VEETTIL VELU, 19 L. W. 115; 46 M. L. J. 122; (1924) M. W. N. 151; (1924) A. I. R. (M.) 771 139

———— Payment of rent—Estoppel. *See* EVIDENCE ACT, s. 116 22

———— *Tenancy, origin of, unknown—Ambiguity in terms—Nature of tenancy, how determined—Evidence, whether admissible—Conduct of parties, effect of.*

In a case where the origin of the tenancy is unknown or where the document creating the tenancy is equivocal or ambiguous in its terms, one has got to take into consideration the attendant circumstances, and evidence as to the mode of enjoyment of the tenancy is also admissible and may be considered in order to arrive at a proper conclusion.

A tenancy created for a particular purpose may subsequently by conduct of parties be converted into a tenancy of a different character. **C** LAL GHOSH *v.* NILKANTHA DAS 898

———— *Tenancy, origin of, unknown—Nature of tenancy, proof of—Permanency of tenancy—Permanent structures erected by tenant—Estoppel.*

Where the origin of a tenancy, or the incidents of the tenancy at its inception, are unknown, evidence of the mode of dealing with the demised land, and the acts and conduct of the parties constitute the best if not the only, evidence for the purpose of proving the nature of the tenancy.

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Where a tenant points to permanent structures on land occupied by him, and invites the Court to infer that his tenancy is of a permanent character, to enable him to avail himself of the plea of acquiescence or estoppel against the landlord, it is necessary for the tenant to show that, in spending money for the erection of buildings of a permanent character, he was acting in an honest belief that he had a permanent right in the land and that the landlord, knowing that he was acting in that belief, stood by and allowed him to go on with the construction of the buildings **C** ALI KAZEMINI MATWALI *v.* MANIK CHANDRA PRAMANIK, 27 C. W. N. 969; (1924) A. I. R. (C.) 156 **580**

———Thekadar, *position of—Lease, grant of—Oudh Rent Act (XXII of 1886), ss. 67, 68.*

In the absence of anything to show to the contrary, a *thekadar* should be presumed to have the ordinary powers of a landlord, including the power to grant leases.

The fact that under section 68 of the Oudh Rent Act, a *thekadar* cannot acquire the rights of a cultivating tenant does not mean that he cannot convey those rights to a tenant. **O** BHUSAN *v.* JAGESHWAR, (1922) A. I. R. (O.) 216 **199**

Legal practitioner—*Brief, rejection of.*

A lawyer has no right to reject a brief when offered to him on payment of fee agreed upon between the parties on grounds of partisanship for a party to the litigation. **O** ALLAHABAD BANK LTD. *v.* SHIVA BAKSH SINGH, 10 O & A. L. R. 459; 11 O. L. J. 337 **826**

Letters Patent (Alla.), cl. 10—*Letters Patent Appeal—Finding of fact, whether can be questioned—Procedure.*

In a Letters Patent Appeal, the judgment appealed against must be judged with respect to the law laid down in it, in accordance with the facts stated at the Bar. If the Counsel choose to submit questions of law based upon a statement of facts which they do not challenge, in fact which they convey to the Court, they cannot afterwards be heard to question it in a Letters Patent Appeal. The proper remedy, if there has been any misunderstanding or slip, so that an erroneous statement of fact has crept in the judgment, is to ask for a review. **A** BIJADHAR BHAGAT *v.* JEAT CHAMAR, 22 A. L. J. 647; (1924) A. I. R. (A.) 518 **601**

Letters Patent (Bom.), cl. 12—*Land situate outside jurisdiction—Suit to declare charge on land—High Court, power of.*

The Bombay High Court has, under clause 12 of its Letters Patent, jurisdiction *in personam* in regard to lands situate outside its territorial jurisdiction, and can grant relief by way of a declaration of a charge on such lands. **B** KOTAKAL *v.* MALABAR TIMBER Co., 26 Bom. L. R. 541; (1924) A I. R. (B.) 412 **1049**

———**cl. 12**—*Mortgage suit—Property and mortgagor outside jurisdiction—High Court, power of.*

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The Bombay High Court has power to entertain a mortgage suit even though the mortgagor resides, and the mortgaged property is situate, outside its territorial jurisdiction, where the cause of action arises within its jurisdiction. **B** JASRAJ FOOAJI *v.* AKUBAI, 26 Bom. L. R. 539; (1924) A. I. R. (B.) 419 **1007**

———**cl. 12**—*Mortgage suit—Suit for lands—Property and mortgagor outside jurisdiction—High Court, power of—Personal jurisdiction.*

Suits by mortgagees to enforce their rights under their mortgages are not suits for land within the meaning of clause 12 of the Letters Patent of the Bombay High Court.

The Bombay High Court can entertain a mortgage suit even though the mortgagor resides, and the mortgaged property is situate, outside its territorial jurisdiction where the cause of action has arisen within its jurisdiction.

The personal jurisdiction of the Bombay High Court is exercised under clause 12 of the Letters Patent not only in cases where the defendants or some of them reside permanently within the jurisdiction but in cases where, according to the provisions of the Letters Patent, they have been lawfully caused to appear upon summons where the cause of action or part of it has arisen in Bombay. **B** VENKATRAO SETHUPATHY *v.* KHIMJI ASSUR VIRJI, 26 Bom. L. R. 535 **442**

———**cl. 15.** *See* LIMITATION ACT, s. 5, SCH. I, ART. 179 **862**

Limitation—Accounts of old partnership, suit for. *See* CONTRACT ACT, s. 258 **378**

Limitation Act (IX of 1908), s. 5. *See* PROVINCIAL INSOLVENCY ACT, s. 78 **376**

———**s. 5**—*Appeal filed beyond time—Sufficient cause—Appeal admitted—Civil Procedure Code (Act V of 1908), s. 115—Revision.*

Where a Court after hearing only the appellant admitted an appeal, filed beyond time, for sufficient cause under section 5 of the Limitation Act, and the respondent did not press the question of limitation in the course of hearing of the appeal :

Held, that there was no reason for interference under section 115 of the Civil Procedure Code. **O** BHARAT *v.* BASANT **617**

———**s. 5**—*Civil Procedure Code (Act V of 1908), s. 122, O. IX, r. 13—Application to set aside ex parte decree—Power to excuse delay—Rule made by Madras High Court, if* intra vires.

The rule framed by the Madras High Court applying section 5 of the Limitation Act to applications to set aside *ex parte* decrees under O. IX, r. 13 of the Civil Procedure Code is *intra vires.*

The combined effect of section 5 of the Limitation Act and section 122 of the Civil Procedure Code is to give power to the High Court to frame such a rule. **M** KRISHNAMACHARIAR *v.* SRI RENGAMMAL, 20 L. W. 332; 47 M. L. J. 409; (1924) M. W. N. 682 **877**

———**s. 5**—*Court-fees not paid on appeal—Order for payment within fixed time or appeal*

stand dismissed—Delay in obtaining stamp—Extension of time.

In the case of an appeal filed without proper Court-fees, the Court passed an order that the appellant should deposit the required Court-fee within a fixed period, otherwise the appeal would stand dismissed. The period allowed expired during Court vacation and on the re-opening day the appellant tendered the requisite amount for the stamp to the stamp-vendor. The stamp-vendor had no stamp of the required value but promised to supply one before the Court closed for the day. The stamp, however, was not supplied on that day but on the next day when it was tendered in Court:

Held, that there had been no negligence or laches on the part of the appellant and sufficient cause had been shown for the extension of time and for reinstatement of the appeal. **Pat.** AMIR MANDAL *v.* MOHAN CHANDRA MANDAL, 3 Pat. 337; (1924) A. I. R. (Pat.) 663 **1030**

——— **s. 5**—*Review of judgment—Appeal—Time spent in review, when excluded.*

An appellant is entitled to exclude time spent in prosecuting with due diligence a proper application for review of judgment.

Where, however, an application for review does not state the real reason on which it is based and where it is not shown that there was reasonable ground for seeking the review, the application cannot be regarded a proper one, prosecuted with due diligence, and the mere fact that it was made, does not entitle the appellant to an extension of time under section 5 of the Limitation Act. **C** KAILASH CHANDRA NAG *v.* BEJOY CHANDRA NAG **786**

——— **s. 5, Sch. I, Art. 179**—*Letters Patent (Bom.), cl. 15—'Judgment', meaning of—Appeal, delay in filing—Order refusing to extend time, whether 'judgment'—Appeal, whether lies—'Practice of High Court', meaning of—Limitation—Leave to appeal to His Majesty in Council, application for—Delay, owing to mistaken advice of Counsel—Sufficient cause—Description of Court—Appellate Court, interference by.*

The word 'judgment' in clause 15 of the Letters Patent of the Bombay High Court means a decision which affects the merits of the question between the parties by determining some right or liability. An order refusing to extend time under section 5 of the Limitation Act for the filing of an appeal is a 'judgment' within the meaning of clause 15 of the Letters Patent of the Bombay High Court and is appealable under that clause.

The words "practice of the High Court" in the Explanation to section 5 of the Limitation Act, extend to all the habits and customs of the Court in dealing with the litigation before it. The limit of time for an appeal in the High Court is part of the practice of the Court, even though that practice may be regulated by a Statute, *viz.*, the Limitation Act.

An application for leave to appeal to His Majesty in Council was filed a few days beyond limitation owing to the wrong advice of Mofussil lawyers whom the appellant consulted and who, in ignorance of the passing of Act XXVI of 1920, told him that the limitation for making the application was six months instead of ninety days:

Held, that there was sufficient cause for extending the period of limitation under section 5 of the Limitation Act.

Per *Marten, J.*—The mere fact that it is Counsel who makes a mistake does not necessarily protect his client against the consequences of his blunder, but on the other hand the fact that the mistake is one made by Counsel is not necessarily fatal to his client.

In India litigants are treated with more indulgence in the matter of time than in England.

Per *Pratt, J.*—A Court of Appeal should always be slow to reverse the decision of a lower Court made in the deliberate exercise of a discretion entrusted to it by law. But the rule is not absolute and the fact that there was a difference of opinion between the Judges of the lower Appellate Court is a circumstance which entitles the Appellate Court to substitute its own discretion for that of the lower Appellate Court, if it thinks it was wrongly exercised. **B** NAGINDAS MOTILAL *v.* NILAJI MORABA NAIK, 26 Bom. L. R. 395; 48 B. 442; (1924) A. I. R. (B.) 399 **862**

——— **s. 6, Sch. I, Art. 181**—*Execution of decree—Application, dismissal of—Revival, application for—Minor applicant—Extension of time—Death of decree-holder, whether default.*

An application for the continuance or revival of a previous execution proceeding struck off or suspended for no act or default of the decree-holder is governed by Article 181 of Schedule I to the Limitation Act. Such an application is substantially an application for the execution of a decree within the meaning of section 6 of the Limitation Act, which protects a minor applicant so long as the disability continues, and postpones the commencement of the period of limitation till the date on which such disability ceases.

The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, and is inapplicable to the case of a party who is dead, for death cannot be ranked under the category of default. **O** AKHTAR HUSSAIN *v.* QUDRAT ALI, (1924) A. I. R. (O.) 31; 11 O. L. J. 133 **775**

——— **s. 14.** *See* CIVIL PROCEDURE CODE, O. II, R. 2 **286**

——— **s. 15**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 53 (1) (b)—Execution of decree—Attachment of decree—Notice to executing Court to stay execution—Limitation, whether suspended.*

Section 15 of the Limitation Act applies only to an absolute stay and not to a limited stay as would be ordered by a notice under O. XXI, r. 53 (1) (*b*) of the Civil Procedure Code. Such an order of stay does not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and does not, therefore, interrupt the running of time against them. **B** CHANBASAPPA NAGAPPA HAVERI *v.* HOLIBASAPPA BASAPPA MOTIBENNUR, 26 Bom. L. R. 317; 48 B. 485; (1924) A. I. R. (B.) 383 **239**

Limitation Act—contd.

——— **s. 15, Sch. I, Art. 182 (5).** *See* CIVIL PROCEDURE CODE, s. 11, EXPL. IV **103**

——— **s. 18**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, application to set aside Limitation Fraud by decree-holder, effect of.*

A decree-holder who is once guilty of fraud in bringing about an execution sale and keeping the judgment-debtor in ignorance of it, must show that opportunity was offered to the judgment-debtor to discover the fraud and that the fraud was in fact dispelled subsequent to the sale. Otherwise the fraud once committed would continue and the judgment-debtor would be entitled to the benefit of the provisions of section 18 of the Limitation Act in making an application for the setting aside of the sale. **Pat** JWALA PRASAD THAKUR MAHTON *v.* JHAMAN MAHTON, 5 P. L. T. 200; (1924) A. I. R. (Pat.) 496 **761**

——— **s. 18**—*Suit barred by time—Fraud, proof of—Knowledge of plaintiff—Burden of proof.*

When a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the Statute from having its ordinary effect. A person who in such circumstances desires to invoke the aid of section 18 of the Limitation Act must establish that there has been fraud, and that by means of such fraud, he has been kept from the knowledge of his right to sue. Once it is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. **N** RAMACHANDRA *v.* HARDEO, 20 N. L. R. 23; (1924) A. I. R. (N.) 94 **590**

——— **s. 19**—*Acknowledgment—Accounts, suit for—Admission that accounts must be taken.*

In a suit for the balance due on taking accounts, an admission that accounts must be taken and settled would be a pertinent acknowledgment. **M** B. KUMARASWAMI *v.* M. NARAYANA RAO, 46 M. L. J. 468; 34 M. L. T. 200; (1924) M. W. N. 355; 19 L. W. 683; (1924) A. I. R. (M.) 619 **355**

——— **s. 19**—*Acknowledgment—Liability—Burden of proof.*

Where some property or right is claimed against the maker of an acknowledgment under section 19, Limitation Act, it is immaterial whether at the moment of his making the acknowledgment, the claim could have been enforced against him, as against him the acknowledgment is sufficient.

If a person, who has *prima facie* no business to make an acknowledgment, makes it, the burden of proving why the acknowledgment was made lies upon him. But if the acknowledgment is alleged to bind other persons, the person so alleging should prove some sort of agency and authority on the part of the maker of the acknowledgment. **M** MALLADI KRISHNAYYA *v.* TONDEPU VENKATAPPAYYA **940**

——— **s. 19**—*Acknowledgment of liability—Acknowledgment written by agent bearing name of principal, whether sufficient—Authority to acknowledge liability.*

A letter acknowledging liability for a debt written by the *munim* of a firm and bearing no other signature than the name of the firm in the heading of the letter is sufficient to come within the meaning of section 19 of the Limitation Act provided the *munim* was authorised to make the acknowledgment.

The mere fact that the *munim* used to write letters on behalf of his principals is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability. **A** UMA SHANKAR *v.* GOBIND NARAYAN, 22 A. L. J. 807 **6**

——— **ss. 19, 31**—*"Prescribed," meaning of—Suit on mortgage—Period of limitation, extension of—Mortgagor, acknowledgment by.*

The word "prescribed" in section 19 of the Limitation Act means "prescribed by any law for the time being in force" and is not limited to the period prescribed in the First Schedule of the Act.

Plaintiff sued on foot of a mortgage on the 2nd January 1919. The mortgage was executed in 1889 and the suit would have been time-barred but by operation of section 31 of the Limitation Act, 1908, the period of limitation was extended to the 8th August 1910. Before its expiry the mortgagor made an admission of liability on the 24th January 1910:

Held, that this was a good acknowledgment within the meaning of section 19 of the Act and the suit was, therefore, within time. **A** HARISH CHANDRA *v.* KASTOLA KUNWAR **743**

——— **Sch. I, Arts. 10, 113.** *See* TRANSFER OF PROPERTY ACT, ss. 10, 14 **962**

——— **Art. 11**—*Claim petition decided against minor—Suit—Limitation—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Guardian and ward—Suit instituted by guardian bona fide—Suit dismissed—Negligence of guardian.*

When an order under section 283, Civil Procedure Code (Act XIV of 1882), is made against a minor, a suit in respect of that order ought to be filed within one year of his attaining majority under Art. 11 of Sch. I to the Limitation Act. If such a suit is filed within one year from the date of the order by the minor's grandmother and it is dismissed, this cannot extend the period of limitation.

If the guardian of a minor without taking into consideration the legal aspect of a case, but acting *bona fide*, institutes a suit on behalf of the minor, he is not guilty of gross negligence even though it would have been to the minor's advantage if he had not instituted the suit. **M** SUBBIAH PANDARAM *v.* ARUNACHALA PANDARAM **992**

——— **Art. 31,** *applicability of—Suit by consignor against carrier—Limitation applicable.*

Article 31 of Sch. I to the Limitation Act applies equally to a suit by a consignor as well as by a consignee. A suit, therefore, by a consignor of goods against a common carrier to recover damages

Limitation Act—contd.

for non-delivery must be brought within the period prescribed by that Article. **C** VALLY MAHOMED *v.* NEDERLAND S. NAVIGATION Co., 27 C. W. N. 806; (1924) A. I. R. (C.) 173 **612**

——— **Sch. I, Arts. 39, 49** *Cutting lac trees and removing them—Suit for damages, nature of—Nature of claim, how determined—Compensation payable.*

In determining the nature of the claim, or finding out the Article by which it is governed, it is the nature of the cause of action rather than its form which has to be looked to and which determines the applicability of the particular Article of the Statute of Limitation.

A right in the trees standing on the land as well as a right to the future crops of trees is a right in immoveable property, and any infringement of such a right is an infringement of a right to or a wrong done to immoveable property.

A suit for damages sustained by the plaintiff on account of the defendant cutting plaintiff's valuable lac producing trees and removing the same is primarily a suit for compensation for "trespass upon immoveable property" and is governed by the three years' rule laid down in Articles 39 and 49 of the Limitation Act, Sch. I.

The compensation payable to the plaintiff has to be determined with reference to the rights which he as proprietor of the trees has lost for ever. **N** NARBADAPRASAD *v.* AKBAR KHAN, 20 N. L. R. 80; (1924) A. I. R. (N.) 125 **769**

——— **Arts. 62, 116**—*Transfer of Property Act (IV of 1882), s. 55 (a)—Registered sale-deed—Failure of seller to pass good title—Suit for refund of purchase-money—Limitation.*

A suit by the plaintiff to recover possession of property sold to him by the defendant and, in the alternative, for a refund of the purchase-money, on the footing that at the date of the sale the defendant had no title to convey is, where the sale-deed has been registered, governed by Article 116 and not by Article 62 of Schedule I to the Limitation Act.

Per *Richardson, J.*—Under section 55 (2) of the Transfer of Property Act, the conveyance itself imports a covenant of title in the absence of an express covenant, and a suit for refund of purchase-money where the seller is unable to pass good title, may be regarded as a suit for damages for breach of this covenant. The limitation for such a suit, where the conveyance is a registered one, is that prescribed by Article 116 of Schedule I to the Limitation Act. **C** INJAD ALI *v.* MOHINI CHANDRA ADHIKARI, 27 C. W. N. 1025; (1924) A. I. R. (C.) 148 **623**

——— **Art. 89.** *See* CIVIL PROCEDURE CODE, O. VIII, R. 2 **956**

——— **Art. 90.** *See* PRINCIPAL AND AGENT **241**

——— **Art. 97**, *applicability of—Consideration, failure of—Dispossession from portion of purchased property.*

Limitation Act—contd.

By virtue of a compromise decree plaintiffs were declared owners of certain property on payment of a sum of money. Having paid the money they obtained possession of the property. Subsequently on being dispossessed from a portion of the property they sued for recovery of the entire consideration money:

Held, the case was not one of failure of consideration but one of mere inadequacy of consideration and Article 97 of Schedule I to the Limitation Act was not applicable. **O** KARIM BUX *v.* ABDUL WAHID KHAN, 11 O. L. J. 323; 10 O. & A. L. R. 976 **81**

——— **Sch. I, Art. 113.** *See* SPECIFIC PERFORMANCE **658**

——— **Art. 114.** *See* CONTRACT ACT, s. 15, (3) **213**

——— **Ars. 120.** *See* FOREST LANDS **835**

——— **Art. 125.** *See* HINDU LAW—ALIENATION **554**

——— **Art. 134.** *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 15D **763**

——— **Arts. 134, 148**—*Mortgage—Trasferee from mortgagee—Good faith—Redemption, suit for—Limitation.*

It is only a *bona fide* transferee from a mortgagee who can claim the protection of Article 134 of Schedule I to the Limitation Act. In the absence of good faith, a suit against him by the mortgagor to redeem the mortgaged property would be governed by Article 148 of Schedule I to the Limitation Act. **L** RAI SAHIB PANDIT WAZIR CHAND *v.* NATHU RAM, 6 L. L. J. 151; (1924) A. I. R. (L.) 468 **321**

——— **Art. 164**—*Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XXI, r. 50, O. XXXI, rr. 1, 3, 6—Suit against firm—Ex parte decree—Application to set aside decree—Limitation—Decree against firm—Liability of partners—Dissolution of firm* pendente lite, *effect of.*

Where a suit is brought against a firm and an *ex parte* decree is passed against the firm, the only way in which such a decree can be set aside is on the ground that the summons was not served on the firm. An application to set aside such a decree must be made within thirty days of the date of the decree, within the meaning of Article 164 of Schedule I to the Limitation Act.

Per *Macleod, C. J.*—It can never be said that a decree against a firm *is ex parte* against one of the partners in the firm because he has not appeared.

In answer to a suit against a firm a partner in the firm can enter appearance in his own name and can file a written statement, and each partner can file a different written statement taking up different defences, but the proceedings continue against the firm, and it can only be decided in execution proceedings, whether a particular partner can be personally liable to satisfy decree. As soon as a decree is passed against the firm the assets of the firm are liable to satisfy

Limitation Act—concld.

it, but a partner's own private property is not liable to be seized in execution unless the plaintiff served the summons on him, or unless he can be brought within the provisions of O. XXI, r. 50 of the Civil Procedure Code.

Where a suit is brought against a firm and the firm is dissolved during the pendency of the suit, the plaintiff can still proceed against the firm, but he cannot proceed against any partner individually, if he knew the firm had been dissolved before proceedings had been taken. **B** ADIVEPPA SHIDLINGAPPA HANCHIMAL *v.* PRAGJI MOHANJI LOHANA, 26 Bom. L. R. 388; (1924) A. I. R. (B.) 366 **773**

——— **Sch. I, Arts. 166, 181.** *See* CIVIL PROCEDURE CODE, s. 47, O. XXI, RR. 22, 90 **92**

——— **Art. 181.** *See* CIVIL PROCEDURE CODE, O. XXXIV, RR. 7 (*c*), 8 (4) **706**

——— **Art. 181.** *See* JUDICIAL COMMITTEE ACT, s. 23 **85**

Lord Canning's Proclamation of 1858. *See* OUDH ESTATES ACT, ss. 8, 10, 14, 15, 22 **333**

Lunacy Act (IV of 1912), ss. 38, 62—*Inquisition, application for—Procedure—Court, duty of.*

To have an inquisition into the state of health, the state of mind, the state of property and general capacity of a person under section 38 or section 62 of the Lunacy Act, is a thing which affects that person so prejudicially that it ought not to be taken except it be first ordered upon a careful consideration of evidence.

Nothing is contained in the Act itself to direct or guide a Judge as to how he shall consider applications for an inquisition and probably no rules exist for dealing with the matter; but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, an inquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses. **C** MUHAMMAD MUNWAR SULTAN *v.* SHAMSUNNISSA BEGUM, 28 C. W. N. 513; 51 C. 480; (1923) A. I. R. (C.) 658 **798**

Madras Civil Rules of Practice, r. 161 (3). *See* CIVIL PROCEDURE CODE, s. 11, EXPL. IV **103**

Madras District Municipalities Act (V of 1920), ss. 9, 303 (2) (4)—*Madras Municipal Election Rules, r. 17 (1)—Ballot papers marked with voter's number, validity of—Election void—Procedure—Fresh election.*

Where at an election held under the Election Rules framed under section 303 (2) of the Madras District Municipalities Act of 1920, the Polling Officer, when giving out the ballot papers to the voters, put on the back of the ballot papers not only the serial number but also the voter's own number on the electoral roll:

Held, (1) that the voter's number on the back of the ballot paper is a mark within the meaning of rule 17 (1) of the Rules by which the voter may be afterwards identified and the ballot papers were, therefore, invalid;

(2) that all the votes cast being invalid, no proper election had taken place.

Section 9 of the Madras District Municipalities Act is not applicable to a case where an election has taken place but has been afterwards declared void and the retiring councillor cannot, in such a case, be declared to have been re-elected. A fresh election must, therefore, be held in such a case.

Rule 17 does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. **M** SETHURAMA MUDALIAR *v.* MANGALA GOUNDAR, 46 M. L. J. 494; 34 M. L. T. 204; 19 L. W. 632; (1924) A. I. R. (M.) 764 **401**

——— **s. 303 (2) (b),** *rules framed under, r. 6—Civil Procedure Code (Act V of 1908), ss. 94, 151, O. XXXIX, r. 2—Election petition—Civil Procedure Code, applicability of—Elected candidates, whether can act pending enquiry—Injunction, interim—Jurisdiction of Court to grant injunction—Inherent power of Court.*

The application of the Civil Procedure Code to election enquiries is definitely restricted in r. 6 of the Madras Municipal Elections Rules framed under section 303 (2) (*b*) of the Madras District Municipalities Act to the trial of suits.

An *interim* injunction can only be within the jurisdiction of the Judge holding an inquiry into an election petition if that injunction is for the purposes of and in furtherance of the trial which he is conducting. If a Court cannot act under section 94 and O. XXXIX of the Civil Procedure Code, section 151 of the Code does not extend its powers.

Under the Madras Municipal Election Rules framed in accordance with section 303 (2) (*b*) of the Madras District Municipalities Act of 1920, a Councillor whose election is impugned on account of alleged irregularities in the election is entitled to sit in Council till his election is set aside by the Judge on inquiry.

Under rule 6 of the Madras Election Rules, a District Judge inquiring into an election petition has no jurisdiction to grant an *interim* injunction restraining an elected candidate from taking his seat pending the disposal of the election petition.

The expression "procedure applicable to the trial of suits" in rule 6 of the Madras Election Rules does not attract the provisions of section 94 or O. XXXIX of the Code of Civil Procedure to an election inquiry under the Act, nor has the Judge any inherent power to issue an injunction. **M** VENKATASUBBIAH CHETTIAR *v.* SESHA AIYAR, 20 L. W. 148; (1924) M. W. N. 538; 47 M. L. J. 201; 47 M. 700; (1924) A. I. R. (M.) 797 **664**

Madras District Municipalities Act—contd.

Madras District Municipalities Act—contd.

——— **s. 303 (2) (4),** *rules framed under, rr. 14, 17—Municipal Election—Ballot papers initialled and marked on face, validity of—Identification of voters—Marking of ballot papers, rule requiring, whether* ultra vires.

Where at a Municipal Election held under Rules framed under section 303 (2) (4) of the Madras District Municipalities Act of 1920, the Polling Officer initialled the ballot papers not only on the back as directed in Rule 14 (1) but also placed his initials on the face of the ballot papers:

Held, (1) that the action of the Polling Officer did not *per se* contravene Rule 14 (1) of the Rules and did not invalidate the votes:

(2) that such act did not in any way facilitate the identification of the particular voters and consequently the provisions of Rule 17 (1) were not infringed thereby.

Where the serial number appearing in the counterfoil of the ballot papers was printed not only on the back of the ballot papers but also upon the face, although the form prescribed under the Rules distinctly stated that the numbers shall be printed only upon the back:

Held, that the number was not a mark by which the voters could be identified within the meaning of Rule 17 (1) and the placing of the number on the face of the ballot papers did not invalidate the votes.

It must be only from the mark itself that the means of identification must be obtained so as to constitute a violation of the secrecy, within the meaning of Rule 17 (1) of the Madras Municipal Election Rules.

The rule providing for the marking of the serial number on the back of the ballot paper is a reasonable one made for the identification of the ballot paper and for the prevention of insertion of false papers and is not *ultra vires* of the Government. **M** VISWANATHA PILLAI *v.* PERIASAMI PILLAI, 46 M. L. J. 491; 34 M. L. T. 207; 19 L. W. 633; (1924) M. W. N. 631; (1924) A. I. R. (M.) 766 **573**

Madras Enfranchised Inams Act (IV of 1862), operation of. *See* INAM **557**

Madras Enfranchised Inams Act (IV of 1866), operation of. *See* INAM **557**

Madras Inams Act (VIII of 1869), operation of. *See* INAM **557**

Madras Municipal Election Rules, r. 17 (1). *See* MADRAS DISTRICT MUNICIPALITIES ACT, ss. 9, 303 (2) (4) **401**

Majority Act (IX of 1875), s. 2—"*Acting in the matter of dower,*" *meaning of—Muhammadan minor, whether can enter into contract for dower—Contract Act (IX of 1872), s. 11.*

The words in section 2 of the Indian Majority Act 'to act in the matter of dower' mean to do all acts in relation thereto, including entering into a contract for payment of dower, which are permissible under the personal law of the party free from the restriction of age put by the Indian Majority Act.

Section 11 of the Indian Contract Act does not militate against this view.

Majority Act—concld.

If a Muhammadan minor who is a major by his personal law but a minor under the Indian Majority Act enters into a marriage, as he is capable of doing, he must enter into a contract for payment of dower. Even if he does not do so, the law will presume such contract.

Section 2 of the Indian Majority Act has reserved to those who have under their personal law attained majority but have not yet attained it under that Act the right to act as majors in matters of marriage and dower and the fixing of the amount and nature of dower is an act in the matter of dower. **C** MOZHARUL ISLAM *v.* ABDUL GANI **914**

Malicious prosecution—*Test as to who is prosecutor—Evidence recorded in criminal proceedings can be treated as evidence in civil case with consent of parties.*

In a case of malicious prosecution the question is who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion: the conduct of the complainant before and after making the charge must also be taken into consideration.

The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry. Therefore, though technically the prosecution may not have been instituted on the complaint of a person yet if he took a most active part in carrying it on, engaged a Pleader at his expense to assist the Prosecuting Inspector, and through this Pleader himself controlled the examination and cross-examination of the witnesses in the case, for all practical purposes he is the prosecutor.

As a general rule a record of evidence given by a witness in the previous judicial proceeding cannot be used as evidence in a subsequent judicial proceeding between the same parties, unless, the conditions which are specified in section 33 of the Indian Evidence Act exist. But when in a civil suit the parties have agreed to the admission of such evidence, the irregularity of procedure is cured.

A civil suit is a proceeding *inter parties* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be: and when the Trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal.

Where the whole result of a civil case can be determined by consent of the parties, it is equally open to them to agree to treat statements as evidence which might not otherwise be so. **A** RADHA KISHAN *v.* KEDAR NATH, 22 A. L. J. 761 **874**

Minor, defendant—Guardian *ad litem,* appointment of—Notice to person in charge of minor, absence of, effect of. *See* CIVIL PROCEDURE CODE, O. XXXII, RR. 3, 5 **541**

Mortgage—*Adverse possession of mortgagee against mortgagor—Rival mortgagors—Possession*

of mortgagees, whether adverse against each other—Plea of adverse possession—Right of Court to raise suo moto.

The possession of a mortgagee is not adverse to his mortgagor. But where there are rival mortgagors, the possession of their respective mortgagees cannot but be mutually adverse.

A Court is justified in raising *suo moto* the plea of adverse possession as the point is one of limitation. **O** RAM CHHOR BAKSH *v.* RAM SURAT **582**

———, agreement to lend money on—Suit on agreement, whether maintainable. *See* SPECIFIC RELIEF ACT, s 42 **5**

——— by member of joint family—Sale of equity of redemption—Suit to redeem mortgage—Limitation. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 15 D **763**

——— *Interest, whether charge upon property.*

The mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate. **P C** GANGA RAM *v.* NATHA SINGH, (1924) A. I. R. (P. C.) 183; 22 A. L. J. 688; 47 M. L. J. 64; 20 L. W. 101; 26 Bom. L. R. 750; 10 O. & A. L. R. 771; 35 M. L. T. 141; (1924) M. W. N. 599; 2 P. L. R. 257; 11 O. L. J. 534; 5 L. 425 **820**

——— *Mortgagee in possession—Government revenue and cessess, liability to pay—Redemption—Accounts—Oudh Local Rates Act (III of 1878), s. 5—Mortgagee in possession, whether landlord.*

In British India, a mortgagee in possession of immoveable property under a mortgage made before the Transfer of Property Act came into force, was, under the ordinary law then in force, bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property, the Government land revenue which might during his possession be assumed upon it, and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against his mortgagor in the accounts.

A mortgagee in possession of the mortgaged property is the "landholder" within the meaning of section 5 of the Oudh Local Rates Act. **P C** ABID HUSAIN KHAN *v.* KANIZ FATIMA, (1924) A. I. R. (P. C.) 102; 10 O. & A. L. R. 281; 22 A. L. J. 284; 34 M L. T. 78; 19 L. W. 703; 46 A. 269; 27 O. C. 72; 11 O. L. J. 427; (1924) M. W. N. 657 **1019**

——— *Mortgagee—Redemption—Adverse possession.*

A mortgagee cannot deny the right of the mortgagor or his successor-in-interest to redeem the mortgage so long as the equity of redemption subsists nor can he set up or acquire title by adverse possession so long as the right to redeem subsists and is not barred by limitation. **A** BAKHA SINGH *v.* RAM NARAIN SINGH, 22 A. L J. 905 **935**

——— of moveable property not in existence, validity of. *See* TRANSFER OF PEOPERTY ACT, s. 100 **297**

——— *Prior and subsequent mortgagees—Intermediate mortgagee, failure of, to appear and contest suit by prior mortgagee, effect of—Priority.*

Where a prior mortgagee takes a subsequent mortgage in renewal of the prior mortgage and sues on the basis of both of them claiming to be redeemed by an intermediate mortgagee and the latter omits to appear and assent his own priority over the plaintiff and does not raise any contest in the suit he is not thereby precluded from suing to work out his own rights on foot of his mortgage in a subsequent suit of his own. **N** LAXMAN *v.* JANOO **389**

——— *Redemption, right of—Stipulation nullifying right, whether enforceable—Long term, whether clog on redemption—Transfer of Property Act (IV of 1882), s. 60.*

The right of redemption is an absolute right provided by section 60 of the Transfer of Property Act, and no contract which is designed to take away that right can be enforced.

Any stipulation in the deed itself which is likely to nullify the right of redemption must be treated as a clog on redemption.

Where the term of a mortgage has been fixed, there can be no redemption within that period.

A term of sixty years in a mortgage is not a clog on redemption by itself. **A** NARAIN *v.* JAGAN **728**

——— *Redemption, suit for—Burden of proof—Admission of defendant, effect of.*

Where a plaintiff in a suit for redemption of a mortgage fails to prove the mortgage on which he relies and which he alleges in his plaint he cannot succeed upon the mere fact that the defendant admits that he is the mortgagee of the land. **O** JAGJIWAN SINGH *v.* GAJRAJ SINGH, 10 O. & A. L. R. 298 **543**

———, suit on—Plea of legal necessity, scope of—Rate of interest—Burden of proof. *See* PLEADINGS **791**

——— void, possession under—Mortgage, converted into sale, void—Possession, whether adverse—Redemption, right of. *See* ADVERSE POSSESSION **561**

Muhammadan Law—*Representation of family, doctrine of, whether recognised.*

In Muhammadan Law, there is no representation of the family as under the Hindu Law. **C** LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

——— **Dower** *debt, nature of—Husband's estate, possession of—Consent of heirs.*

The widow of a Muhammadan of the Sunni School has for her dower the rights of an ordinary creditor and can be given, only by the consent of her husband or his heirs a right to possession of

the estate until by the rents and profits the debt is liquidated. **C** SAHU BIBI *v.* ISMAIL SHEIKH, 27 C. W. N. 1013; 51 C. 124; (1924) A. I. R. (C.) 508; 40 C. L. J. 171 **294**

——— **Dower**—*Debt—Widow's right—Charge—Decree for* mesne profits *against husband's estate—Precedence of widow's claim—Widow forestalling other creditors—Fraud—Suspicion—Legal testimony.*

A Muhammadan widow has a right to payment of her dower debt. That right does not amount to a charge on the property, but if the widow is in possession at the death of her husband, she is allowed to retain possession until the debt is paid.

A Muhammadan widow is a creditor of her sons to the extent of her dower-debt and her right, which is created on the date of her marriage, must have precedence over the right of a person who subsequently obtains a decree for *mesne profits* against the estate.

If a widow wishes to forestall other creditors and obtain what is due to her first, there is nothing fraudulent in her action in carrying such a wish out.

A Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. **O** ZAMIN HUSAIN KHAN *v.* TASADDUQ ALI KHAN **692**

——— **Gift**—*Possession, transfer of—Property in possession of mortgagee.*

A Muhammadan father made a gift of a house and a piece of land in favour of his daughter by registered deed. The land was in possession of a mortgagee. Possession of the house was transferred to the donee immediately and she was directed to take possession of the land on redemption. After the donor's death the donee got possession of the land from the mortgagee in pursuance of the gift:

Held, that the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

Quære:—Whether the equity of redemption in property which is in the possession of a mortgagee can form the subject-matter of a valid gift according to Muhammadan Law. **B** HASHIMBI YAKUBSAHEB BEG *v.* AJAMATBI MAKTUMSAHEB BEG, 26 Bom. L. R. 337; 48 B. 396; (1924) A. I. R. (B.) 410 **208**

——— **Guardian, de facto**—*Alienation of minor's property.*

Under Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. **L** MUHAMMAD SADDIQ *v.* KHUDA BAKHSH, 6 L. L. J. 227; (1924) A. I. R. (L.) 564 **506**

——— **Inheritance**—*Renunciation of inheritance—Bequest as to more than one-third of property — Bequest to heir—Consent of heirs—Divorce in death-illness — Widow, rights of —*Marz-ul-maut, *what is—Limitation Act (IX of 1908), Sch. I, Art. 127, application of—Undivided property of Muhammadan family—Suit to recover share—"Joint family," meaning of.*

A transfer or a renunciation of a right of inheritance before it has vested is prohibited under the Muhammadan Law. Rights of inheritance only arise after the death of the person whose estate is in question. A Muhammadan cannot renounce his right of inheritance before that right has become vested by the death of the person to whom he is entitled to succeed

A bequest by a Muhammadan can only take effect to the extent of one-third of the net assets remaining after payment of his funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby, and a bequest to a person entitled to inherit is void unless the other inheritors give their consent, after the death of the testator, to its taking effect.

A divorce pronounced by a Muhammadan in death illness or *marz-ul-maut* does not deprive the widow of her right of inheritance, where the husband dies during the period of her *iddut*.

In order to establish *marz-ul-maut* there must be present at least three conditions, (*a*) proximate danger of death, so that there is a preponderance of apprehension or *khauf* that at a given time death must be more probable than life, (*b*) some degree of subjective apprehension of death in the mind of the sick person, and (*c*) some external *indicia*, chief among which would be the inability to attend to ordinary avocations.

A too narrow a view should not be taken of the doctrine of death-illness.

Article 127 of the Schedule to the Limitation Act does not apply to a suit to recover share of undivided property of a family governed by Muhammadan Law. The words "joint family" in the Article qualify the word "property" and refer to a joint family as conceived by Hindu Law. They cannot apply to a Muhammadan family as such, where each member holds his share in severalty.

Where on the death of a Muhammadan, the only male member of the family assumes management of the estate, there being other females entitled to shares therein, the natural presumption is that he enters upon the estate as agent or manager for them, and on his own behalf. **S** BHAGBHARI *v.* KHATUN, 16 S. L. R. 25 **118**

——— **Minor**, whether can enter into contract for dower. *See* MAJORITY ACT, s. 2 **914**

——— **Wakf**, *constitution of—Intention—Grant by Hindu to Muhammadan community, whether constitutes* wakf.

In order to constitute a *wakf* under the Muhammadan Law, it is not necessary that the term '*waqf*' be used in the grant, provided from the general nature of the grant itself that tenure can be inferred.

Muhammadan Law– concld.

Quære.—Whether a grant by a Hindu to a Muhammadan community is incompetent as the foundation of a *waqf*. **P C** MAHOMED RAZA *v.* YADGAR HUSSAIN, (1924) A. I. R. (P. C.) 109; 7 N. L. J. 116; 51 C. 446; (1924) M. W. N. 447; 20 L. W. 3; 28 C. W. N. 937 **645**

——— **Wakf**—*Dedication, proof of—Burial of saint in plot of land*–Sajjadanashin *without* wakf, *status of.*

The mere burial of a saint in a plot of land and the performance of his *Urs* for some years does not convert the plot of land into trust property.

Where a person asserts that certain property is *wakf* the *onus* is on him to establish a dedication of the property, express or implied, to public religious uses.

In the absence of a *wakf*, the title of *Sajjadanashin* must be regarded as a mere courtesy title. **L** ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN, (1924) A. I. R. (L.) 58 **765**

——— ——— Mutwalli, *who may be appointed—Income to be applied to upkeep of mosque and balance to be appropriated by* Mutwalli, *legality of—Procedure—Final decree, date fixed for passing—Decree passed before date fixed, legality of.*

There is nothing contrary to Muhammadan Law in a trust which provides that the income of the *wakf* property is to be applied, in the first instance to the upkeep of a mosque, and that the residue, if any, should be the remuneration of the *Mutwalli.*

In the absence of a specific provision as to the appointment of the *Mutwalli* of a *wakf*, the descendants of the *wakif* have the first claim to be appointed *Mutwallis.*

Where a date is fixed for the passing of a final decree, the Court acts illegally in passing the final decree before the date fixed. **L** ZULFIKAR ALI *v.* NABI BAKHSH, 6 L. L. J. 155; (1924) A. I. R. (L.) 459 **324**

Negligence, what constitutes—Perils of sea. *See* BILL OF LADING **154**

Negotiable Instruments Act (XXVI of 1881), ss. 9, 118—*Holder in due course—Presumption—Burden of proof—Companies Act (VII of 1913), s. 89—Manager of Bank, whether has authority to transfer negotiable instrument.*

Under section 118 of the Negotiable Instruments Act it is a legal presumption that every negotiable instrument is made or drawn for consideration, and, that every transfer of it is also for consideration, and further, that the holder of a negotiable instrument is a holder in due course. The *onus* is, therefore, upon the person challenging the rights of the transferee of a negotiable instrument to prove facts which would show that such transferee is not in fact a holder in due course. For instance, he must show either that the holder received the instrument without consideration or that he had sufficient cause to believe that there was a defect in the title of his transferor to the instrument.

Negotiable Instruments Act—contd.

The manager of a Bank has authority to make a valid transfer of a negotiable instrument on behalf of the Bank. **L** HINDUSTAN ASSURANCE AND MUTUAL BENEFIT SOCIETY, LD. *v.* GURDIT SINGH, 6 L. L. J. 183; (1924) A. I. R. (L.) 462 **741**

——— **ss. 35, 93, 105, 106**—*Pro-note payable on demand—Endorsement—Payment by maker—Cause of action against endorser—Delay in presentation—Notice of dishonour—Endorser's liability—Limitation.*

The liability of an endorser of a negotiable promissory note arises out of the endorsement and not on the note. Therefore, the cause of action against him cannot arise earlier than the endorsement.

A payment by the maker of a note saves limitation against persons liable on the note but not against those liable on the endorsement.

The extent and nature of the liability of the endorser of a note payable on demand is not governed by section 35 of the Negotiable Instruments Act. Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. If it is not so presented, the endorser is discharged.

Where an endorsee presented a note to the maker for payment nearly nine months after endorsement and a part-payment of one Rupee was endorsed on the note by the maker and notice of dishonour was given to the endorsee only just before suit, in a suit against the maker and endorsee more than three years after endorsement:

Held, that the suit was barred by limitation as against the endorser even if he was at all liable. **M** JAGANNATHA REDDIAR *v.* LAKSHMANA REDDIAR, 47 M. L. J. 475 **932**

——— **ss. 43, 44, 45, 118**—*Cheque—Consideration—Holder in due course—Presumption—Partial consideration—Decree against drawer, whether can be passed.*

Under section 118 of the Negotiable Instruments Act there is a presumption that a cheque was drawn for consideration, that an endorsement appearing on it was made for consideration and that the endorsee is a "holder in due course." The presumption is a rebuttable one and it is open to the drawer or the payee of cheque to prove that the cheque was drawn without consideration, or that the endorsement was made without consideration, but so long as the presumption is not rebutted by evidence it must be presumed that the cheque was drawn for consideration and that the endorsee is a holder in due course.

Where the drawer of a cheque admits partial consideration for the cheque, or partial consideration is proved against him a decree can be passed against him to the extent of the consideration admitted by him or proved against him. **Pat** KISHEN PRASAD *v.* SASSARAM LIME, LTD., 2 P. L. R. 54; (1924) A. I. R. (Pat.) 521 **572**

——— **s. 118**—*Promissory note, suit on—Plaintiff abandoning recital—Consideration partly cash and partly by way of reducing defendant's liability—Proof—Plaintiff, what can recover.*

Negotiable Instruments Act—concld.

Plaintiff sued to recover Rs. 8,000 from the defendant on the basis of a promissory note executed by the latter. Defendant admitted having executed the promissory note but denied having received any consideration therefor. Plaintiff thereupon abandoned the recital in the promissory note and tried to prove that defendant had got the benefit of Rs. 8,000 partly in cash and partly by reduction of his liabilities towards another firm. He failed to prove the latter part of his case:

Held, that under the circumstances plaintiff was entitled to recover only what had actually been paid by him to the defendant. A SHAMBHU DAYAL *v.* LALLU MAL, (1924) A. I. R. (A.) 256 **717**

Notice, absence of—Suit against Railway for damages for loss of goods—Court holding notice not necessary—Revision, whether lies. *See* CIVIL PROCEDURE CODE, s. 115 **205**

———, service of—Representative suit, maintainability of—Some of several representatives not joining in suit—Fresh leave, if necessary—Duty of Court. *See* CIVIL PROCEDURE CODE, O. I, R. 8 **26**

———, whether necessary—Denial by Railway Company of receipt of consignment. *See* RAILWAYS ACT, s. 77 **725**

———, whether necessary—Suit against Public Officer—Tortious act. *See* CIVIL PROCEDURE CODE, ss. 80, 100 **72**

Oudh Civil Courts Act (XIII of 1879), s. 17 *See* CIVIL PROCEDURE CODE, s. 115 **694**

Oudh Civil Digest, para. 272, cls. vi, vii, *applicability of—Confession of judgment—Compromise after issues—Pleaders' fees, scale of.*

Clause VII of para. 272 of the Oudh Civil Digest applies only to cases which are decided on confession of judgment made at once and not to cases in which some degree of contest has been made. If a case has gone so far as the framing of issues Pleaders' fees should be charged at the full scale under clause vi of para. 272. O BALDEO SINGH *v.* JAI SINGH, 10 O. & A. L. R. 325 **504**

Oudh Estates Act (I of 1869), ss. 8, 10, 14, 15, 22—*Second Summary Settlememt of 1858, effect of—Lord Canning's Proclamation of 1858, effect of—Settlement of property after confiscation—Exclusive ownership—Trust created in favour of another, whether binding—Transfer or recognition of antecedent rights—Transfer in favour of immediate successor, effect of.*

A *Talukdar* possessed of the legal estates in the *Talukdari* property may bind himself by equitable obligations to allow beneficial interests in the same property in favour of a designated individual or in favour of a joint Hindu family of which he himself may be a member and that he does so in the exercise of his powers of alienation *inter vivos* or by making a testamentary disposition.

Notwithstanding the strong language of Oudh Estates Act, and in particular the enactment in section 10 that the Courts are to accept the lists framed under the Act as conclusive that the persons included in them are *Talukdars* or grantees, and,

Oudh Estates Act—contd.

those of section 11; the Courts may nevertheless go behind the Act to the extent at least of recognising the trusts, and may give effect to beneficial titles distinct from the statutory title under the Act.

Section 15 of the Oudh Estates Act as well as section 14 deal with cases of transfers before the passing of the Act as also with cases after the passing of that Act.

In the case of a transfer by a *Talukdar*, it is the date of the transfer which counts in determining whether the transferee occupies or not the particular status assigned to him by the provisions of sections 14 and 15 of the Oudh Estates Act.

The effect of the proclamation of Lord Canning of the 15th March 1858, was to divest all landed property from the proprietors in Oudh and to transfer it and vest it in the British Government.

A proprietor in Oudh died in 1849 and was succeeded by his two sons *B.* and *G.* After confiscation of the property under Lord Canning's proclamation, the Second Summary Settlement of the estate was made with *B.* In 1860 he got the name of *G.* also entered in the *Khewat* in the column of Zamindar as having equal share with himself and subsequently in the same year, when enquiry was made from him by the Government as to the family custom of inheritance he declared that he and his brother were successors to the heritage in equal shares and that in future the descendants of them both would succeed according to religious ordinance and family usage. In 1867 *G* applied for partition but under a compromise agreed to accept an annuity. On the passing of the Oudh Estates Act, the name of *B* was entered in list I and list III prepared under section 8 of the Act. *B* died in 1871 and *G* succeeded to the *Taluka*. On the latter's death in 1919 a dispute arose between his widow and the daughter of *B* as to the right to succeed to the estate:

Held, (1) that at the time of the Second Summary Settlement, after confiscation of the estate under Lord Canning's Proclamation, *B* acquired exclusive title to the property;

(2) that, however, *B* by recognising the title of *G* as to one-half of the interest in the estate imposed a trust upon himself in favour of the latter to that extent;

(3) that this trust was discharged by the compromise under which *G* accepted an annuity and relinquished his right to partition;

(4) that the compromise could not be considered as a re-transfer by *G.* in favour of *B.* It was a recognition of antecedent rights and not a transfer by one brother to the other;

(5) that, therefore, on the date of the passing of the Oudh Estates Act, *B* was a *Talukdar* within the meaning of that Act without any equitable obligations attached to the estate and on his death *G* was his lawful successor under section 22 of the Act and on the death of the latter, his widow was entitled to succeed;

(6) that even if there was a transfer in favour of *G.* the result would be the same as it would be a transfer in favour of the immediate successor which would not take the estate out of the

Oudh Estates Act--concld.

operation of the Oudh Estates Act under section 15 of the Act.

Per *Dalal, J. C.*—Section 15 of the Oudh Estates Act does not apply to an estate not under transfer at the time of the passing of the said Act. Whatever transfers may have been made before the passing of the Act, if at the passing of the Act, the property was in possession of the *Talukdar* unburdened by any trust or vested interests, the provisions of section 15 would not apply. **O** INDAR KUAR *v.* NAND RANI KUAR, 10 O. L. J. 657; (1924) A. I. R. (O.) 273 **333**

Oudh Laws Act (XVIII of 1876), s. 9. *See* PRE-EMPTION **83**

Oudh Local Rates Act (III of 1878), s. 5. *See* MORTGAGE **1019**

Oudh Rent Act (XXII of 1886), ss. 47, 48—*Oudh Rent (Amendment) Act (IV of 1921), s. 4—'Payable' in section 48, meaning of—Enhancement of rent, illegal—Agreement to pay—Arrears, suit to recover, maintainability of.*

The word "payable" in section 48 of the Oudh Rent Act as amended by the Act of 1921 means payable under the Act which was in force at the time.

No agreement made between a landlord and tenant in contravention of the provisions of section 47 of the Oudh Rent Act, could be a valid agreement. Section 4 of the Oudh Rent (Amendment) Act of 1921 merely restricts a landlord from ejecting a tenant or enhancing his rent otherwise than in accordance with the provisions of the Act. It does not enable a landlord to claim arrears of rent under an agreement that was invalid, under section 4 of the Oudh Rent Act of 1886, and was, therefore, no agreement at all. **O** GUR DIN *v.* SIRAJUNNISSA, 10 O. & A. L. R. 169; 11 O. L. J. 445 **513**

——— **ss. 67, 68.** *See* LANDLORD AND TENANT **199**

——— **s. 108, sub-s. (10) (b),** *scope of—Jurisdiction of Civil and Revenue Courts—Suits for possession of occupancy holding.*

Sub-section (10) (*b*) of section 108 of the Oudh Rent Act is not intended to be limited to suits against the landlord. It extends to every suit for the possession of an occupancy holding which must be brought and decided in the Revenue Court.

Per *Pullan, A. J. C.*—It is doubtful whether sub-section (10) (*b*) of section 108 of the Oudh Rent Act is intended to apply to suits which are not brought against the landlord.

The provisions of the Oudh Rent Act would be rendered nugatory if a party were allowed to let slip the remedy afforded by sub-section (10) of section 10[illegible] against the party from whom his relief can be obtained and institute proceedings in Civil Courts against another party who is entirely unconcerned with that relief. **O** BIKARMAJIT SINGH *v.* BANSRAJI, 10 O. & A. L. R. 761 **271**

——— **ss. 108, cl. 15, 124, cls. (b), (c)**—*Profits, suit for*—Lambardar, *failure of, to file accounts—Gross rental, liability on.*

Oudh Rent Act—1886—concld.

In a suit for profits against a *lambardar*, the latter ought to file accounts especially when he is literate and on his failing to do so, he is liable to have a decree passed against him based on gross rental. **O** JAGRANI *v.* IQBAL NARAIN, 9 O. & A. L. R. 485; (1924) A. I. R. (O.) 347 **441**

——— **ss. 119, 135**—*Civil Procedure Code (Act V of 1908), ss. 100, 115—Appeal to District Judge from appellate decree of Collector—Second appeal, grounds for—Finding of fact—Decision of District Judge as Rent Court—Revision, whether competent.*

The High Court has jurisdiction to interfere in revision with a decision of a District Judge acting as a Rent Court, under the provisions of section 115 of the Civil Procedure Code read with section 135 of the Oudh Rent Act.

By virtue of the opening words of section 119 of the Oudh Rent Act, an appeal to the District Judge from an appellate decree of the Collector will attract the provisions of section 100 of the Civil Procedure Code, and will be limited to grounds on which a second appeal is admissible.

The question whether a fact has been proved when evidence for and against has been properly admitted is a pure question of fact. **O** JAGANNATH PERSHAD *v.* BECHU, 9 O. & A. L. R. 931; 11 O. L. J. 77; (1924) A. I. R. (O.) 349 **327**

——— **s. 127**—*Trespasser—Ejectment—Jurisdiction of Civil Court.*

Section 127 of the Oudh Rent Act was enacted to give a landlord a swift remedy, through the Revenue Court for the collection of rent even from a trespasser. It does not deprive the landlord of his remedy to eject a trespasser through the Civil Court. **O** RAM CHARAN *v.* CHAMPAT SINGH, 9 O. & A. L. R. 770; 11 O. L. J. 11; (1924) A. I. R. (O.) 222 **819**

Oudh Rent (Amendment) Act (IV of 1921), s. 4. *See* OUDH RENT ACT, ss. 47, 48 **513**

Pensions Act (XXIII of 1871), s. 4—*Interpretation of Act—Suit for declaration of heirship to deceased pension holder—Specific Relief Act (I of 1877), s. 42—Nature of relief.*

The relief for a declaration of status is substantial relief *per se* and, under the provisions of section 42 of the Specific Relief Act, such a claim is maintainable though it has no reference whatsoever to any right as to any property.

In determining the application of section 4 of the Pensions Act, the Court should not inquire into the motives of the plaintiff. The fact that the plaintiff has the intention of using the declaration, which he may obtain from the Court, for the purpose of inducing the authorities concerned to accept his claim to the pension, cannot be either a bar to the maintainability of the suit for a declaration under section 4 of the Pensions Act, or a sufficient ground for dismissing it in the exercise of the discretion under section 42 of the Specific Relief Act.

The provisions of the Pensions Act being in derogation of the ordinary rights of a citizen must be construed strictly. **O** NAQI HUSAIN *v.* CHHAJI BEGAM, 10 O. & A. L. R. 908 **606**

Plaint, *signing of—Co-plaintiffs—Plaint not signed by all plaintiffs, effect of—Amendment.*

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Though the authority to bring a suit is a question of principle, the proper signing of the plaint is a matter of practice only and any mistake or omission therein may be amended at any time and authority to institute a suit may be established by other means besides the signature. **S** MOTHARAM DOWLATRAM *v.* PAHLAJRAI GOPALDAS **141**

Pleadings—*Mortgage, suit on—Plea of legal necessity, scope of—Rate of interest—Burden of proof.*

A plea in general terms as to the mortgage-bond in suit being illegal and without consideration and necessity opens the defence that there was no necessity to borrow at a high rate of interest, and the question being raised the onus is on the lender to prove that the necessity included borrowing on such terms.

As in all questions of onus, a certain amount of evidence may cause the onus to shift, and evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail. But when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. **P. C.** RADHA KISHUN *v.* JAG SAHU, (1924) A. I. R. (P. C.) 184; 5 P. L. T. 434; 26 Bom. L. R. 732; 20 L. W 285; 47 M. L. J. 329; 2 P. L. R. 259; 35 M. L. T. 177; 11 O. L. J. 652; 22 A. L. J. 959 **791**

———, plea of—New plea in appeal. *See* EASEMENT **197**

——— *Suit on promissory-note—Decree on previous oral settlement—Plaint not amended—Cause of action, whether can be changed.*

In a suit for recovery of money due on a promissory-note the Court found that the promissory-note sued on was a forgery but gave the plaintiff a decree on the basis of the oral settlement made between the parties before the promissory-note was given:

Held, that the suit was based throughout on the promissory-note and this having been found to be a forgery, the claim must necessarily fail. **L** RAJINDAR SINGH *v.* TEK CHAND, (1923) A. I. R. (L.) 628 **266**

——— *Variance in pleadings and proof—Hindu Law—Joint family property—Presumption of jointness—Conduct of parties when no evidence as to nucleus of joint funds—Hindu ladies' exclusion, when to be inferred—Duty of Court.*

Where it is alleged in the plaint that certain lands were acquired by *B* in respect of which the plaintiff could not possibly have any definite information and if it subsequently transpires in the course of the proceedings that it was not *B* but *S* who had acquired the lands for the joint family and as a member thereof, there is not such a variation in the plaintiff's case as would either disentitle him to a decree or discredit his case altogether,

Pleadings—*concld.*

In the absence of proof of division the legal presumption is that the normal state of every Hindu family is joint in food, worship and estate. The presumption, however, is not applicable after separation in the sense of disruption such as would put an end to a joint family.

Where there is no evidence as to nucleus it may be very readily presumed from the subsequent conduct of the parties, that the property was joint.

Where the question of inclusion of Hindu ladies is concerned, the Court has got to be exceedingly careful to come to a conclusion one way or the other, so long as it does not appear that they ceased to obtain their maintenance from the family. **C** KUMUDINI DASSYA *v.* MUKTA SUNDARI DASSYA **432**

Possession *and title—Long possession—Title not established—Right to continue in possession.*

A person in long anterior and peaceable possession at the time of the threat of dispossession is until the contrary is shown, entitled to maintain his possession against all but the true owner.

In a suit for declaration of title to land and for an injunction restraining defendant from disturbing possession, it was found that neither plaintiff nor defendant had established title but that plaintiff was in possession on the date of suit and for 11 years previously and that the defendant was never in possession:

Held, that the plaintiff was entitled to be maintained in possession. **M** PERIASAMI MUTHIRIAN *v.* ANANDAYI AMMAL, 20 L. W. 14; (1924) A. I. R. (M.) 722 **82**

———, *constructive—Title, absence of—Presumption.*

In the absence of title the law will raise from definite physical control of part of land a presumption of possession of that which the possessor has shown a clear and unambiguous intention to possess. **Pat** NARAYAN SINGH *v.* DILDAR ALI KHAN, 3 Pat 915 **544**

———, *suit for—Burden of proof.*

In a suit for possession a plaintiff must succeed on the strength of his own title and is not assisted by any weakness real or apparent, in the case for the defendant. **C** LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

Pre-emption—*Portion of property sold transferred by vendee—Suit for balance, whether maintainable.*

Defendant purchased certain property and sold a portion of it to *M.* who asserted a right of pre-emption. Plaintiff then sued to pre-empt the portion retained by the defendant, and the latter objected that a suit for pre-emption of a portion of the property purchased by him was not maintainable:

Held, that the defendant himself having parted with a portion of the property to *M.* could not object that a suit for pre-emption of the balance retained by him did not lie. **L** UDE RAM *v.* ATMA RAM, 5 L. 80; (1924) A. I. R. (L.) 431 **960**

Pre-emption—concld.

——— *Sale of share in law suit—Oudh Laws Act (XVIII of 1876), s. 9.*

By an agreement entered into between a vendor and the vendee, the latter undertook to meet the costs of the litigation in consideration of receiving half the property in the event of success. The vendee paid no money in cash to the vendor:

Held, that the agreement being the sale of a share in a law suit no right of pre-emption arose. O AJUDHIYA PRASAD *v.* RAM AUTAR 83

———-, whether allowable — Pre-emption suit against *benamidar*—Pre-emptor not entitled to preference over real vendee. *See* BENAMI TRANSACTION 42

Pre-emption decree, *compliance with—Money deposited in Court less than the decretal amount, effect of.*

Plaintiff obtained a decree for pre-emption on payment of a certain sum of money, and he was also awarded his costs. He paid the decretal amount into Court within the time fixed by the Court, and then attached out of it a sum representing the amount of the costs awarded to him. The vendee appealed and the decretal amount was enhanced, and the vendee was also awarded proportionate costs, after the decision of the appeal the plaintiff withdrew from Court the amount attached by him, but shortly after, and within the time allowed by the Appellate Court, he paid back into Court a larger sum of money which, however, together with the sum already in deposit in Court fell short of the amount fixed by the Appellate Court as payable by him:

Held, that plaintiff had failed to comply with the decree of the Appellate Court and his suit was, therefore, liable to be dismissed. O BHAGWANDIN TIWARI *v.* RAMADHAR TIWARI 540

———— —-, *compliance with—Short payment—Costs, whether can be deducted.*

It is the duty of a person holding a decree for pre-emption to take all precautions to ensure the carrying out of the terms of the decree.

A pre-emptor who has been awarded costs is entitled to deduct the amount of those costs from the pre-emption price at the time of payment. If, however, he does not choose to do so, and fails to pay the full amount mentioned in the decree within the period prescribed, there is no compliance with the terms of the decree. L WALI MAHOMED *v.* KAPURIA MAL, 2 L. L. J. 770 416

———— *Failure to comply with terms of decree, effect of.*

A compromise decree arrived at in a pre-emption suit provided that if the plaintiff failed to pay to the vendee a certain sum by a certain date his suit shall stand dismissed. Plaintiff paid the sum specified in the decree except 4 annas within the time specified and obtained possession of the pre-empted property. When the defendant discovered the deficiency in the deposit made in Court he applied for restoration of the pre-empted property to him and dismissal of the plaintiff's suit;

Pre-emption decree—concld.

Held, (1) that the Court had no jurisdiction to extend the time specified in the decree for payment of the amount;

(2) that there was no distinction in this respect between a decree passed on compromise and a decree passed after contest;

(3) that the decree not having been complied with the plaintiff's suit must be dismissed and possession of the pre-empted property restored to the defendant. L RAHMAT KHAN *v.* NAWAB KHAN 1012

Presidency Small Cause Courts Act (XV of 1882), s. 22, *application of—Suit cognisable by Small Cause Court instituted in High Court, effect of—Amount or value of subject-matter of suit, determination of—Presidency Small Cause Court, jurisdiction of—Suit for damages for trespass, whether cognisable by Small Cause Court—Construction of Statutes—Courts, duty of—Practice, questions of, how determined.*

On a true construction of section 22 of the Presidency Small Cause Courts Act, where a plaintiff institutes a suit of a character cognisable by the Small Cause Court, in the High Court, and estimates the amount or value of his claim in the plaint at a sum which is within the ambit of the jurisdiction of the Small Cause Court, that section is applicable to the suit, and the plaintiff must be taken to have deliberately accepted the risk to which the provisions of that section expose him.

The test of the amount or value of the subject-matter of a suit is to be determined by the amount set forth in the plaint. But by placing a fictitious value on his claim, the plaintiff is not at liberty to determine the tribunal by which the suit is to be tried.

A suit is cognisable by a Small Cause Court if in respect both of its character and the amount or value of its subject-matter it is within the jurisdiction of the Court.

A suit claiming damages for trespass to plaintiff's land by unauthorised deposit thereon of building materials is cognisable by a Small Cause Court.

In construing a Statute, Courts of Justice should endeavour to discover the meaning to be given to it by a consideration of its terms.

Questions of practice in India are to be determined in accordance with the principles laid down by the Courts in India. C CHANDMULL KANGORIA *v.* DEBI CHAND, 28 C. W. N. 6; 51 C. 62; (1924) A I. R. (C.) 405 317

———— **s. 22**—*Civil Procedure Code (Act V of 1903), s. 35—Suit dismissed on appeal—Costs of Trial Court—Appellate Court, power of.*

Where a suit for a Small Cause nature tried in the High Court is dismissed on appeal, the Appellate Court has power, in a proper case, to refuse to allow the costs in the Trial Court to the defendant. B MEHTA & Co. *v.* HEUREUX, 26 Bom. L. R. 382; (1924) A. I. R. (B.) 422; 48 B. 531 766

———— **ss. 38, 69**—*Reference under s. 69, form, contents and competency of—Application under s. 38, nature of.*

Presidency Small Cause Courts Act—concld.

A Small Cause Court is competent to make a reference to the High Court, under section 69 of the Presidency Small Cause Courts Act, upon an application made under section 38.

In order that a reference under section 69 of the Presidency Small Cause Courts Act may be in the proper form, there must be a statement of the facts of the case signed by the Judges who heard it; the point on which there is a difference of opinion must be formulated, and statements of the reasons assigned by each Judge in support of his view.

An application under section 38 of the Act is a stage in the suit which is not necessarily terminated by the decree, and attracts the operation of section 69. **C** CHAKRABARTY *v.* OLOF BORIN, 38 C. L. J. 275; 27 C. W. N. 883; 50 C. 919 **419**

Presidency Towns Insolvency Act (III of 1909), s. 30 (2). *See* INSOLVENCY **849**

——— **s. 41**—*Adjudication order annulled—Second application on same facts, whether maintainable.*

Where on the failure of an insolvent to apply for his discharge within the time provided by the Presidency Towns Insolvency Act, the order adjudicating him insolvent is annulled, he is not entitled to an order of adjudication upon a second application on the same facts and on the same materials. **C** BALLAR CHAND SEROJEE, *In re*, 27 C. W. N 739; (1923) A. I. R. (C.) 703 **651**

——— **s. 41**—*Insolvency Rules, r. 142 A—Insolvent, failure of, to apply for discharge—Registrar in Insolvency jurisdiction to annul adjudication—Review—Forum.*

Where an insolvent fails to apply for his discharge within the time fixed by rule 142 A of the Insolvency Rules of the Calcutta High Court, the Registrar in Insolvency has jurisdiction to make an order annulling the adjudication.

An order of annulment of adjudication made by the Registrar in Insolvency can only be reviewed by the Registrar, an application to the Court for review of such an order is not maintainable. **C** *In re* MEGHRAJ PUROHIT, 27 C. W. N. 916; (1924) A. I. R. (C.) 83 **840**

Principal and agent—*Negligence—Loss caused to principal—Damages, suit for—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 90—U. P. Municipalities Act (II of 1916), s. 326, applicability of, to suit against servant of Municipality.*

Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or overconfidence in the honesty of others, such misconduct on the part of the agent is actionable.

Where the accountant of a Municipality was able to embezzle large sums of municipal revenue owing to the disregard by the Executive Officer of the Municipality of the rules and directions laid down by the Municipality for his guidance in such matters and the Municipality sued the accountant and the Executive Officer to recover the amount embezzled:

Held, (1) that the suit was governed by Article 90 of Schedule I to the Limitation Act;

(2) that the misconduct of the Executive Officer in disregarding the rules and instructions laid down for his guidance made him liable to the Municipality in respect of items of the receipt of which he had personal notice and the embezzlement of which he failed to prevent, and of items the embezzlement of which would have been prevented by the most ordinary and casual scrutiny of the entries to which the Executive Officer appended his signature by which he certified to their correctness.

Quare:—Whether section 326 of the U. P. Municipalities Act is applicable to a suit by a Municipal Board against one of its own servants. **A** MUKERJI *v.* MUNICIPAL BOARD, BENARES, 22 A. L. J. 26; 46 A. 175; (1924) A. I. R. (A.) 467 **241**

——— *Rendition of accounts, where made—Suit to recover money due from agent, where lies—Jurisdiction.*

Unless the contract clearly indicates the contrary, a commission agent carrying on independent business who becomes a factor entrusted with goods of his principal with wide powers has no doubt eventually to account to his principal but the accounting must necessarily be due at the place where all the business is transacted.

Plaintiff who carried on business in the District of Badaun appointed defendant who carried on business at Bombay, as his *pakka ashtia*. In the course of the dealings between the parties payments were made by the defendant by part and statements of account sent by post to Badaun. Default having been made in payment plaintiff filed a suit at Budaun to recover money alleged to be due from the defendant commission agent on account of profits on sales improperly retained by the latter:

Held, that the Budaun Court had no jurisdiction to entertain the suit. **A** TIKA RAM *v.* DAULAT RAM, 22 A. L. J. 591; 46 A. 465; (1924) A.I. R. (A.) 530 **661**

Probate and Administration Act (V of 1881), ss. 86, 90—*Order granting permission to sell immoveable properties—Appeal, whether lies—'Rules' in s. 86, meaning of—Permission to sell when to be granted—Dispute as to title—Incumbrances—Enquiry.*

The word 'rules' in section 86 of the Probate and Administration Act, means rules of procedure regarding appeals laid down in the Civil Procedure Code.

The meaning of section 86 of the Probate and Administration Act is that all orders made by the District Judge or District Delegate by virtue of the powers conferred upon him under the Act are subject to appeal in accordance with the rules of procedure laid down in the Code of Civil Procedure.

Under section 86 of the Probate and Administration Act, an appeal lies to the High Court against an order passed by a District Judge granting permission to an administrator to dis-

pose of immoveable property under section 90 of the Act.

It is not desirable to grant permission to an administrator to sell immoveable properties not in his possession to which third parties claim an absolute title, or which are subject to ostensible incumbrances, unless it is proved that other properties, not the subject of contention, are not available for sale. Nor should permission be granted unless the Court is satisfied that the sale is necessary and in the interests of the estate as a whole.

It is not legally necessary for letters of administration to the estate of a Burman Buddhist to be taken out. **R** HAJI PU *v.* TIN TIN, 2 R. 117; (1924) A. I. R. (R.) 237 **746**

Procedure *--Relief available in suit or in execution of decree--Fresh suit, whether maintainable.*

It is not permissible to a party to a suit to bring a separate suit to obtain the reliefs which were available to him in the previous suit itself or in execution of the decree in that suit. **C** SAROJ BANDHU BHADURI *v.* MANIK SHEIKH **917**

Pro-note--*Endorsement by guardian of minor—Endorsement in personal capacity, validity of.*

Where the endorsement of transfer of a pro-note was signed by the guardian of the minor son of the payee, but there was nothing either in the body of the note or appended to the signature to show that she signed as guardian:

Held, that the transferee of the note could not be regarded as the holder of the note and had no *locus standi* to maintain a suit upon it. **M** SUPPAI GOUNDAN *v.* KANDASWAMI GOUNDAN, 19 L. W. 560; (1924) A. I. R. (M.) 617 **567**

Provident Funds Act (IX of 1897), ss. 2, 4—*Civil Procedure Code (Act V of 1908), s. 6—Compulsory deposit, what is—Attachment, exemption from—Rules framed by Government, validity of.*

The test as to whether a deposit in a Provident Fund is or is not a compulsory deposit within the meaning of section 2 of the Provident Funds Act, is whether the money is repayable on demand or at the option of the subscriber or depositor; if it is not, the deposit is a compulsory one and is exempt from attachment by a Civil Court under section 4 of the Act.

It is competent for Government to issue rules relating to the internal management of a Provident Fund, but the Provident Funds Act does not empower Government to prescribe by rules the procedure which shall be followed for the recovery of debts due by depositors for which a decree has been obtained in the Civil Court and any such rules must be treated as *ultra vires*. **Pat** JAGANNATH THIRANI *v.* TARA PRASANNA GANGULI, 3 Pat. 74; (1924) A. I. R. (Pat.) 521 **424**

Provincial Insolvency Act (III of 1907), s. 37—*"Creditor," meaning of.*

The expression "creditor" in section 37 of the Provincial Insolvency Act does not include a secured creditor. **C** JADU NATH HALDAR *v.*

MANINDRA NATH CHANDRA, 27 C. W. N. 816; (1923) A. I. R. (C.) 689 **323**

s. 39 cl. 4 (a)--*Final dividend, notice of, to creditors—Form of notice—Madras rule—Creditor's right to prove debt.*

Under section 39, clause 4 (*a*) of the Provincial Insolvency Act, a particular form of notice to creditors, whose claims have been notified but not proved, is prescribed whenever a final dividend is to be declared. In Madras, the rules under the Insolvency Act require a separate registered letter addressed to each creditor, and when a notice of that sort is prescribed by the rules made under the Statute, a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed.

Where a final dividend has been declared, without giving the required notice to a creditor, the right of proof is not affected by mere laches on his part in not furnishing proof earlier, and he should be allowed to re-open the matter and given an opportunity of proving his debt within a time to be fixed by the Court. **M** VENKATANARAYANA CHETTY *v.* SEVUGAN CHETTY, 47 M. L. J. 240; 20 L. W. 163; (1924) A. I. R. (M.) 769 **620**

Provincial Insolvency Act (V of 1920), ss. 2 (d), 28—*Civil Procedure Code (Act V of 1908), s. 60—Transfer of Property Act (IV of 1882), s. 6 (e)—Share in partnership assets, whether attachable and saleable in execution—"Property," what is—Property liable to attachment and sale in execution, whether alone vests in Receiver—Mere right to sue, what is—Assignment of share in partnership assets, value of.*

A partner's share in the assets of a partnership concern is "property" and is liable to attachment and sale in execution of a decree.

The definition of the word "property" is section 2, clause (*d*) of the Provincial Insolvency Act of 1920 is very comprehensive and includes any property over which or over the profits of which the insolvent has a disposing power which he may exercise for his own benefit. All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of his debts including claims in the nature of damages, except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation are "property" which vests in the Official Receiver.

Under section 28 of the Provincial Insolvency Act of 1920 it is the whole property of an insolvent that vests in the Receiver and not only that which can be attached and sold in execution of a decree.

The assignment of a share in the assets of a firm is not the assignment of a mere or bare right to sue but of the share of the assets of the firm with the incidental right of recovering the same by the aid of the Court. It is for the Court in each particular case to decide whether in the view of the Court the assignment in dispute is property with an incidental remedy for its recovery or whether it is a bare right to

bring an action within the meaning of section 6, clause (e) of the Transfer of Property Act. S VISHINDAS NIHALCHAND *v.* THAWERDAS 642

——— **s. 9** — *Bombay Provincial Insolvency Rules, r. 27 (4)—Adjudication application—Failure to make deposit—Return of application—Procedure—Appeal against adjudication order—Insolvent, whether necessary party.*

An application to adjudicate a person insolvent presented without a deposit of the necessary amount required under r. 27 (4) of the Bombay Provincial Insolvency Rules should not be returned to the petitioner. The petitioner or his Pleader should be told to make the deposit within a certain time, and then if he fails to do so the petition might be dismissed. The insolvent is a necessary party to an appeal by a creditor against the adjudication order. B CHHOTUBHAI BHAIMBAI *v.* DAJIBHAI UKABHAI, 26 Bom. L. R. 432; (1924) A. I. R. (B.) 472 482

——— **ss. 10, 25**, *scope of—Insolvency petition, dismissal of—Procedure.*

Sections 10 and 25 of the Provincial Insolvency Act are not to be employed as an excuse for getting rid of troublesome insolvency petitions. It is not enough for the Court simply to say that it is not satisfied that the petitioner is unable to pay his debts and to dismiss his petition. Such a finding must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. A MATHURA RAM *v.* BALDEO RAM 21

——— **ss. 23, 31**—*Protection before and after adjudication.*

Under section 23 of the Provincial Insolvency Act, protection *before* adjudication can be allowed if the debtor is under arrest or imprisoned in execution of a decree of any Court. Section 31 applies *after* the order of adjudication is made. M SINNASWAMI CHETTIAR *v.* ALIGI GOUNDAN, 47 M. L. J. 530; (1924) M. W. N. 836 938

——— **s. 28**. *See* ESTOPPEL 946

——— **ss. 37, 39**. *See* TRANSFER OF PROPERTY ACT, s. 6 (*e*) 141

——— **s. 41**—*Order of discharge—Refusal to grant discharge, propriety of.*

Where an insolvent's assets were not of a value equal to eight annas in the rupee and the insolvent far from helping the Receiver to pay his debts, had obstructed him:

Held, that the order refusing to grant a discharge was perfectly reasonable. O JAGMOHAN SINGH *v.* DEPUTY COMMISSIONER, FYZABAD 54

——— **s. 51**, *application of—Insolvency petition—Execution sale, validity of.*

There is no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the Executing Court for the delivery of the property that the Court is required by section 52 of the Act to direct the property, if in its possession, to be delivered to the Receiver. In the absence of such an application the Court is at liberty to sell the property and the sale, being legal, cannot be impeached by the Receiver or the creditors. L RALLA RAM *v.* RAM LABHAYA MAL, 6 L. L. J. 232 509

——— **s. 75 (2)**—*Deputy Commissioner invested with powers of Subordinate Judge—Order in insolvency matter—Appeal, to whom lies—General Clauses Act (X of 1897), s. 24—Notification under repealed Act, when remains in force—No excuse for not referring appeal to proper Court—Appeal to be dismissed.*

The Court of a Deputy Commissioner, who has been invested with powers of a Subordinate Judge is subordinate to the Court of the District Judge within the meaning of section 75 (2) of the Provincial Insolvency Act, 1920, and an appeal against his order in the exercise of insolvency jurisdiction lies to the District Judge and not to the High Court.

By virtue of section 24 of the General Clauses Act, a notification issued under section 3 of the Provincial Insolvency Act would remain in force under the repealing Act (V of 1920), as section 3 of the repealed Act has been re-enacted in the repealing Act.

Where, the law being clear, there was no excuse for preferring to the High Court an appeal which lay to the District Judge, the High Court refused to return the memorandum of appeal and dismissed the appeal. C CHATTURBHUJ MAHESRI *v.* HARLALL AGARWALLA 858

——— **s. 78**—*Limitation Act (IX of 1908), s. 5—Applicability of s. 78 to insolvency proceedings initiated before the new Act of 1920.*

Section 78 of the Provincial Insolvency Act of 1920 did not create for the first time or take away any substantive right but it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act, so that section 78 is applicable to insolvency proceedings initiated before the Act of 1920. M KARUTHAN CHETTIAR *v.* RAMAN CHETTY, (1923) M. W. N. 746; 18 L. W. 808; 45 M. L. J. 844; (1924) A. I. R. (M.) 400 376

Provincial Small Cause Courts Act (IX of 1887), s. 17—*Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 6—Attachment of immoveable property before judgment—Provincial Small Cause Court, jurisdiction of.*

A Provincial Small Cause Court has no jurisdiction to attach immoveable property before judgment and to adjudicate on claims which such attachment may produce. C SADEK ALI *v.* SAMED ALI, 28 C. W. N. 16; (1924) A. I. R. (C.) 193 300

——— **s. 25**. *See* CUSTOM—WAJIB-UL-ARZ 313

——— **s. 25**—*Decree based on no evidence, whether in accordance with law.*

In a suit to recover money on the basis of a document alleged to be a bond the plaintiff's

Provincial Small Cause Courts Act—contd.

statement was contradicted by all of his witnesses. The suit was nevertheless decreed:

Held, that the decree was not based upon evidence and could not be said to be in accordance with law within the meaning of section 25 of the Provincial Small Cause Courts Act. **O** DAYAL *v.* BHIMMA, 9 O. & A. L. R. 1045 **860**

——— **s. 25**—*Suit tried by Court not having jurisdiction—Revision.*

Where owing to the misrepresentation of the plaintiff a suit is tried in a Court which has no jurisdiction to try it, and a decree is passed, the decree is liable to be set aside in revision. **O** G. I. P. RY. CO., BOMBAY *v.* MATHURA DAS **569**

——— **s. 35**—*Small Cause suit—Transfer of Munsif possessing Small Cause Court powers—Decree by successor not having such powers, validity of.*

Where a Munsif possessing Small Cause Court powers is transferred and the decree is made by his *locum tenens* who does not possess such powers, while a Court invested with the jurisdiction of a Small Cause Court exists in the district, the decree is *ultra vires*. **O** RAM LAKHAN *v.* JANKA, 10 O. & A. L. R. 741 **268**

——— **Sch. II, Arts. 19, 28**, *applicability of—Suit to recover ornaments from stakeholder, nature of—Declaration, suit for—Jurisdiction of Small Cause Court.*

Article 28 of Schedule II to the Provincial Small Cause Courts Act contemplates a suit between rival claimants to the estate of a deceased person, when the relief claimed is a share of the estate and not only an item of the estate as against a third party.

A suit to recover certain ornaments and jewellery from a stakeholder to whom they have been made over for safe custody and who is willing to hand them over to the true owner, to which other persons claiming the ornaments etc., are also impleaded as parties, is in its essence a suit for a declaration and falls within the purview of Art. 19 of Sch. II to the Provincial Small Cause Courts Act and is, therefore, excluded from the cognisance of a Small Cause Court. **A** SITAL PRASAD *v.* DUKKHI LAL **409**

——— **Art. 35** (ii)—*Failure to return property borrowed—Borrower, whether guilty of breach of trust—Suit of recovery for ornaments or price thereof—Jurisdiction.*

A borrower who merely detains property lent to him beyond the period within which he was expected to return it, is not guilty of the offence of criminal breach of trust.

A suit for the recovery of ornaments lent or for the price thereof is not, therefore, excluded from the jurisdiction of the Court of Small Causes. **A** MAKHAN LAL *v.* BIHARI LAL, (1924) A. I. R. (A.) 571 **627**

——— **Art. 41**—*Suit for contribution—Property not held jointly—Suit, whether cognisable by Small Cause Court—Appeal, second.*

Plaintiff and defendants divided their properties though they continued to be held under the same *patta*. Defendants failed to pay up the *Kist* in respect of their property, and the plaintiff, in order to save his own property from sale, had to pay up the arrears of the *Kist*. He sued the defendants for contribution:

Held, that the suit did not fall within the purview of Art. 41 of Sch. II to the Provincial Small Cause Courts Act, in as much as the property was no longer joint, and the suit was, therefore, cognisable by a Small Cause Court and a second appeal was not competent. **M** S. SEETHARAMABRAHMAM *v.* S. KRISHNABRAHMAN, 19 L. W. 547; (1924) M. W. N. 478; (1924) A. I. R. (M.) 790 **353**

Punjab Courts Act (VI of 1918), s. 41 (1) (a) (b) (c), (3)—*Custom, question of—Second appeal—Certificate, whether essential.*

A decision about the existence of a custom cannot be attacked in second appeal on any of the grounds set forth in section 41 (1) (*a*) (*b*) (*c*) of the Punjab Courts Act without the lower Appellate Courts' certificate in terms laid down in section 41 (3) of the Act. **L** UTTAM SINGH *v.* MUNSHI, 6 L. L. J. 261 **527**

Punjab Land Revenue Act (XVII of 1887) s. 44—*Record of Rights, entries in—Presumption of correctness—Rebuttal—Extraneous evidence, whether necessary—Pedigree table, entries in, relating to devolution of property.*

An entry in a Record of Rights is not necessarily conclusive. It is an entry to which the presumption of correctness attaches under the provisions of section 44 of the Punjab Land Revenue Act unless and until the contrary is proved by legal evidence. If, however, the entry itself is inconclusive, or appears on the face of it to be erroneous a Court would be justified in rejecting it, and it would not be necessary in such a case to produce extraneous evidence to prove the incorrectness of the entry. The question whether the presumption of correctness attaching to an entry in the Record of Rights has been rebutted is one of fact and cannot be examined in second appeal.

Quære:—Whether a presumption of correctness, under section 44 of the Punjab Land Revenue Act, attaches to entries in a pedigree table relating to the devolution of property. **L** WALI MUHAMMAD *v.* MUHAMMAD BAKHSH, 5 L. 84; (1924) A. I. R. (L.) 444 **998**

Railway Company—*Goods, consignment of—Risk note A—Loss caused by delay—Company, responsibility of.*

A Railway Company is in the absence of a risk note protecting it from consequences of delay, bound to deliver goods within a reasonable time, and is liable to pay compensation for loss caused by delay which it is unable to explain.

In the case of goods consigned to a Railway Company under Risk note A, which protects the Company from responsibility for the "condition in which the goods may be delivered to the consignee at destination or for any loss arising from the same" the Railway are not protected

against loss caused by delay. **A** B. N. W. RAILWAY *v.* MUNNA LAL BISHAMBHAR NATH, 22 A. L. J. 769 **19**

——— *Loss of goods consigned—Risk note B—Admission of loss by plaintiff—Company, whether bound to prove loss.*

In the case of goods consigned to a Railway Company under Risk Note B, where the plaintiff admits the loss of the goods consigned by him the defendant company is relieved of the necessity of proving the same.

Certain goods were consigned under Risk Note B at a station on the E. B. Ry., but were eventually lost. Plaintiff, while admitting the loss, sued to recover the value of the goods from the E. I. Ry. but did not adduce any evidence that the loss was due to the neglect of that railway:

Held, that under the circumstances the plaintiff was not entitled to succeed. **C** GANESH LAL *v.* EAST INDIAN RAILWAY LTD. **426**

Railways Act (IX of 1890), s. 72—*Railway Company, position of—Risk note form B—Deterioration or damage to consignment—Railway Company, whether liable—Consignee, position of—Liability, how far continues.*

A Railway Company, when entrusted to carry goods from one station to another has, under section 72 of the Railways Act the liability of a bailee, but it can contract itself out of that liability by a special contract in one of the forms recognised by Government.

Under the risk note form B the Company is held free from all responsibility for any loss, destruction or deterioration or damage to the consignment except when there is a loss of a complete consignment or one or more complete packages forming part of the consignment.

Where, therefore, all the bags belonging to any consignment arrive and none of them is missing the Company is protected by Risk Note B even though it is found that the bags had been damaged owing to the wilful neglect of the Railway Company.

The Railway Company is protected by the Risk Note B equally against a claim by the consignor and the consignee.

The position of the Railway Company as carriers protected by Risk Note B continues till the date of the delivery to the plaintiff. It is not, therefore, liable as warehouseman even if the loss is occasioned after the consignment arrives at its place of destination and before delivery to the consignee. **A** EAST INDIAN RAILWAY COMPANY *v.* JANKI PRASAD, (1924) A. I. R. (A.) 605 **737**

——— **s. 72**—*Contract Act (IX of 1872), ss. 151, 152, 168—Responsibility of Railway, nature of—Second appeal—Finding of fact—Inference from finding, whether may be questioned.*

Under section 72 of the Railways Act, the responsibility of a Railway Administration for the loss of goods delivered to it to be carried by Railway is that of a bailee under sections 151, 152 and 168 of the Contract Act.

A finding of fact cannot be questioned in second appeal but it is open to a Court of second appeal to see whether the inference drawn from the facts found is correct. **C** LAKSHMI NARAIN BAIJNATH *v.* SECRETARY OF STATE FOR INDIA, 27 C. W. N. 1017; (1924) A. I. R. (C.) 92 **279**

——— **ss. 72, 76**—*Risk Note, Form B—Carriage of goods—Unreasonable delay in delivery—Damges—Railway Company, liability of.*

Where a railway company fails to deliver goods consigned to it for carriage within a reasonable time, it is liable for ordinary damages in respect of the delay and such liability is not covered by the Risk Note Form B, the protection afforded by which extends to the exempted or specified cases only.

What is reasonable time within the meaning of the above rule is a question of fact to be decided on the particular circumstances of each case. **N** EAST INDIAN RAILWAY Co. *v.* MURADALI **1**

——— **s. 72 (2)**—*Risk Note signed by person delivering goods—Railway Company, whether protected.*

Under section 72 (2) of the Railways Act, a Railway Company is protected by a Risk note signed either by the person sending goods or the person delivering goods to the Company. **C** HARI SHANKAR RAJ *v.* E. I. RY., COY. **705**

——— **s. 77.** *See* CIVIL PROCEDURE CODE, s. 115 **205**

——— **s. 77**—*"Loss," meaning of—Denial by Railway Company of receipt of consignment—Notice, whether necessary—Limitation.*

The word "loss" in section 77 of the Railways Act means loss by the Railway and not simply loss to the owner.

No notice is necessary under section 77 of the Railways Act where the Railway Company denies the receipt of a parcel consigned to it.

When the burden of notice is laid on the consignor the words of the section must be construed strictly.

The date of the notice must be within six months of the date of the consignment. **A** BADRI PRASAD *v.* G. I. P. RAILWAY, 22 A. L. J. 897 **725**

——— **s. 316.** *See* CIVIL PROCEDURE CODE, s. 79 (1) **531**

Registration Act (XVI of 1908), ss. 3, 17, 49—Amalnamah *authorising grantee to take possession, whether requires registration—Admissibility for collateral purpose.*

An *Amalnamah* which is neither a lease nor an agreement to lease within the meaning of section 3 of the Registration Act but merely authorises the grantee to take possession and is intended to be followed by a formal *Kabuliyat* is not compulsorily registrable and is admissible in evidence without registration.

Apart from section 17 (2) (*v*) of the Registration Act, such a document, even if deemed compulsorily registrable, is inadmissible only for the limited purpose mentioned in section 49 (*c*) of the Act as evidence of a transaction 'affecting' immoveable property comprised therein, and would not be inadmissible for the purpose of

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determining who were the parties to the transaction. C LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

——— **s. 17** (**b**)—*Receipt of mortgage money—Registration.*

A receipt showing that the whole of the mortgage money has been paid does not require registration under section 17 (*b*) of the Registration Act, unless the receipt mentions that the mortgage has been extinguished thereby. B SHRIDHAR SHABAYA JOTISHI *v.* JANAK SHANKAR JOTISHI, 26 Bom. L. R. 486; (1924) A. I. R. (B.) 447 **415**

——— **ss. 32, 35, 58 to 61.** *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, ss. 57, 59, 63A **274**

——— **ss. 58, 60.** *See* EVIDENCE ACT, s. 90 **457**

——— **s. 60**—*Statement at time of registration, whether evidence—Misrepresentation, proof of.*

On the 2nd October 1913, defendant entered into an agreement to sell certain lands to the plaintiff. On the 27th October 1913, he sold these lands to a third person by two sale-deeds; and on the 6th November 1913, he made a conveyance in virtue of the first agreement. In the attestation which had to be made at registration, he in respect of the sales of the 27th October made a statement that he had signed the documents in question not as sales, but as mortgage-deeds. At the trial he asserted that he was so drunk at the time that he did not knew what he was about, and gave no evidence in support of his earlier statement:

Held, that under the circumstances the mere statement of the vendor at the time of registration could not lead to the inference that the vendor's impression had been induced by the action of the other party; that no misrepresentation having been proved the first transaction was a proper sale and could not be impeached. **P C** MAHARU *walad* LOTU *v.* KHANDU *walad* HARI PATIL, (1924) A. I. R. (P. C.) 186; 47 M. L. J. 128; 20 L. W. 107; 26 Bom. L. R. 742; 35 M. L. T. 139; (1924) M. W. N. 645; 10 O. & A. L. R. 928 **822**

Religious endowment—*Several shrines—Succession to one shrine, whether affects others.*

The constitution of each particular shrine must govern the succession to its *gaddi* and the mere fact that a certain *chela* has succeeded to one of the shrines enjoyed by his *Guru* does not *ipso facto* entitle him to succeed to another. L KESHWA NAND *v.* MOHAN PURI, 5 L. L. J. 543; (1924) A. I. R. (L.) 170 **496**

——— *Temple Committee--Vacancy in trusteeship not filled up—Application to Court—Notice to committee, nature and sufficiency of—Order, whether appealable.*

A Temple Committee having failed to fill up a vacancy in the trusteeship in accordance with the scheme framed for the temple, an application was made to the Court by certain of the worshippers to fill up the vacancy in accordance with the scheme and notice of the application was given to

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the members of the Committee. Objection was taken to the validity of the notice on the ground that it omitted to state specifically the consequence of non-compliance with the notice:

Held, that notice of application before the Court and the action contemplated under the scheme was sufficient and valid notice to the Committee.

Quære.—Whether an order passed on such an application is appealable. M SETU IYER *v.* SUNDARAM PILLAI **615**

Remand order *erroneous—Party not appealing against such order, whether can question it again.*

A party who accepts an erroneous order of remand and does not appeal against it cannot be allowed to challenge it again. N GANGARAM *v.* KANHAILAL **626**

Res judicata between co-defendants, requisites of. *See* CIVIL PROCEDURE CODE, s. 11 **389**

——— *Estoppel—Admission by widow in compromise*—Locus standi *not admitted—Representatives, whether bound.*

An estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel.

Plaintiff alleged in a suit that he was the reversioner or of *G*'s husband. The suit was compromised and *G* gave the plaintiff a portion of the land held by her and agreed that he should succeed her. In a subsequent suit by the plaintiff to contest the validity of a gift made by *G*:

Held, (1) that the admission made by *G* in the previous suit created an estoppel binding on her;

(2) that *G*'s representatives were not estopped from denying that plaintiff was a reversioner of *G*.'s husband and the point was not *res judicata* against them. L NIHAL SINGH *v.* NARAIN SINGH, 6 L. L. J. 45; (1924) A. I. R. (L.) 469 **525**

——— in execution proceedings. *See* CIVIL PROCEDURE CODE, s. 48, O. XXI, RR. 60, 63 **905**

——— *Mortgage—Redemption—Jurisdiction of Civil and Revenue Courts--Circular No. C 1123 of 1862, operation of.*

By virtue of Circular No. C 1123 of 1862, the jurisdiction of Civil Courts in Oudh was barred in the case of all claims by mortgagors to recover possession of the mortgaged property, whatever the date of the mortgage.

The predecessors-in-interest of the plaintiffs executed a mortgage of certain property in 1859. During Settlement proceedings in 1862 they applied to the Revenue Court for redemption. Their application was dismissed on the ground that the term within which redemption was to be made had expired and that the mortgagors had no right left in them to redeem. In 1921 the plaintiffs instituted a suit for redemption on the allegation that the decision of the Revenue Court was without jurisdiction and did not operate as *res judicata*:

Held, that the Revenue Court had jurisdiction by virtue of Circular No. C. 1123 of 1862, and its order operated as *res judicata*, and the plaintiffs

Res judicata—concld.

suit was, therefore, barred. O CHANDAN SINGH *v.* SHEO NARAIN SINGH, 10 O. & A. L. R. 13; 10 O. L. J. 606; (1924) A. I. R. (O.) 245 **698**

——— pleaded—Court refusing to try the plea before entering into merits—Revision. *See* CIVIL PROCEDURE CODE, s. 115 **628**

Revision, abatement of. *See* CIVIL PROCEDURE CODE, O. XXII **456**

——— Interlocutory orders — Amendment of plaint—General rule. *See* CIVIL PROCEDURE CODE, O. VI, R. 17 **375**

———, whether competent—Appeal to District Judge from appellate decree of Collector—Second appeal, grounds for—Finding of fact—Decision of District Judge as Rent Court. *See* OUDH RENT ACT, ss. 119, 115 **327**

Rules and Bye-Laws of Karachi Municipality, Appendix D, r. 6 (e), *whether* ultra vires *—Terminal tax, refund of—Procedure of—Municipality, power of, to prescribe rules.*

Clause (*c*) of rule 6 of Appendix D. of the Rules and Bye-laws of the Karachi Municipality, which lays down the procedure for the refund of terminal tax in respect of goods supplied to Government is not *ultra vires.*

No bye-law of a Municipality can cut down an exemption allowed by the Legislature, and any such bye-law is invalid.

Where, however, an exemption is allowed by the bye-laws themselves, it is competent to the Municipality to prescribe and lay down the conditions under which it will grant that exemption. S KARACHI MUNICIPALITY *v.* M. R. D'SA, 17 S. L. R. 58 **990**

Sale, whether void—Notice of attachment, absence of, effect of. *See* CIVIL PROCEDURE CODE, s. 47, O. XXI, RR. 22, 90 **92**

Sale of goods—*C. I. F. contract, incidents of—Seller, duty of—Property, when passes—Failure of buyer to make payment—Cause of action, where arises—Place of suing—Civil Procedure Code (Act V of 1908), s. 20 (c).*

A *C. I. F.* sale is not a sale of goods, but a sale of documents relating to goods. It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination and the ordinary contract of insurance on that voyage and to tender these documents against the payment of the contract price.

That he secures the freight for the carriage of the goods in question to their destination, has the goods covered by an insurance policy for the voyage, places the goods on board the ship proceeding to the destination mentioned in the contract, and then tenders the necessary documents to the buyer. When he has done this, he has done all that he need do to entitle him to the payment of the price at which the goods have been agreed to be purchased. The insurance of the goods is intended for the protection of the buyer and if the goods are lost in transit, it is the buyer that recovers the amount of the insurance policy. The buyer, therefore, protects himself against the loss of the goods by getting the seller to insure them as soon as they are placed on board and the property in the goods, therefore, which are appropriated to the buyer passes to him as soon as the seller puts the goods on board a ship bound for the place of destination.

Respondents Nos. 1 and 2 were both residents of and carried on business at Amritsar. Respondents No. 2 contracted to purchase certain goods from respondents No. 1 C. I. F. Karachi.

The indent contained the following clause :—

" For reimbursement we authorise you or your correspondents to draw upon us at 30 days sight with relative documents attached for payment (in case of need sellers invoice to be taken in lieu of the draft) which drafts we engage and bind ourselves to accept, on presentation and pay on maturity notwithstanding any objection we may have regarding maturity or on account of any variation whatever from the terms of the indent."

The goods arrived at Karachi and the drafts for the price together with the relative documents were despatched to the Amritsar branch of the Chartered Bank of India. Due notices were sent to respondents No. 2 to retire the drafts and make arrangements for taking delivery of the goods but they failed to do either, contending that the goods had been late shipped. Respondents No. 1 then retired the draft, and referred the disputes between them and Respondents No. 2 to the arbitration of certain arbitrators at Karachi, who made an award in their favour. Respondents No. 1 then made an application to the Court at Karachi to file the award :

Held, that the contract having been made at Amritsar, the documents of title having been tendered to respondents No. 2 at Amritsar, and the latter being bound to make the payment at Amritsar, no part of the cause of action had arisen at Karachi, and the mere fact that the goods were lying at Karachi did not give the Karachi Court jurisdiction to deal with the matter. S MEHTA & Co. *v.* PARMESHARDAS PARSHOTAMDAS, (1924) A. I. R. (S.) 4; 16 S. L. R. 293 **303**

———Damages, assessment of. *See* TRANSFER OF PROPERTY ACT, s. 100 **297**

———Dispute as to quality—Burden of proof—Arbitration—Reference stipulating survey of goods—Award made without survey—Jurisdiction. *See* ARBITRATION **151**

Secondary evidence, *admissibility of—Document produced in previous litigation—Custody, proof of.*

Where the original of a document which was produced in a previous litigation cannot be traced but its custody is satisfactorily proved secondary evidence of the contents of the document is admissible.

The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a state-

Secondary evidence—concld.

ment contained therein is of a refined but of a fundamental character, and should not be lost sight of. **C** LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI, 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558 **357**

Sir rights—*Proprietary rights—Transfer of* sir *rights—Joint undivided village—Each proprietor's right to have separate* sir *—Agra Tenancy Act (II of 1901), ss. 10, 34, 58—Ejectment—Sale of rights by 3 out of 4 joint* sir*-holders—*Sir *rights of 4th co-sharer, whether affected—U. P. Land Revenue Act (III of 1901), ss. 4 (12), 36.*

Sir rights, though they can only be held by a proprietor, are something beyond and apart from the mere proprietary rights. The right of *sir*-holder is a right to exclusive possession coupled with the fact that no person cultivating under him can acquire occupancy rights. In a joint and undivided village each proprietor may have his own separate *sir* although the proprietary rights in the whole village are joint.

Sir rights cannot be acquired by purchase. Where the entire *sir* has been sold and the purchaser has obtained actual cultivatory possession, the land is treated as his *khudkasht* and not as his *sir*.

Where three out of four brothers, the joint *sir*-holders of a *sir khata*, sell their rights, they lose their *sir* rights by the sale and obtain instead ex-proprietary rights in a proportionate share of the holding. The 4th brother, who has not sold his rights, does not lose his *sir* rights in the remaining portion of that holding and if the purchaser from his brothers takes possession of that portion, he is liable to be ejected from that plot. **A** RAM PRASAD SINGH *v.* JANKI PRASAD SINGH **899**

Societies Registration Act (XXI of 1860), ss. 9 18—*Penalty imposed by Society, when can be recovered—Rules framed before registration lodged with Registrar, force of.*

Section 9 of the Societies Registration Act implies that in order to be recoverable in a Court of law, a penalty imposed by a society registered under the Act, must have been imposed in the manner prescribed by the Act and not otherwise, that is to say, for breach of a bye-law duly made in accordance with the rules and regulations of the Society, or, if the rules do not provide for the making of bye-laws, a bye-law made at a general meeting by the concurrent votes of three-fifths of the members present.

The mere fact that certain rules framed by a Society before registration are lodged, after registration, with the Registrar under section 18 of the Societies Registration Act does not invest them with any special legal force. **O** ZARDOZI UNION *v.* BASHIR KHAN, 10 O. & A. L. R. 117 **556**

Specific performance—*Hindu Law—Joint family—Contract by Manager—Decree, whether can be passed against minors—Limitation Act (IX of 1908), Sch. I, Art. 113—Agreement to execute sale-deed on demand—Limitation, commencement of.*

There is no general rule that a decree for specific performance cannot be passed against minors.

Specific performance—concld.

Where a contract for the sale of immoveable property is entered into by a Manager on behalf of and for the benefit of a joint Hindu family and he dies before completion of the contract, the contract can be enforced against the surviving members of the family whether they are adults or minors.

Where a contract for the sale of immoveable property provides for the execution of sale-deed on demand from the vendee the cause of action for a suit for specific performance arises only after request and refusal. **M** NARAYANAN CHETTY *v.* MUTHIAH CHETTIAR, 46 M. L. J. 575; 34 M. L. T. 350; (1924) M. W. N. 482; 20 L. W. 103; (1924) A. I. R. (M.) 680; 47 M. 692 **658**

Specific Relief Act (I of 1877), ss. 19, 21—*Contract of sale—Suit for specific performance—Damages, prayer for, whether necessary—Court, discretion of.*

A plaintiff is not obliged in a suit for specific performance to pray specifically for damages whether in addition or in substitution. He has a choice of remedies open to him to apply for and the Court has always a discretionary power to allow damages if it is of opinion that damages are the appropriate remedy. **L** K. H. SKINNER *v.* ROSY SKINNER **712**

——— **s. 22**—*Specific performance—Suit to recover under executed contract of lease, nature of—Discretion of Court.*

A lease granted by a co-sharer contained a covenant that should partition take place between the co-sharers and the leased land be allotted to a co-sharer other than the lessor, the lessee would be entitled to take possession of an equal area of land of the same quality as the land leased out of the area allotted to the lessor. The lessee got into possession of the leased land but subsequently on partition the land was allotted to another co-sharer and the lessee sued for possession of an equal area of land from the area allotted to his lessor:

Held, that the suit was one for recovery of possession under an executed contract and not one for specific performance of an executory contract and no question, therefore, of the exercise of the Court's discretion under section 22 of the Specific Relief Act could arise. **O** BATUL KHANAM *v.* SALTANAT BAHADUR KHAN, 26 O. C. 393; 10 O. L. J. 420; (1924) A. I. R. (O.) 165 **796**

——— **s. 31**—*Evidence Act (I of 1872), ss. 92, proviso 1, 93—Transfer of Property Act (IV of 1882), ss. 58(c), 60—Rectification of deed—Sale-deed—Agreement of re-purchase—Consideration, amount of, left blank—Evidence of amount, admissibility of—Mortgage by conditional sale—Redemption—Mortgage money.*

Section 31 of the Specific Relief Act entitles a party to a document, on the ground of fraud or mistake, to have the document rectified so as to bring it into accord with the real intention of the parties. Where, therefore, a blank has been left in a document, owing either to fraud or to mistake, evidence to fill the blank is admissible under proviso 1 to section 92 of the Evidence Act.

Specific Relief Act—contd.

A sale-deed contained an agreement for re-purchase in the following terms :— "Will re-sell to the vendor at his request within three years for Rs. " but the amount of the consideration was omitted. In a suit by the vendor for rectification of the deed by insertion of the amount of the consideration :

Held, (1) that the omission was due either to an oversight of both parties, which would amount to a common or "mutual" mistake, or to the action of the defendant, on whose instructions the deed was prepared in order that he might subsequently take advantage of the omission as against the plaintiff, which would amount to fraud on his part, and that, in either case, evidence was admissible to fill in the blank ;

(2) that looked at from another point of view, the deed was a mortgage by conditional sale, and the mortgagor was, under section 60 of the Transfer of Property Act, entitled to redeem the mortgage in the absence of specific agreement to the contrary, on payment of the mortgaged money, that is to say, in the present case, the amount of the original loan. **R** MAUNG PE GYI *v.* HAKIM ALLY, 2 R. 113; (1924) A. I. R. (R.) 235; 3 Bur. L. J. 44 **759**

——— **s. 39**—*Suit for cancellation of mortgage—Want of mortgagor's title—Estoppel.*

The principle of estoppel between the mortgagor and the mortgagee works in favour of and against both of them.

A mortgagee in possession is estopped from denying the title of his mortgagor during the continuance of the mortgage, just in the same way as the mortgagor is estopped from varying his own authority to mortgage the property.

Therefore, a mortgagee after he has obtained possession of the mortgaged property in pursuance to the contract of mortgage cannot claim the relief of cancellation of the mortgage under section 39 of the Specific Relief Act on the ground that his mortgagor had no authority to mortgage the property. **O** IBAD ASHRAF *v.* INAYAT ULLAH, 10 O. & A. L. R. 697 **62**

——— **s. 42**. *See* PENSIONS ACT, s. 4 **606**

——— **s. 42**—*Adoption invalid—Presumptive heir—Declaratory suit, maintainability of.*

A reversioner who is the presumptive heir can maintain a suit to have an adoption made by the life-tenant declared invalid so far as he himself is concerned. **L** RULYA RAM *v.* RADAME, 4 L. L. J. 37; (1922) A. I. R. (L.) 68 **194**

——— **s. 42**—*Court Fees Act (VII of 1870), Sch. II, Art. 17—Declaratory suit—Consequential relief not claimed—Dismissal of suit—Appeal—Court-fees—Appellate Court, duty of.*

In determining the amount of Court-fees payable on a memorandum of appeal against a decree dismissing a suit for a declaratory decree on the ground that the plaintiff might and ought to have prayed for consequential relief, but did not do so, it is not the province of the Court to see whether the suit is properly framed, or whether the plaintiff is entitled to the declaration asked for, or what would be the effect if the plaintiff succeeded in obtaining the declaration asked for. The Court has only to see whether it is a memorandum of appeal in a suit in which no consequential relief is prayed, and has been stamped accordingly. **C** SRI SRI GOKUL NATH JIN *v.* NEW BIRBHUM COAL CO., 27 C. W. N. 972; (1924) A. I. R. (C.) 183 **589**

Specific Relief Act—contd.

——— **s. 42, proviso**—*Agra Tenancy Act (II of 1901), s. 167—Hindu Law—Joint family—Lease of agricultural land granted by father—Suit by son to challenge terms of lease—Ejectment—Declaration, suit for, whether maintainable—Jurisdiction of Civil and Revenue Courts.*

Plaintiff, a Hindu son, brought a suit for a declaration that certain terms in a lease of agricultural land of joint family property granted by his deceased father were not binding upon him. It was objected that as the plaintiff was entitled to sue for ejectment, a mere suit for a declaration was not competent:

Held, that as a decree for ejectment of a tenant of agricultural land could not be passed by a Civil Court, a suit for a declaration was maintainable. **A** PHOOL SINGH *v.* GOBIND KOER **399**

——— **s. 42, proviso**—*Suit for office—No prayer for possession—Maintainability.*

In a suit for an office the plaintiff is not bound to ask for possession of properties relating thereto.

Where the plaintiffs sued for a declaration that they were the trustees of a temple lawfully appointed by the Devastanam Committee and for a direction that defendants should be made to restore the office to them and for an injunction restraining them from interfering with the exercise of their duties as trustees:

Held, that the suit as framed was properly maintainable without a prayer for possession of the trust properties and that proviso to section 42 of the Specific Relief Act did not operate as a bar to the suit.

Per *Spencer, Offg. C. J.*—A trustee, claiming only a right to administer a certain trust should not be compelled to sue for physical possession of all the trust properties against defendants who claim only a similar right of management and should not be compelled to pay stamp duty calculated on the total value of the endowments of the trust.

Per *Srinivasa Iyengar, J.*—When the question is whether a suit as framed is maintainable or not, what has to be looked to is the plaint and the plaint alone. **M** SWAMINATHA IYER *v.* RAMIER, 47 M. L. J. 671 **1053**

——— **s. 42**—*Receiver in possession of properties under s. 146, Criminal Procedure Code—Suit to establish title—Consequential relief for possession, whether necessary.*

Where a Magistrate by his order under section 146, Criminal Procedure Code, placed the properties, the subject of dispute, in the possession of a Receiver, that Receiver must be taken to be in possession on behalf of the persons properly entitled to the properties.

Therefore, a plaintiff suing to establish a title in such a case, need not seek any consequential relief by way of recovery of possession. It is

Specific Relief Act—concld.

sufficient for him to sue for mere declaration of title. **M** DEVARAJULU NAIDU *v.* KONDAMMAL, 20 L. W. 754 **929**

——— **s. 42**—*Transfer of Property Act (IV of 1882), s. 6 (e)—Specific performance—Agreement to lend money on mortgage—Suit on agreement, whether maintainable—Proper remedy—Mortgagor, right of, whether transferable.*

A suit does not lie for specific performance of an agreement to lend money on mortgage.

Where a mortgagee does not pay the whole of the mortgage-money, the mortgagor cannot sue for the recovery of the balance, but he may obtain compensation or damages for breach of the contract or may redeem the mortgage on payment of the sum due.

Therefore, the right of a mortgagor under an agreement to obtain money on mortgage, being a mere right to sue for damages, cannot be assigned under section 6 (*e*) of the Transfer of Property Act. **M** YADAVENDRA BHATTA *v.* SRINIVASA BABHU, 20 L. W. 17 and 548; 47 M. L. J. 435; 47 M. 698 **5**

Stamp Act (II of 1899), s. 2 (5) (b)—*Bond—Attestation, whether necessary.*

Under section 2 (5) (*b*) of the Stamp Act a bond requires attestation by a witness. **O** DAYAL *v.* BHIMMA, 9 O. & A. L. R. 1045 **860**

——— **s. 2 (5) (c), (22), Sch. I, Art. 5**—*Agreement to deliver grain on demand, unattested, whether agreement, bond or promissory note.*

A document by which a person binds himself to deliver a certain quantity of grain to another on demand, and which is not attested by a witness, is neither a bond within the meaning of section 2 (5) (*c*) nor a promissory-note within the meaning of section 2 (22) of the Stamp Act. It is an agreement falling under Art. 5 of Sch. I to the Stamp Act. **O** ABHAYRAJ KUNWAR *v.* DATA DIN, 26 O. C. 383 **459**

——— **s. 2 (21), Sch. I, Art. 48 (d)**—*Power-of-attorney in favour of three persons—Stamp payable.*

In computing the stamp duty payable on a power-of-attorney the Legislature takes no account of the number of persons executing the power. It is the number of agents appointed and the powers of such agents which determine the amount of the stamp duty.

A general power-of-attorney executed by two persons authorising three persons to act jointly or severally falls under clause (*d*) of Art. 48 of Sch. I to the Stamp Act. **O** JOGI RAM *v.* MOHAMMAD RAFI, 9 O. & A. L. R. 898 **467**

Succession Act (X of 1865), ss. 46, 48. *See* WILL **777**

——— **s. 111,** *applicability of, to Punjab.*

Section 111 of the Succession Act is applicable to cases governed by the Hindu Wills Act, but as the latter Act is not applicable to the Punjab, section 111 of the Succession Act has no application to the case of a Will made by a Hindu in the Punjab. **L** PREM SINGH *v.* HARDIT SINGH, (1923) A. I. R. (L.) 649 **1045**

Succession Certificate Act (VII of 1889), ss. 10 (1), 19—*Order refusing to grant extension of certificate, whether appealable.*

An order under section 10 (1) of the Succession Certificate Act refusing to grant an extension of a certificate for the collection of debts, to debts other than those specified in the certificate, is appealable. **C** RADHA RAMAN KUNDU *v.* GOPAL CHANDER SINHA, 27 C. W. N. 947; (1924) A. I. R. (C.) 208 **513**

——— **s. 16**—*Succession certificate-holder to minor's estate, position of—Payments made after majority of minor, validity of.*

The holder of a succession certificate who has to collect debts due to the estate of a minor cannot be compared to a certified guardian. The succession certificate holds good until the minor takes steps to revoke it on coming of age, so it does not follow that the moment the minor becomes eighteen years of age, the Succession Certificate is no longer valid, and that if any payment is made to the holder it is made to an unauthorized person. **B** GANPAYA NARNAPPA *v.* KRISHNAPPA ANNAYA HEDGE, 26 Bom. L. R. 491; (1924) A. I. R. (B.) 394 **422**

Succession (Property Protection) Act (XIX of 1841), ss 3, 4, 5, *proceedings under—Procedure—Relief—Administration suit—Receiver, appointment of.*

The whole of the proceedings under Act XIX of 1841 are interlocutory depending upon the filing of an application for relief asking the Court to determine who has the right to possession pending the final determination of the rights of the parties in a regular suit.

Considering the wide powers that are now given to the Courts to make interlocutory orders in regular suits, an application for relief under Act XIX of 1841 should not now be entertained. The Act is really out of date, and there is no necessity whatever for parties claiming the estate of a deceased person to have recourse to it. The relief which is properly open to them is to file an administration suit and apply for the appointment of a Receiver, in which case the question will be, who should be given possession until the dispute between the parties has been decided in the suit. Then the Court can by an interlocutory order either appoint a Receiver and so take the property into its own possession, or it can allow any of the disputing parties to have possession on such terms as it may think fit. **B** MAHMADBHAI PEERBHAI *v.* BAI HAVABAI, 26 Bom. L. R. 145; (1924) A. I. R. (B.) 507 **269**

Suits, *valuation of—General rule—Value assigned by plaintiff—Value found by Court—Jurisdiction, appellate, how determined—Suit decided unsatisfactorily—Court, inherent power of—Civil Procedure Code (Act V of 1908), s. 151.*

The value of the subject-matter of a suit is the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that either purposely or through gross negligence the true value of the suit has been altogether misrepresented in the plaint.

In civil suits the valuation given by the plaintiff determines the jurisdiction both originally and in appeal.

Suits—concld.

Where the plaintiff fixes the value at a certain minimum plus as much more as the Court may find due on the evidence, the valuation should then be taken to be value as found by the Court.

Where both the Trial Court and the Court of first appeal fail to decide a matter satisfactorily, the High Court should exercise its inherent jurisdiction under section 151 of the Code of Civil Procedure and wipe out the whole proceedings and send back the case for trial. **A** UMME KHAIR *v.* AZIZ ALI, (1922) A. I. R. (A.) 47 **183**

Trade Mark—*Ordinary principles, whether apply in India—Tradesmen acquiring goods from manufacturer and reselling them—Competition with manufacturer, whether infringement.*

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer.

Ordinary principles of Jurisprudence with regard to trade marks and those forbidding the passing off of goods apply in India. **P C** IMPERIAL TOBACCO CO. OF INDIA LTD. *v.* ALBERT BONNAN AND BONNAN & Co., (1924) A. I. R. (P. C.) 187; 26 Bom. L. R. 683; 2 P. L. R. 230; 47 M. L. J. 69; (1924) M. W. N. 602; 20 L. W. 495; 51 C. 892; 29 C. W. N. 81 **1013**

Transfer of Property Act (IV of 1882), s. 6 (e). *See* PROVINCIAL INSOLVENCY ACT, S. 2 (D) 28 **642**

——— **s. 6 (e).** *See* SPECIFIC RELIEF ACT, S. 42 **5**

——— **s. 6 (e)**—*Civil Procedure Code (Act V of 1908), s. 60 (e)—Provincial Insolvency Act (VII of 1920), ss. 37, 39—Mere right to sue, transfer of—Transfer of estate with remedy for recovery—Property, meaning of, in Insolvency Law—Claim for breach of contract, whether vests in Receiver.*

The word "property" under the English Insolvency Law includes claims in the nature of damages which have accrued due prior to the date of insolvency except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation.

Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos* or by a testamentary instrument can be affected by him with a trust by an instrument *inter vivos* or by a testamentary instrument provided the objects of the trust are lawful.

Section 6, clause (*e*) of the Transfer of Property Act does not prevent assignment of the whole estate of the assignor with an incidental remedy for its recovery but prohibits the transfer of a *bare* right to sue.

Section 6 (*a*) of the Transfer of Property Act has no application to the case of a property vesting in a person by an order of the Court under the provisions of sections 37 and 39 of the Provincial Insolvency Act.

A claim for breach of a contract which has become due to the insolvent prior to his insolvency and has not been paid to him vests in the Official Receiver. **S** MOTHARAM DOWLATRAM *v.* PAHLAJRAI GOPALDAS **141**

——— **s. 10.** *See* GRANT **918**

——— **ss. 10, 14**—*Limitation Act (IX of 1908), Sch. I, Arts. 10, 113—Construction of document—Covenant by vendee to give right of first refusal to vendor and his heirs, validity of—Remoteness—Restraint on alienation—Suit to enforce covenant—Limitation.*

The vendee of a house covenanted to live in the house himself and when he wanted to sell the house to give the right of first refusal to the vendor and his heirs at a certain price, and to sell the house as a whole and not piecemeal. In a suit by the vendor to enforce the covenant against the vendee himself:

Held, (1) that the covenant was not void for remoteness nor did it offend against the provisions of section 10 of the Transfer of Property Act;

(2) that the suit was not one to enforce a mere right of pre-emption but was a suit for specific performance and was governed by Art. 113 of Schedule I to the Limitation Act. **S** KHEMCHAND RAMDAS *v.* MOHSAN SHAH, 17 S. L. R. 1 **962**

——— **s. 44**—*Transfer of share by one co-owner—Conditions, subsequent, how far can affect—Repairs not made—Loss—Negligence—Presumption.*

If one co-owner transfers his right or interest in the joint property, the other co-owners cannot impose on the share or interest transferred any conditions or liabilities not affecting it, (*i. e.*, not existing) at the date of the transfer.

In other words, they cannot saddle any new conditions or liabilities, which come into existence after the date of the alienation and bind the alienees by them.

Nor can the transferees be made to suffer for the negligence or misdeeds of their transferor or his legal representative, not of a date prior to their transfer but subsequent to the date of the alienations in their favour.

If one co-owner transfers his right or interest in the joint property, the other co-owners cannot impose on the share or interest transferred any conditions or liabilities, not affecting it, (*i.e.*, not existing) at the date of the transfer. In other words, they cannot saddle any new conditions or liabilities, which come into existence after the date of the alienation and bind the aliences by them: nor can the transferees be made to suffer for the negligence or misdeeds of their transferor or his legal representative, not of a date prior to their transfer but subsequent to the date of the alienations in their favour.

One co-owner cannot exclusively be saddled with the loss caused by his negligence in repairing the joint property in time, if the other co-owner had access to the property and could arrange himself for the repairs being made.

Negligence cannot be presumed; it is rather to be presumed that ordinary care has been used. **N** CHANDRASHEKHAR *v.* ABIDALLI **920**

——— **ss. 45, 105, 107**—Kabuliyat, *whether transfers right to enjoy immoveable property—Registration.*

Transfer of Property Act—contd.

A registered *kabuliyat* executed by the lessee and accepted by the lessor does not operate to transfer the right to enjoy immoveable property. **N** AHMED KHAN *v.* SADASHEO **736**

——— **s. 52**—Lis pendens—*Court sales.*

The doctrine of *lis pendens* is applicable to a sale effected by the Court in execution of a decree. **Bom** BHASKAR *v.* SHANKAR, 26 Bom. L. R. 418; (1924) A. I. R. (B.) 467 **453**

——— **ss. 52, 123**—*Gift, when complete—Donor, whether can revoke gift before registration—Injunction restraining donee from getting gift-deed registered, grant of*—Lis pendens, *doctrine of, application of.*

It is open to a donor to revoke the gift before it s completed.

A gift of immoveable property under section 123 of the Transfer of Property Act can only be effected by a registered instrument. Therefore a donor can, if he is so minded, revoke the gift before registration, and obtain an injunction from the Court restraining the donee from getting the gift-deed registered.

Per *Macleod, C. J.*—A transfer of immoveable property effected by a donee, by getting the gift-deed registered during the pendency of a suit for injunction restraining him from getting registration, is vitiated by section 52 of the Transfer of Property Act. **B** SUBBA RAMA HEGDE *v.* VENKATSUBBA HEGDE, 26 Bom. L. R. 427; 48 B. 435; (1924) A. I. R. (B.) 434 **477**

——— **s. 53**—*Fraudulent transfer—Transfer to prefer creditors and to defeat others, validity of—Consideration, passing of, effect of.*

In a suit on a promissory note, the defendant filed a written statement denying its execution but allowed it to be decreed *ex parte*. A few days after the written statement was filed and before decree, the defendant executed a usufructuary mortgage of all her immoveable properties for a term of 10 years in favour of her brother's son who was not a man in well-to-do circumstances.

There was no pressure from any creditor nor was there any necessity for creating a mortgage over the entire properties for such a long period of time. No provision was made for the payment of the pro-note debt. It was, however, found that out of the consideration of Rs. 10,000 a sum of Rs. 7,000 went towards the discharge of debts due to third parties by the defendant and the recitals as to the rest of consideration were made with the object of defeating and delaying the plaintiff who had brought the suit on the pro-note:

Held, that although the effect of the transaction was to defeat and defraud the plaintiff creditor the transaction could not be regarded as wholly void and effect must be given to it to the extent of Rs. 7,000, which was applied towards the discharge of the transferor's debts. **M** LOORTHIA ODAYAR *v.* GOPALASAMI, 19 L. W. 135; 46 M. L. J. 125; (1924) M. W. N. 117; (1924) A. I. R. (M.) 450 **147**

——— **ss. 53, 54.** *See* CIVIL PROCEDURE CODE, S, 64 **388**

Transfer of Property Act—contd.

——— **s. 55 (a).** *See* LIMITATION ACT, SCH. I, ARTS. 62, 116 **623**

——— **ss. 58 (c), 60.** *See* SPECIFIC RELIEF ACT, s. 31 **759**

——— **s. 60.** *See* CONTRACT ACT, s. 16 (3) **213**

——— **s. 60.** *See* MORTGAGE **728**

——— **s. 61.** *See* HINDU LAW—ALIENATION **34**

——— **s. 74**—*Civil Procedure Code (Act V of 1908), App. D, Form 6—Suit by prior mortgagee—Subsequent mortgagee made party—Decree fixing period of payment—Payment made by subsequent mortgagee—Final decree, whether can be passed in his favour in same proceedings.*

If in a mortgage suit to which a subsequent mortgagee is a party a preliminary decree is passed in Form 6 prescribed by the Civil Procedure Code, fixing successive periods of payment of the decretal amount by the mortgagor and the subsequent mortgagee, and if the latter makes payment under such a decree, he acquires under section 74 of the Transfer of Property Act all the powers of the decree-holder prior mortgagee in respect of that mortgage, including the right to continue the suit, which does not terminate till a final decree is passed, and is entitled to be transferred to the plaintiff side and a final decree passed in his favour in the same proceeding. **N** SHANKAR RAO *v.* GANPAT RAO **283**

——— **s. 76**—*Contract Act (IX of 1872), s. 73—Surplus mortgage-money — Interest, award of—Interest by way of damages.*

In the absence of a stipulation to that effect a mortgagor who sues for redemption is not entitled to any interest prior to the institution of the suit on the surplus mortgage-money that is found with the mortgagee after the satisfaction of the mortgage. Nor can such interest be allowed by way of damages. The mortgagor, however, can recover interest as from the date of the suit, for the institution of the suit is really a notice to the mortgagee calling upon him to hand over the surplus money. **A** ISMAIL HASAN *v.* MAHDI HASAN, 22 A. L. J. 833 **63**

——— **s. 83**—*Mortgage—Redemption — Deposit in Court—Sub-mortgagee, position of—Mortgagee whether includes assigns—Deposit to account of mortgagee and sub-mortgagee, validity of.*

The word mortgagee in section 83 of the Transfer of Property Act includes the legal representatives and assigns of the mortgagee.

A sub-mortgage is an assignment of the mortgage and having regard to the remedies of the sub-mortgagee, a deposit by the mortgagor of the mortgage money in Court does not contravene the provisions of section 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites the sub-mortgage in his petition and the Court directs notice to issue to the mortgagee and the sub-mortgagee and the money, owing to disputes between the mortgagee and sub-mortgagee, is not paid out,

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The fact that the mortgagee and the sub-mortgagee have disputes *inter se* either as to the validity of the sub-mortgage or as to the amount due thereunder will not affect the mortgagor.

A sub-mortgagee is a necessary party to a suit for redemption.

A claim by a sub-mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original mortgagee's rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage-debt, it will operate as a complete assignment, and if for any lesser sum, as an assignment *pro tanto*. **M** V. A. SUBBA ROW *v.* PONNAMMAI NADATHI, 46 M. L. J. 74; 19 L. W. 294; (1924) A. I. R. (M.) 453 **363**

——— **s. 100**. *See* TRUSTS ACT, s. 6 **405**

——— **s. 100**—*Mortgage of moveable property not in existence, validity of—Contract Act (IX of 1872), s. 74—Sale of goods—Damages, assessment of—Liquidated damages—Appeal, second—Damages—Finding of fact—Arbitrary finding.*

A mortgage of moveable property which was not in existence at the time when the contract of mortgage was entered into is valid and is enforceable as against a transferee of the property with notice of the mortgage.

The method of assessing damages in case of a breach of a contract to deliver sugar-cane juice produced out of a certain area of land would be to ascertain the quantity of juice which could be produced out of the stipulated area, to ascertain the price at which it might have been fairly sold in the market during the season to which the contract related, deducting from such price the ordinary charges of producing and selling the quantity of juice in question. The amount so awarded should not, however, in any case exceed the amount of liquidated damages fixed by the parties.

Ordinarily the question as to the amount of damages to which a party is entitled is a question of fact and a finding as to the amount of damages arrived at by the first Appellate Court would be binding on the High Court in second appeal; but where the finding is an arbitrary one the High Court is entitled to interfere with it. **A** JUGAL KISHORE *v.* RAM NARAIN, (1923) A. I. R. (A.) 199 **297**

——— **s. 116**, *applicability of—Landlord and tenant—Holding over, what constitutes—Consent of landlord, absence of—Dispossession of tenant—Possession, suit for, by dispossessed tenant, whether lies.*

The principle of section 116 of the Transfer of Property Act, applying to the holding over by a tenant after the expiry of his lease, implies that the tenant is left in occupation of the tenancy by the consent of the landlord, express or implied, and unless there is a new privity of contract between the parties after the expiry of the term, the old terms cannot be enforced between them.

The possession of a tenant who holds without the consent of the landlord is no better than that of a trespasser, and once he is dispossessed by a person who claims under a settlement from the landlord, he cannot recover possession of the tenancy on the strength of his former possession. **Pat** MATHURA PRASAD *v.* NAJU KHAN, 4 P. L. T. 696 **568**

——— **s. 116**—*Landlord and tenant—Holding over what constitutes.*

The option of giving an assent which will convert a holding over by a tenant into a tenancy is one that is conferred by section 116 of the Transfer of Property Act, on the lessor and not on the lessee. The effect of the section that, if there is continuance of possession and if that continuance of possession is assented to by the lessor, that, in law, operates as a renewal, of the lease from month to month or from year to year in the absence of any agreement to the contrary. **B** MEGHJI VALLABHDAS *v.* DAYALJI LALJI & COMPANY, 26 Bom. L. R. 231; 48 B. 341; (1924) A. I. R. (B.) 322 **507**

——— **ss. 122, 123**. *See* CIVIL PROCEDURE CODE, s. 92 **980**

——— **ss. 130, 131**—*Transfer of actionable claim—Defective notice to debtor—Debtor, whether bound—Waiver.*

In order that the debtor may be bound by the transfer of an actionable claim under the exception mentioned in the proviso to section 130 of the Transfer of Property Act there must be a strict compliance with the requirements of section 131 of the Act.

The mere fact that a person to whom a notice of transfer of an actionable claim under section 130 of the Transfer of Property Act is given, omits to take exception to the validity of the notice, would not disentitle him to insist upon strict compliance with the requirements of section 131 of the Act. **C** SADASOOK RAMPROTAP *v.* HOARE MILLER & Co., 27 C. W. N. 733; (1923) A. I. R. (C.) 719 **632**

Trusts Act (II of 1882), s. 6—*Transfer of Property Act (IV of 1882), s. 100—Gift of immoveable property—Charge for maintenance in favour of stranger—Suit to enforce charge, maintainability of.*

Where immoveable property is gifted subject to a charge of maintenance, the person in whose favour such a charge is created, can enforce it by a suit in his own name against the donee even though he is not a party to the deed of gift. **N** JANKI *v.* MOHANLAL **405**

U. P. Court of Wards Act (III of 1899), ss. 8, 9, 15, 26, 41, 46—*Contract Act (IX of 1872), ss. 11, 65—Jurisdiction of Court of Wards—Wards, position of—Abandonment of jurisdiction—Failure to assume management, effect of—Disqualified proprietor and voluntary wards, whether distinguishable—"Shall be presumed", meaning of—Disqualified proprietor, mortgage by—Mortgage, whether void* ab initio*—Compensation—Erroneous representation of law—Estoppel.*

Under sections 9 and 41 of the U. P. Court of Wards Act, it is only with the sanction of the

Local Government that the Court of Wards can either assume or abandon the superintendence of any person or property. Once a notification under section 14 of the U. P. Court of Wards Act has been issued, the property of the ward is considered to be under the Court's superintendence and the mere fact that the Court does not take over the management of the property in fact cannot affect the legal character of the ward and of his property. These remain under the Court's superintendence with all the consequences arising therefrom until a further notification is published under section 46 of the Act.

There is no distinction between the proprietors disqualified under section 8 of the U. P. Court of Wards Act and proprietors whose estates are taken over on their own application under section 9 of the Act. Both classes of proprietors are brought under the common denomination of ward and labour alike under the disabilities imposed on all wards.

The words "shall be presumed" in section 15 of the U. P. Court of Wards Act cannot be construed as allowing any evidence in rebuttal.

A mortgage executed by a proprietor whose estate has been notified as under the superintendence of the Court of Wards is void *ab initio* notwithstanding the fact the Court has never taken over the actual management of the estate.

The failure of the Court of Wards to take over management of an estate notified to be under its superintendence had not the effect legally of removing the ward and his property from its superintendence.

Section 26 of the U. P. Court of Wards Act empowers the Court of Wards to appoint a manager for any property under its superintendence, and though normally such managers are specially qualified officers there is nothing in the Act itself to prevent the Court of Wards from allowing a ward to carry on the duties of a manager.

Section 11 of the Contract Act puts minors and persons disqualified by law from contracting, on the same footing.

There are many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any Court it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But he cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.

Section 65 of the Contract Act starts from the basis of there being an agreement or a contract between competent parties and has no application to a case in which there never was and never could have been any contract.

Therefore where an agreement is void because the party entering into it was incapable from contracting as where the agreement is by a disqualified proprietor under the superintendence of the Court of Wards no compensation can be allowed under section 65 of the Contract Act.

A representation of a question of law cannot operate as an estoppel. A representation by a proprietor, whose estate has been notified as under the superintendence of the Court of Wards, that he is competent to transfer the estate does not operate as an estoppel. **O** HARI KISHUN DAS LALA *v.* CHOUDHRI MOHAMMAD SAFI JAN, 10 O. & A. L. R. 491; 11 O L. J. 502 **800**

U. P. Land Revenue Act (III of 1901), ss. 4 (12), 36. *See* SIR RIGHTS **899**

——— ss. 107, 233 (k)—*Partition—Mortgagee, position of—Mortgage, whether can be enforced against share allotted to mortgagor.*

Parties to a partition suit cannot re-agitate the matter in the Civil Court and claim that any land was wrongly allotted at the time of partition. But a mortgagee is not a necessary party to partition proceedings and his absence from such proceedings will not result in the mortgage being extinguished.

After partition the mortgagee of a particular co-sharer cannot enforce the mortgage against any land allotted to co-sharers other than his mortgagor, but a partition would not prevent him from enforcing his lien against the land allotted to the share of his mortgagor. **O** JANKA *v.* SHIAM KISHORE LAL, 9 O. & A. L. R. 742; 11 O. L. J. 14; (1924) A. I. R. (O.) 307 **483**

——— ss. 111, 112, 233 (k)—*Partition, modes of initiation of—Question of title—Procedure—Jurisdiction of Civil Courts, bar to, extent of.*

To oust the ordinary jurisdiction of Civil Courts by virtue of the bar created by section 233 (*k*) of the U. P. Land Revenue Act, it must be shown that the alleged bar is perfect and is in accordance with the provisions of the law which create that bar.

Where a Collector proceeds to enquire into a question of proprietary title raised in partition proceedings he must strictly follow the procedure laid down in the Code of Civil Procedure for the trial of original suits, and the effect which his decree will have depends upon the observance of the formalities prescribed by section 111 of the U. P. Land Revenue Act.

The partition of a *khata* can be initiated either by an application for partition of the *khata* or by an application by way of an objection in response to a call made by the proclamation contemplated by the provisions of Chapter VII of the U. P. Land Revenue Act. A partition made without either of these two conditions being complied with cannot be given the effect of operating as a bar to the determination of a question of title in a Court of Civil jurisdiction. **O** NAROTAM DAS *v.* MOHAMMAD RAZA, 9 O. & A. L. R. 1030; (1924) A. I. R. (O.) 224 **781**

———s. 233 (k)—*Partition proceedings—Suit to modify partition record, maintainability of.*

A partition record isanalogous to a decree defining the rights of parties given *inter parties* and operates as *res judicata.*

A suit by a person who was a party to a partition proceeding to have the result of the partition as

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entered in the partition record modified on the allegation that there has been a mistake, is barred by the provision contained in section 233 (*k*) of the U. P. Land Revenue Act. **A** KEDAR NATH *v.* JAGANNATAH SINGH **380**

U. P. Municipalities Act (II of 1916), s. 162 —*Tax on salary of Municipal servant—Absence from duty on accounnt of leave—Right to refund.*

A Municipal servant is not entitled to refund of the tax assessed on his salary under Municipal bye-laws during any period in which he is absent from the Municipality. **O** PURVES *v.* MUNICIPAL BOARD, SITAPUR **48**

——— **ss. 162 (2), 194, sub-s. (1), cl. (b)**—*Rudauli, notified area of—Assessment of tax on non-residents.*

The liability for tax on non-residents, owning property within the limits of the notified area of Rudauli, arises in virtue of the rule framed by the Local Government under the U. P. Municipalities Act, and the tax can be assessed with regard only to the value of their property or trade. The words quoted have no reference whatsoever to profits or losses forming the basis of assessment or exemption. **O** LOUIS DREYFUS CO. *v.* EMPEROR, 11 O. L. J. 434 **576**

——— **s. 326.** *See* PRINCIPAL AND AGENT **241**

Vendor and purchaser—*Contract for purchase of goods—Goods to bear specified numbers—Numbers not descriptive of quality—Vendor forwarding goods of required quality bearing different numbers—Purchaser, whether can refuse acceptance.*

The defendants contracted to purchase from the plaintiffs some bales of long cloth of their manufacture of a particular quality and bearing certain specified numbers. The plaintiffs forwarded cloth of the required quality and description but bearing different numbers and explained that there was a clerical error in the contract and that the numbers entered in the contract should have been those marked on the goods. The defendants, however, refused acceptance of the bales and terminated the contract. Thereupon the plaintiffs sold the goods at a loss and sued them for recovery of the balance of the amount. It was found that the numbers on the cloth had nothing to do with its quality nor was the cloth sold in the market by its numbers. The fact was that the purchaser of the cloth from the manufacturers could get any numbers put upon it that he pleased, and they indicated to him the width of the pieces in each bale but when the bales passed out of his hands they became merely reference numbers:

Held, that as the numbers put on the goods did not give any warrant or indication of their quality or description, the defendants were not entitled to refuse goods bearing different numbers and were bound to make good to the plaintiffs loss caused by their breach of the contract. **P C** RAMJIVAN NEVATIA *v.* BHIKAJI AND CO., 26 Bom. L. R. 442; 46 M. L. J. 655; 10 O. & A. L. R. 601; (1924) M. W. N. 430; (1924) A. I. R. (P. C.) 143; 35 M. L. T. 140; 20 L. W. 424; 48 B. 519 **381**

Vendor and purchaser—contd.

——— *Contract for sale of goods—Refusal to take delivery—Property in goods, whether passes—Damages, measure of—Damages claimed on wrong basis—Amendment of plaint.*

Where a purchaser does not take delivery of goods ordered by him; the vendor cannot re-sell the goods on his account as the property in the goods has not passed to the purchaser. But he can claim damages the measure of which, under the ordinary rule, would be the difference between the contract rate and the market rate at the date of the breach.

In such a case as the above if the vendor claims as the measure of damages the difference in price which he realised at the re-sale of goods and the contract price, the Court can nevertheless award damages according to the correct measure even without an amendment of the plaint to that effect. **B** NARSINGGIRJI MANUFACTURING CO. *v.* BUDANSAHEB ABDULSAHEB KAJI, 26 Bom. L. R. 523; (1924) A. I. R. (B.) 390 **430**

——— *Covenant to pay money, whether runs with land—Civil Procedure Code (Act V of 1908), ss. 11, 102, 115—Suit of small cause nature—Appeal, second, whether lies—Revision—High Court, power of*—Res judicata—*Decision of Small Cause Court.*

There is no such thing as between a vendor and a purchaser as a covenant to pay money running with the land.

The predecessor of the plaintiff sold certain land to the predecessor of the defendant and contemporaneously with the sale-deed but quite independently of it, the latter executed an *ekrarnama* whereby he bound himself, his heirs and legal representatives, so long as the land was held by them, to pay to the vendor and his legal representatives the sum of twenty rupees per year for the *sheba* of a particular *Thakur*. The vendor subsequently sold the land to the defendant. Plaintiff sued the defendant in the Small Cause Court to recover the sum secured to him by the *ekrarnama* and obtained a decree. An application in revision to the High Court was dismissed. A subsequent suit for similar relief which was tried by the Munsif on the ordinary side was, however, dismissed, but was decreed by the District Judge on appeal. On second appeal by the defendant:

Held, (1) that the suit was an ordinary suit for money and was not excluded from the cognisance of a Small Cause Court by Article 4 or Article 11 of Schedule II to the Provincial Small Cause Courts Act;

(2) that, therefore, no appeal lay to the District Judge against the decision of the Munsif dismissing the suit;

(3) that a second appeal to the High Court was barred by section 102 of the Civil Procedure Code, but that it was open to the High Court to treat the memorandum of appeal as an application for revision and to set aside the decree of the District Judge as being without jurisdiction;

(4) that assuming the suit was not cognisable by a Small Cause Court, it was liable to dismissal as the agreement on which it was based did not run with the land and did not bind the defendant;

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(5) that, in that view of the case, the previous decision of the Small Cause Court and the refusal of the High Court to entertain an application in revision against it, did not operate as *res judicata*, as the case was not cognisable by a Small Cause Court. **C** MOHINI MOHAN ROY v. RAMDAS PARAMHANSA, 28 C. W. N. 271; (1924) A. I. R. (C) 487; 39 C. L. J. 532 **210**

———*Sale by person out of possession—Sale for consideration of costs of litigation to recover property—Champerty—Validity of sale—Vendor refusing to join as plaintiff—Suit by vendee, joining vendor as defendant, whether competent.*

In India there is no law of Champerty and a transaction by which an indigent person out of possession makes over his property to some other person who is prepared to recover it by paying the costs of the litigation, though involving a claim of a speculative nature, is not invalid in law.

Where a vendor backs out of his agreement with the vendee to join with the latter as co-plaintiff in recovering possession of the subject-matter of the sale, there is no alternative for the vendee but to sue alone and implead the vendor as a defendant and the suit cannot be said to be defective on that ground. **O** INDARPAL SINGH *v.* RAMESHWAR BAKSH SINGH **285**

———*Sale of goods—Failure to give delivery—Breach of contract, date of—Damages—Civil Procedure Code (Act V of 1908), s. 34—Interest from suit to decree—Discretion of Court—Reasons, record of.*

Defendants as importers sold to plaintiffs certain goods coming out from England. The shipments were specified as from April to June of the year. Defendants failed to deliver goods of May shipment. The correspondence in regard to the shipment went on till 31st October. When the defendants withdrew their offer to deliver the goods. Plaintiff sued for damages:

Held, that under the circumstances it was not unreasonable to take the market-rate of 1st November in assessing damages for the non-delivery of the goods.

A Court has discretion under section 34 of the Civil Procedure Code to allow interest from the date of the suit to the date of the decree, but as such a course is out of the ordinary, the Court should record its reasons for awarding such interest. **C** PANNALAL SAGORE MULL *v.* MUKHRAM RADHAKISSEN, 39 C. L. J. 77; (1924) A. I. R. (C.) 637 **87**

Wajib-ul-arz, entry in, construction of—Pre-emption. *See* CONSTRUCTION OF DOCUMENT **550**

Way, *right of—Public high-way—Private pathway—Suit to enforce right—Special damage.*

"By the Common Law of England, there are three distinct classes of rights of way and other similar rights. First, there are private rights, in the strict sense of the term, vested in the particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term, which exist for the benefit of all the King's subjects, and the source of these is ordinarily dedication."

A suit for the enforcement of a private right of way is maintainable without proof of special damage. It is only in the case of a public high-way that the question of special damage arises. **C** HARISH CHANDRA *v.* HARISH CHANDRA, (1923) A. I. R. (C.) 622; 39 C. L. J. 347 **195**

Will—*Capacity of testator, proof of—Undue influence—Burden of proof—Succession Act (X of 1865), ss. 46, 48.*

In Probate proceedings the onus of establishing the capacity of the testator lies on the propounder. If the caveator impugns the Will on the ground that it was obtained by the exercise of undue influence, [illegible] persuasion or moral coercion, it lies upon him to establish that case by legal testimony. The Court will not, in such a case, rest its decision upon mere suspicion.

A man may act foolishly or even heartlessly in making his Will, but if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition. **PC** MOTIBAI HORMUSJEE KANGA *v.* JAMSETJEE HORMUSJEE KANGA, 22 A. L. J. 98; (1924) A. I. R. (P. C.) 28; (1924) M. W. N. 173; 34 M. L. T. 4; 19 L. W. 437; 26 Bom. L. R. 579; 29 C. W. N. 45 **777**

——— *in favour of grandson excluding son, validity of—Creditors of son, object to save property from, legality of.*

There is no law which prohibits a person from taking measures to ensure that his self-acquired property over which he has an absolute power of disposal should enure for the benefit of his minor grandsons and should not be taken by the creditors of his son. A devise of immoveable property over which the testator has an absolute power of disposal, in favour of the testator's grandsons, to the exclusion of his son, with the object that the property should not fall into the hands of the creditors of the son, is, therefore, perfectly legal. **N** DEBICHARAN *v.* SHANKER RAO, 7 N. L. J. 1; (1924) A. I. R. (N.) 71 **322**

———, *interpretation of—Reasonable and unreasonable Wills*—Parda nashin *ladies, transactions with—Law applicable.*

In the case of a Will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those causes which demand a rigorous scrutiny of Wills, of which the opposite can be said that they are unnatural, unreasonable or tinged with impropriety

In the case of a deed executed by a *parda nashin* lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon the deed and it must be proved affirmatively and conclusively that the deed was not only executed

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by, but was explained to and really understood by the grantor. It must also be established that it was not signed under duress but by the free and independent exercise of her will. S BHAGBHARI *v.* KHATUN, 16 S. L. R. 25 118

———, *proof of—Witnesses of no status, testimony of, value of.*

Where a Will that is propounded is a natural Will and there is evidence that the deceased intended to make such a Will, the mere fact that the attesting witnesses are not men of any status is not sufficient to discredit the testimony of such witnesses. P C WAMAN GANESH *v.* SARUBAI, (1924) A. I. R. (P. C.) 106; 7 N. L. J. 126; 19 L. W. 699; (1924) M. W. N. 445 641

WORDS & PHRASES:—

Acting in the matter of dower, meaning of. *See* MAJORITY ACT, s. 2 914

Adjustment of decree, meaning of *See* CIVIL PROCEDURE CODE, O. 2 454

'Agent' in s. 188, Bengal Tenancy Act, meaning of. *See* BENGAL TENANCY ACT, ss. 3 (4), 105, 188 987

Any property, meaning of. *See* CIVIL PROCEDURE CODE, s. 73, CLS. (*a*) (*b*) (*c*) 20

Benefits to arise out of land. *See* GENERAL CLAUSES ACT, s. 3 (25) 890

Bona fide or innocent purchaser. *See* CIVIL PROCEDURE CODE, ss. 47, 144 1002

Case. *See* CIVIL PROCEDURE CODE, s. 115 667

Cause of action, meaning of. *See* CIVIL PROCEDURE CODE, O. II, R. 2, SCOPE OF 286

———, meaning of. *See* CIVIL PROCEDURE CODE, O. IX, RR. 8, 9 985

Cause shown, meaning of. *See* COMPANIES ACT, 1913, s. 209 (IX) 515

Chur. *See* BENGAL TENANCY ACT, 1885, s. 180 702

Common carrier, who is. *See* CARRIERS ACT, ss. 2, 6 1038

Costs in the cause. *See* COSTS IN THE CAUSE, MEANING OF 263

Creditor, meaning of. *See* PROVINCIAL INSOLVENCY ACT, 1907, s. 37 323

Decree. *See* CIVIL PROCEDURE CODE, ss. 47, 141, 144, 151, SCOPE OF 49

Decree-holder, whether includes attaching creditor. *See* CIVIL PROCEDURE CODE, s. 2 (3) 947

Final order, what is. *See* CIVIL PROCEDURE CODE, s. 109 (*a*) 366

For all persons indiscriminately, meaning of. *See* CARRIERS ACT, ss. 2, 6 1038

For ever. *See* GRANT 918

Guardian de facto. *See* MUHAMMADAN LAW 506

Holder in due course. *See* NEGOTIABLE INSTUMENTS ACT, ss. 43, 44, 45, 118 572

Immoveable property in General Clauses Act, s. 3 (25). *See* CIVIL PROCEDURE CODE, O. XXI, RR. 46, 89 890

Words & Phrases—concld.

In perpetuity. *See* GRANT 918

Joint family, meaning of. *See* LIMITATION ACT, ART. 127 118

Judgment, meaning of. *See* LETTERS PATENT (BOM.), CL. 15 862

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